

CHAPTER VI

PENAL SANCTIONS FOR MALTREATMENT OF PRISONERS OF WAR

A. INTRODUCTORY

At the very beginning of this volume attention was invited to the general lack of protection available to the prisoner of war from the early days of recorded history until the eighteenth and nineteenth centuries.¹ By the latter period, not only had the theoretical basis been laid for the rule that prisoners of war were honorable men reduced by the power of arms to an unfortunate status² and that they were entitled to be protected from death and inhuman treatment by their captors, but also for the principle that those who were guilty of treating prisoners of war inhumanely were subject to punishment for their actions. This principle made its first formal appearance in the 1792 Decree of the French National Assembly.³ It was greatly amplified in Lieber's Code,⁴ and records exist of at least three major trials that took place at the end of the American Civil War (1861-65) in which the accused were charged with maltreatment of prisoners of war. In the fall of 1865, Captain Henry Wirz, formerly of the Confederate army, was tried by a Federal military commission for the cruel treatment and unlawful killing of prisoners of war who had been in his custody at the Andersonville, Georgia, prisoner-of-war camp.⁵ He was convicted, sentenced to death, and hanged. One of his civilian employees, James W. Duncan, was tried for the same offense in 1866, was convicted,

¹ See pp. 2-8 *supra*.

² See note I-18 *supra*.

³ See note I-20 *supra*.

⁴ See note I-28 *supra*. Two other relevant articles of the Lieber Code read as follows:

Article 59

A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities.

Article 71

Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed.

⁵ 8 *Am. St. Trials* 657, reprinted in part in 1 Friedman 783. See also note I-26 *supra*.

and was sentenced to imprisonment at hard labor for 15 years. And Major John H. Gee, also formerly of the Confederate army, was tried in 1866 for the failure to take proper care of Federal prisoners of war in his charge at Salisbury, North Carolina, and for causing the death of several. He was acquitted.⁶

Despite the precedents which had thus been established,⁷ and despite the great stride forward in regularizing the laws and customs of war earlier accomplished by the adoption of the 1864 Geneva Red Cross Convention, the 1899 Hague Regulations contained no provisions for penal sanctions for the killing or inhumane treatment of prisoners of war and, except for a provision for the pecuniary responsibility of the offending State, the same was true of the 1907 Hague Regulations.⁸ Both of these conventions did contain provisions requiring that prisoners of war be humanely treated, and prohibiting the killing or wounding of those who had surrendered, but the events of World War I clearly demonstrated the inadequacy of such provisions standing alone.⁹ In its Report, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, created by the Preliminary Peace Conference in January 1919, listed, in addition to a number of general offenses, some of

⁶ Winthrop, *Military Law* 1233 n.5. Winthrop states (at 1233): "[A]ny individual officer resorting to or taking part in such act [of putting a prisoner of war to death] or [in unlawful, unreasonably harsh, or cruel] treatment is guilty of a grave violation of the laws of war, for which, upon capture, he may be made criminally answerable."

⁷ The Oxford Manual had also contained a provision in its Article 84 for the punishment of persons who violated the law of war.

⁸ Just a few years before, the 1902 Treaty of Vereeniging, ending the Boer War, had contained, in its Article IV, a provision for the trial by British courts-martial of Boers who were alleged to have committed violations of the law of war. With respect to the 1907 Hague Regulations, the following statement appears in Pictet, *Commentary* 617: "States were left entirely free to punish or not acts committed by their own troops against the enemy, or again, acts committed by enemy troops, in violation of the laws and customs of war. In other words, repression depended solely on the existence or non-existence of national laws repressing the acts in question." Inexplicably, the 1906 Geneva Red Cross Convention had contained a chapter entitled "Repression of Abuses and Infractions," and the abuses and infractions against which the Parties were called upon to legislate in Article 28 thereof included "ill treatment of the sick and wounded of the armies"; and the 1929 Geneva Red Cross Convention had contained a similarly titled chapter by the provisions of Article 29 of which the Parties were required to legislate against "all acts in contravention of the provisions of the present Convention"; but the 1929 Prisoner-of-War Convention contained no such provisions.

⁹ In 3 Hyde, *International Law* 1845, the author stated: "The conduct of Germany and her allies in the course of World War I, as well as participants in some subsequent conflicts, has served to emphasize the fact that prisoners of war may still be subjected to the caprice and malice of a captor whose passions differ in no wise from those of the Carthaginian or Goth, and from the violence of which no regulations are likely to assure adequate protection."

which could apply to prisoners of war as well as to others, two offenses specifically directed against maltreatment of prisoners of war: ill-treatment of wounded and prisoners of war; and employment of prisoners of war on unauthorized works.¹⁰ Although the American and the Japanese members of the Commission filed reservations to certain portions of the Report, the representatives of all 10 of the member nations composing the Commission concurred in the portion recommending the imposition of penal sanctions against those responsible for violations of the laws and customs of war, including those relating to the protection of prisoners of war; and Article 128 of the Treaty of Versailles contained a recognition by Germany of the right of the Allies "to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war."¹¹

While the 1929 Convention included provisions relating to many areas not covered by the earlier 1899 and 1907 Hague Regulations, and has been described as "an instrument which lays upon the Detaining Power considerably more obligations towards its captive, than it requires from the captive towards the captor,"¹² and while it does contain provisions requiring the humane treatment of prisoners of war, once again no specific penal sanctions were provided for violations of this requirement.¹³ Whether or not the incorporation of provisions for such sanctions into that Convention would have acted as a deterrent during World War II is entirely a matter of opinion. However, if we are to accept the basic theory of all penal codes, there are at least some individuals who would have been deterred from illegal activities by the knowledge that punishment for certain acts was specifically prescribed in a widely publicized treaty to which they were

¹⁰ 14 A.J.I.L. 95, 115. It is interesting to note that in its "Report" the Commission on the Responsibility said (at 14 A.J.I.L. 121):

Every belligerent has, according to international law, the power and authority to try the individuals alleged to be guilty of the crimes of which an enumeration has been given in Chapter II on Violations of the Laws and Customs of War, if such persons have been taken prisoners or have otherwise fallen into its power.

¹¹ The manner in which this program failed, and the reasons therefor, are discussed in Marin, *Recueil* 684-86 and in UNWCC *History* 46-52. The classical presentation of the trials which did take place in Germany is to be found in Mullins, *The Leipzig Trials*. The German attitude towards these trials is presented in Galling, *The Countercharge: the Matter of War Criminals from the German Side*. Seven of the twelve cases tried at Leipzig involved some type of maltreatment of prisoners of war.

¹² 1 ICRC *Report* 218.

¹³ See note 8 *supra*. The I.M.T. had no difficulty in reaching the conclusion that "violations of these provisions [of the 1907 Hague Regulations and of the 1929 Geneva Convention] constituted crimes for which the guilty individuals were punishable." I.M.T. 497.

subject.¹⁴ Be that as it may, the fact remains that there were no such specific provisions for penal sanctions when World War II began, and that the treatment of prisoners of war (particularly the treatment of Russian prisoners of war by the Germans¹⁵ and the treatment of all enemy prisoners of war by Japan¹⁶) was, generally, so barbaric

¹⁴ Provisions for penal sanction for the maltreatment of prisoners of war are obviously not a panacea which will automatically extirpate all activities of this nature. That is not the history of any penal legislation. However, they do act as a deterrent for some and they do provide a firm base for the punishment of offenders, something which has heretofore been lacking. At the 1949 Diplomatic Conference the Netherlands delegate (Mouton) took the position, one that is particularly applicable to a code dealing with the law of war, that "an international convention had no strength without the possibility to enforce it, had no strength without sanctions." 2B *Final Record* 31.

¹⁵ Dallin, *German Rule* 414; *I.M.T.* 473-75. It would be appropriate to quote here the portion of the IMT's opinion (at 475) setting forth the now historic exchange that took place between German Admiral Canaris (Chief of German Intelligence) and German General Keitel (Hitler's personal Chief of Staff):

On the 15th September 1941, Admiral Canaris protested against the regulations for the treatment of Soviet prisoners of war signed by General Reinecke on the 8th September 1941. He then stated:

The Geneva Convention for the treatment of prisoners of war is not binding in the relationship between Germany and the USSR. Therefore only the principles of general international law on the treatment of prisoners of war apply. Since the 18th century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill or injure helpless people. . . . The decrees for the treatment of Soviet prisoners of war enclosed are based on a fundamentally different viewpoint.

This protest, which correctly stated the legal position, was ignored. The defendant Keitel made a note on this memorandum:

The objections arise from the military concept of chivalrous warfare. This is the destruction of an ideology. Therefore I approve and back the measures.

In Keitel's case the Tribunal adjudged the sentence of death, which was executed.

¹⁶ 10 *Dept. State Bull.* 145 (1944); *I.M.T.F.E.* 1002. The latter stated:

Ruthless killing of prisoners [of war] by shooting, decapitation, drowning, and other methods; death marches in which prisoners [of war] including the sick were forced to march long distances under conditions which not even well-conditioned troops could stand, many of those dropping out being shot or bayoneted by the guards; forced labor in tropical heat without protection from the sun; complete lack of housing and medical supplies in many cases resulting in thousands of deaths from disease; beatings and torture of all kinds to extract information or confessions or for minor offenses; killing without trial of recaptured prisoners after escape and for attempt to escape; killing without trial of captured aviators; and even cannibalism; these are some of the atrocities [against prisoners of war] of which proof was made before the Tribunal.

as to turn the calendar back many centuries.¹⁷

During the course of World War II there were a number of official declarations made by the Allied leaders to the effect that the punishment of war criminals was one of the major objectives of the war.¹⁸ These culminated in the 1943 Moscow Declaration and in the 1945 Potsdam Declaration.¹⁹ In the latter it was specifically stated that "stern justice shall be meted out to all war criminals including those who have visited cruelties upon our prisoners." In addition, on a number of occasions during the course of the war, protests were submitted through the Protecting Powers concerning maltreatment of prisoners of war and other violations of the 1929 Convention.²⁰ In October 1943 the United Nations War Crimes Commission was established with the primary mission of investigating and perpetuating evidence of war crimes and of formulating the procedures necessary to insure the trial and punishment of war criminals.²¹ There was, then, adequate warn-

¹⁷ Estimates of prisoner-of-war mortality during World War II are as varied as they are numerous. One estimate places the total number of Soviet soldiers captured by the Germans at 5,000,000 and the total number of survivors at only 1,000,000. Dallin, *German Rule* 426. Another estimate is that 2,300,000 Russians died "du typhus" in the prisoner-of-war camps maintained by the Germans, and that in those maintained by the Japanese the allied mortality was 16,000 out of 46,000. Rousseau, *Droit international public* 563. (In all fairness, however, it must be pointed out that the same author estimates that in the prisoner-of-war camps maintained by the Soviet Union the mortality was 1,321,000 out of 3,700,000 Germans; 63,000 out of 75,000 Italians; and 150,000 out of 615,000 Japanese.) Some of the most authoritative figures are probably those set forth by the *I.M.T.F.E.* (at 1002-03):

Of United States and United Kingdom forces 235,473 were taken prisoner by the German and Italian Armies; of those, 9,348 or 4 per cent died in captivity. In the Pacific Theater 132,134 prisoners were taken by the Japanese from the United States and United Kingdom forces alone of whom 35,756 or 27 per cent died in captivity.

¹⁸ See generally UNWCC *History* 87-108.

¹⁹ 9 *Dept. State Bull.* 310-11 (1943); and 13 *ibid.*, 137 (1945), respectively.

²⁰ See, e.g., the Molotov Note of 7 November 1941, UNWCC *History* 88-89; and 10 *Dept. State Bull.* 145 (1944) where the following is stated with respect to one of the protests:

In that protest the Department again called upon the Japanese Government to carry out its agreement to observe the provisions of the convention and warned the Japanese Government in no uncertain terms that the American Government would hold personally and officially responsible for their acts of depravity and barbarity all officers of the Japanese Government who have participated in their commitment and, with the inexorable and inevitable conclusion of the war, will visit upon such Japanese officers the punishment they deserve for their uncivilized and inhuman acts against American prisoners of war.

The protest referred to above also summarized the specific articles of the 1929 Convention which the Japanese were alleged to have violated. 10 *Dept. State Bull.* 168-75. A number of these notes of protest are reproduced *in extenso* under the caption "Japanese Atrocities" in 13 *Dept. State Bull.* 343-57 (1945).

²¹ UNWCC *History* 112-34.

ing that the Allies intended to impose penal sanctions against individuals guilty of the maltreatment of prisoners of war. We shall have occasion later in this chapter to review a few of the many trials of individual war criminals which followed the termination of hostilities in 1945.²² And each of the judgments rendered after the trials conducted before both the International Military Tribunal at Nuremberg in 1945-46 and the International Military Tribunal for the Far East at Tokyo in 1946-47 is based, in part, upon the murder and ill-treatment of prisoners of war.²³

Shortly after the conclusion of World War II the late Dr. Ernst H. Feilchenfeld of Georgetown University found that he had quite a few former prisoners of war available on the campus for direct-research purposes. He took advantage of this situation to probe deeply into a number of specific facets of the prisoner-of-war problem. One of his major conclusions was that "[i]t is one of the greatest weaknesses of the existing rules on prisoners of war that they do not contain definite and written provisions on sanctions. There should be sanctions and they should be written into a new convention."²⁴ Apparently, this need for "statutory" provisions to repress violations of the proposed new conventions, including that pertaining to prisoners of war, was generally recognized and the draft prisoner-of-war convention presented by the ICRC to the 1948 Stockholm Conference contained a proposed article on the subject.²⁵ However, the Stockholm Conference found the proposal inadequate, and adopted a resolution requesting the ICRC to continue its work in this area so as to be able to submit to the impending Diplomatic Conference a more far-reaching proposal with respect to penal sanctions for violations of the convention.²⁶

²² While exact statistics have never been accumulated, it is probable that something in excess of 2,000 separate trials were conducted by the various Allies in Europe and in the Far East. (Of course, many of these involved victims other than prisoners of war, and most of them involved more than one accused.) One table, which does not purport to be complete, lists 1,911 trials. 15 *LRTWC* xvi. Of the 89 cases actually reported in *LRTWC*, 49, or 55 per cent, involved some prisoners of war as victims. Unfortunately, few of these statistics include any data with respect to the number or the nature of war crimes trials conducted in the Communist countries.

²³ *I.M.T.* 471 & 475; *I.M.T.F.E.* 1024-1136, *passim*.

²⁴ Feilchenfeld, *Prisoners of War* 89. He also stated (at 91): [I]t would be an improvement if a new convention on prisoners of war contained in one chapter a whole criminal code dealing with acts to be treated as war crimes. This code should contain clear definitions and be sufficiently specific. Professor Quincy Wright suggests a code defining as concretely as possible the various crimes against prisoners of war." For a somewhat similar suggestion made after World War I, see Phillimore & Bellot 62.

²⁵ Article 119 of that draft included several of the provisions now appearing in Article 129 of the Convention. *Draft Revised Conventions* 134. It derived basically from Article 29 of the 1929 *Wounded-and-Sick Convention*. See note 8 *supra*.

²⁶ Resolution XXIII, Report of the XVIIth Conference 76, 94.

The ICRC complied with that request and proposed several new articles containing both substantive and procedural provisions.²⁷ The proposal containing the substantive provisions was amended and adopted by the 1949 Diplomatic Conference, ultimately becoming Article 130 of the 1949 Convention.²⁸ The proposals containing the additional procedural provisions received a cooler reception, none of them being accepted *in toto*, although a few portions thereof did survive to be incorporated elsewhere in the Convention.

As a result of the foregoing actions, the 1949 Convention contains provisions listing the specific acts of maltreatment considered to be major ("serious" or "grave") violations of the Convention;²⁹ and separate provisions calling upon the High Contracting Parties to ensure that their statute books contain legislation establishing penal sanctions both for such major violations and for all other violations of the provisions of the Convention.³⁰ In view of the rapidity with which both sides in the Korean hostilities announced that they would comply with the 1949 Convention,³¹ the world was warranted in anticipation that the treatment of prisoners of war in that armed conflict would be exemplary and that the need for resort to penal sanctions would be minimal. Unfortunately, such was not the case. Numerous instances of the commission of many of the grave breaches of the Convention enumerated in Article 130, including the murder of prisoners of war, began to come to light as early as September 1950, as soon as troops of the United Nations Command moved into territory previously held by the North Koreans.³² At the time of the

²⁷ Article 119, 119(a), 119(b), and 119(c). Remarks and Proposals 64-65.

²⁸ See 3 *Final Record*, Annex 49, at 42. The listing of the specific offenses which were to constitute "grave breaches" of the Convention, proposed in Article B of that Annex, was adopted by the 1949 Diplomatic Conference as Article 130 with only stylistic changes. It should not be overlooked that Article 13 also lists a number of substantive offenses which are designated "serious" breaches of the Convention. See note 42 *infra*.

²⁹ Articles 13 and 130, respectively.

³⁰ The first and third paragraphs of Article 129, respectively.

³¹ In July 1950 the Foreign Minister of the Democratic Republic of Korea (North Korea) sent a message to the United Nations Secretary-General stating that its forces were "strictly abiding by principles of Geneva Conventions [*sic*] in respect to Prisoners of War." 1 ICRC, *Confit de Corée*, No. 16. For the commitments made by the United States and the Republic of Korea, see *ibid.*, Nos. 12 and 15, respectively. For the commitments made by the Governments of the other forces comprising the United Nations Command, see, *ibid.*, Nos. 20-46.

³² For some of the major violations of the law of war and of the provisions of the 1949 Convention which began to come to light beginning in September 1950, see U.S. Congress, *Korean War Atrocities*, *passim*. Concerning the method by which the United Nations Command proposed to take judicial action against the identified culprits, see note V-24 *supra*.

signing of the Armistice Agreement in July 1953, the United Nations Command had identified and was holding several hundred Communist prisoners of war, both North Korean and Chinese, for trial for pre-capture offenses committed against United Nations Command prisoners of war. Under the provisions of the Armistice Agreement relating to the repatriation of prisoners of war, it was necessary to repatriate these individuals without the imposition of the punishment which many of them undoubtedly deserved.³³

It is obvious, then, that Korea did not provide a valid proving ground for these new provisions of the 1949 Convention dealing with penal sanctions for violations.³⁴ Whether a future international armed conflict in which any Communist countries involved are formally Parties to the Convention will prove any different is a matter of conjecture.³⁵ Certainly, the many brutal atrocities against prisoners of war committed by the North Koreans, and the numerous more

³³ When India finally agreed late in 1973 to repatriate the Pakistani prisoners of war whom she had held for a period of two years after the complete cessation of hostilities, some 195 were at first denied repatriation and were retained for trial for war crimes by Bangladesh. As they were ultimately repatriated without trial, it is not possible to state the exact nature of the war crimes that they were alleged to have committed. Because Bangladesh, rather than India, was the intended prosecutor, it is probable that the allegations concerned civilians rather than prisoners of war.

³⁴ It will perhaps have been noted that throughout this study it has unfortunately been necessary, on numerous occasions, to state that international armed conflicts in which Communist nations were involved have not provided valid proving grounds for the various provisions of the Convention. In some such conflicts the applicability of the Convention has been denied by them despite the specific provisions of Article 2; in others they have merely systematically disregarded and violated the Convention as a matter of national policy, usually at the same time charging their adversaries with such conduct. For some specific examples, see notes 35, 36, and 63 *infra*.

³⁵ The events in Vietnam are not helpful, as the North Vietnamese denied that the Convention was applicable (see note I-68 *supra*; see also Levie, *Maltreatment in Vietnam* 330) and the Vietcong denied that they were bound by its provisions (5 *I.R.R.C.* 636 (1965)). However, as we have seen, the requirement of humane treatment of prisoners of war long predates the 1949 Convention and has undoubtedly become a part of the customary international law of war. See p. 343 *supra*. It is therefore unpleasantly illuminating to read the following statement made by one of the American prisoners of war (Frishman) released by the North Vietnamese in August 1969, during the course of the hostilities, as an indication of their humanitarian point of view:

All I'm interested in is for Hanoi to live up to their claims of humane and lenient treatment of prisoners of war. I don't think solitary confinement, forced statements, living in a cage for three years, being put in straps, not being allowed to sleep or eat, removal of finger nails, being hung from a ceiling, having an infected arm which was almost lost, not receiving medical care, being dragged along the ground with a broken leg, or not allowing an exchange of mail to prisoners of war are humane. AEI, Problem 26, See also note II-145, *supra*.

subtle, but equally reprehensible, violations of the provisions of the Convention committed by the Chinese Communists, do not augur well for the future.³⁶

It may be stated that in the course of the evolution of the law of war a "common law" of penal sanctions evolved under which punishment was imposed on offenders for maltreatment of prisoners of war as well as for other violations of the law of war. This was not a wholly satisfactory solution, as it encouraged the argument that the imposition of such sanctions violated the maxim *nullum crimen sine lege, nulla poena sine lege*—no punishment without a preexisting law.³⁷ This is not to say that the trials for conventional war crimes conducted after World War II fell within this prohibitory maxim.³⁸ The offenses which were the subjects of such trials were violations of the law of war which were punishable under that law at the times of their commission.³⁹ Moreover, the individuals tried for killing prisoners of war were actually being tried for some type of unjustifiable homicide; and the individuals tried for physically maltreating prisoners of war by torture, beating, using them as medical guinea pigs, etc., were actually being tried for assault and battery, or aggravated assault, or maiming, etc. In very rare instances will it be found that

³⁶ According to U.K. *Treatment* 31, the Chinese Communists in Korea asserted:

Prisoners of war were common people who had been duped by their reactionary governments. Those who did not recognize the "truth" of this assertion and argued that they were entitled to the provisions of the convention were sharply told that they were "war criminals" and entitled to nothing—except shooting. For referring to the convention men were struck, threatened and made to stand at attention for long periods.

And again (at 32):

[T]he Chinese in Korea, by simply maintaining that all soldiers fighting for their "bourgeois" or "imperialist" opponents were, *ipso facto* "war criminals," succeeded to their own satisfaction in justifying their complete disregard of the convention. One prisoner [of war] was told by a Chinese interrogator that the Prisoner-of-War Convention was fully observed by the Chinese. "but only after the prisoner had reached a stage of full repentance for his past crimes."

Fighting against the Chinese was the most heinous of these crimes.

This is almost exactly what had been forecast 15 years earlier as the treatment of prisoners of war to be expected from the Soviet Union, then the only Communist nation. Taracouzio, *Soviet Union* 321. For actual Soviet practices during World War II, see Richardson, *Prisoners of War as Instruments of Foreign Policy* 47. Upon the death of Japanese Prince Fumitaka Konoye in 1956 in the Soviet Union, where he had been held since his capture in 1945 while serving in the Japanese army, the Japanese Foreign Office announced that it had learned that he had died while serving a sentence adjudged upon his conviction in 1951 of having committed the war crime of "supporting capitalism." *New York Times*, 11 December 1956 at 8, cols. 3-4.

³⁷ Discussions in depth of the subjects of *nullum crimen sine lege, ex post facto*, the defense of superior orders, etc., will be found throughout the voluminous literature with regard to the post-World War II war crimes program.

³⁸ 15 *LRTWC* 166-70.

³⁹ *I.M.T.* 461-62; *I.M.T.F.E.* 1103-04.

an individual was tried for a violation of the law of war as to which there was no comparable offense among the penal statutes of the vast majority of the States then constituting the world community of nations. Nevertheless, it is, of course, preferable from legal, sociological, and penological points of view to have specific coverage of these matters included in a binding international agreement such as the 1949 Convention.⁴⁰ It therefore behooves us to investigate the extent to which the provisions of the Convention, and the penal laws of most nations, affirmatively remedy the situation with respect to those violations of the laws and customs of war involving the maltreatment of prisoners of war.⁴¹

B. SUBSTANTIVE OFFENSES

Although it has become customary to refer to Article 130 as the "grave breaches" provision of the Convention, it is essential that consideration be given to the provisions of Article 13 at the same time. While the first paragraph of Article 13 uses the term "serious breach," rather than "grave breach," this does not appear to constitute a distinction.⁴²

The first sentence of Article 13 is really the fundamental principle of the Convention, the one which is repeated either explicitly or implicitly throughout the Convention—prisoners of war must be humanely treated.⁴³ The offenses specified in Articles 13 and 130 are

⁴⁰ Most legal systems will still require national laws to implement the Convention's provisions. See the discussion of SUBSTANTIVE OFFENSES, immediately below.

⁴¹ It must be borne in mind that we are here concerned solely with the provisions of the Convention relating to the trial and punishment of individuals, whatever their prior or current status, who are allegedly guilty of the maltreatment of prisoners of war.

⁴² Article 133 provides that the English and French versions of the Convention are equally authentic. In the French version the word "grave" is employed in both Articles 13 and 130. While one unsuccessful attempt was made to adopt uniform language in another aspect of these two articles (see pp. 358-359 *infra*), no attempt was made to eliminate the discrepancy, if it be one, with respect to the use of the different words "serious" and "grave" appearing solely in the English version to categorize the types of breaches proscribed by Articles 13 and 130, respectively. Article 85(1) of the 1977 Protocol I refers to "[t]he provisions of the Conventions relating to the repression of breaches and grave breaches."

⁴³ The requirement for humane treatment of prisoners of war has been termed the "basic theme" (Pictet, *Commentary* 140), the "touchstone" (AEI, Problem 4) of the Convention. It is a standard enunciated by the Prophet Muhammad in the seventh century. Erekoussi. *The Koran and the Humanitarian Conventions*, 2 *I.R.C.* 273, 277. Occurrences during the 1973 Arab-Israeli War, involving the wilful killing and inhuman treatment of Israeli prisoners of war by the Syrians and Egyptians, charged by Israel [Israeli Ministry for Foreign Affairs, Defenceless; Blaustein and Paust, *On POW's and War Crimes*, 120 *Cong. Rec.* 1779 (1974)] would seem to raise a question as to whether the humanitarian admonitions of the Prophet are still being followed.

merely those that have been determined to be the major violations of that principle.⁴⁴ There can, of course, be innumerable violations of the Convention other than those considered to be so important as to warrant specific mention.

In effect, the Convention places a number of offenses committed against prisoners of war in the category of "grave breaches," thereby making them offenses which the contracting parties are under an obligation to punish or to assist in punishing, regardless of the nationality of the offender. And so obviously serious are the offenses enumerated, that there can be no possible quarrel with the statement contained in the report of the committee of the 1949 Diplomatic Conference that only those offenses had been included "which no legislator would object to having included in the penal code."⁴⁵ While it is possible to apply a variety of methods in subdividing the substantive offenses listed in Articles 130 and 13, we will here consider and discuss them in the context of those appearing in both Articles—those appearing only in Article 130, and those appearing only in Article 13.⁴⁶

1. Wilful Killing

This is murder—an offense under the military and civilian penal codes of every civilized nation. It is the offense against prisoners of war that has been most frequently punished in the past. It was prohibited by Article 23c of both the 1899 and the 1907 Hague Regulations, although neither of those codes provided for penal sanctions for violations thereof. However, in the notes on *The Dreierwalde*

⁴⁴ There was some discussion at the 1949 Diplomatic Conference of a proposal to use the term "serious crime" in the first paragraph of Article 13. 2A *Final Record* at 349 (emphasis added). This proposal was discarded because it was felt to be inappropriate to refer to "crimes" in an Article setting forth the basic requirement of humane treatment. *Ibid.*, 563. In view of the overall content of the Article, this was strange reasoning. However, even if it is determined that the acts or omissions enumerated in Article 13 that are not specifically repeated in Article 130 are not separate grave breaches of the Convention, it would appear apodictic that, at a minimum, a violation of any of the prohibitions of Article 13 would constitute a violation of the substantive offense of "inhuman treatment" listed in Article 130. The ICRC's official interpretation of the Convention affirmatively states both that "[t]he principal elements of humane treatment are . . . listed in the Article [13]" (Pictet, *Commentary* 140), and that Article 13 specifies "certain acts which constitute grave breaches." *Ibid.*, 143.

⁴⁵ 2B *Final Record* 115. They would also be criminal violations of the law of war under the definition of war crimes enunciated in Lauterpacht, *The Law of Nations and the Punishment of War Crimes*. 21 *B.Y.I.L.* 58, 79.

⁴⁶ While this author believes that the "serious breaches" of the first paragraph of Article 13 and the "grave breaches" of Article 130 should be considered as being equally within the purview of Article 129 (the procedural Article), admittedly States have not so dealt with them. For example, section 1(1) of the United Kingdom's *Geneva Conventions Act*, 1957, specifically provides only for punishment for the commission of the grave breaches enumerated in Article 130 of the Convention and does not mention Article 13 thereof.

Case, the United Nations War Crimes Commission concluded that the killing of prisoners of war constituted a criminal violation of the law of war under customary international law even before the 1907 Hague Regulations became effective.⁴⁷ This seems to have been the general consensus as we find that, after World War II, the courts of the countries trying war crimes cases, whether of common law or of civil law heritage, uniformly applied penal sanctions in cases involving the killing of prisoners of war.⁴⁸ It appears beyond dispute that in including the offense of "wilful killing" of prisoners of war among the grave breaches of the Convention which are specifically subject to penal sanctions, the drafters of the 1949 Convention were merely continuing in complete conventional form what had previously been based on a combination of customary and conventional law.

The contention has been advanced that the term "wilful killing" includes death caused by faults of omission *provided* that the omission was wilful and was intended to cause death.⁴⁹ While there may be some controversy in connection with the basic premise, with the provisory clause it is somewhat difficult to see how the death could be deemed to have resulted from a fault of omission. The examples given to support the contention—reduction of food rations to a point where deficiency diseases cause death, and putting to death as a reprisal despite the fact that reprisals against prisoners of war are specifically prohibited—can scarcely suffice for that purpose. An execution knowingly and wilfully performed as a reprisal—reprisals being specifically prohibited—would certainly be a wilful killing, but by an act of commission, not by an act of omission. And the reduction of the food ration to a point which would not support life, if done wilfully and intentionally and not because of circumstances beyond the control of the offender, would probably constitute both a wilful killing by a specific act of commission and the offense of "wilfully causing great suffering or serious injury to body or health," which is hereinafter discussed.⁵⁰

In addition to the "grave breach" of wilful killing specified in Article 130, there is also the "serious breach" specified in Article 13 consisting of "any unlawful act or omission by the Detaining Power

⁴⁷ 1 LRTWC 81, 86. See, e.g., note 4 and note I-28 *supra*. See also Digest, 15 LRTWC 99, and Winthrop, *Military Law* 1233.

⁴⁸ See, e.g., U.S.: *The Dostler Case* and *The Jaluit Atoll Case*; U.K.: *The Essen Lynching Case* and *The Stalag Luft III Case*; Canada: *The Abbaye Ardenne Case*; France: *Trial of Robert Wagner* (reversed on jurisdictional grounds) and *Trial of Carl Bauer*. See also I.M.T. 471-72; I.M.T.F.E. 1002; and Kalshoven, *Bel-ligerent Reprisals* 191. See also the discussion of Article 121 at p. 397 *infra*, and of Article 42 at pp. 403-404 *infra*.

⁴⁹ Pictet, *Commentary* 626-27. See also 1971 GE Documentation, II at 38 n.107. But see *Pal Dissent* 1158; and 1971 GE Report, para. 568.

⁵⁰ See pp. 360-361 *infra*.

causing death." Several comments concerning that provision appear appropriate: first, while the phrase "causing death" may have been intended to be coextensive with the Article 130 grave breach of "wilful killing," this is not so, as the latter offense is more restricted than the former (for example, the Article 13 offense would include causing death by negligence, death resulting from the use of excessive force to prevent escape, death resulting from the failure to protect a prisoner of war from the violence of civilians, etc.); second, the objections voiced above concerning acts of omission are obviously not applicable here where the definition given specifically includes acts of omission and does not include either "wilfully" or "knowingly"; and third, while the provision refers to unlawful acts or omission of the *Detaining Power*, the latter acts through human agents and the responsible individuals are the ones who will suffer punishment for the offenses which they have committed or ordered to be committed.⁵¹

2. Torture or Inhuman Treatment, Including Biological Experiments

a. INHUMAN TREATMENT

The prisoner-of-war codes of 1899, 1907, and 1929 all provided for the humane treatment of prisoners of war, but none of them contained sanctions for inhumane treatment. This omission has now been rectified. As we have just seen, Article 13 of the 1949 Convention provides, in pertinent part, that "prisoners of war must at all times be humanely treated." Article 130 makes "inhuman" treatment a grave breach of the Convention. From the phraseology employed in Article 130, both in English and in French, it would seem that the draftsmen intended the above-captioned items to describe only one offense;⁵² and it is probable that this is so, with inhuman treatment being the broad term within which the other two items fall, specific mention being made of torture and of the use of prisoners of war as human guinea pigs because, unfortunately, these two offenses occurred with such

⁵¹ The I.M.T. properly stated (at 466) that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

⁵² The 1956 Commission of Experts (convened solely to study the problem of grave breaches) made this comment:

The Commission noted that the framers of the Conventions had considered torture and inhuman treatment to be different aspects of one and the same "grave breach," which also comprised biological experiments. In the Experts' opinion, all acts or omissions that led to great moral suffering or caused serious deterioration in the victim's mental condition should also be comprised in that "grave breach."

1956 GE Report 5.

alarming frequency during World War II.⁵³ However, for the purposes of this discussion, which is enumerating offenses against prisoners of war not only from the point of view of the Convention, but also from the point of view of the national penal codes under which they will be prosecuted, torture and biological experiments will be treated as separate offenses.

The captioned provision leaves open for interpretation the question as to exactly when maltreatment, other than torture or biological experiment, becomes inhuman. It seems clear that this is a decision which it will be necessary for the national courts concerned to reach on a case-by-case basis.⁵⁴ Inasmuch as national standards vary greatly, it can be assumed that problems will arise in this area. It is worthy of note that the 1956 Commission of Experts arrived at the conclusion, in which the ICRC apparently concurs, that, for maltreatment to constitute the grave breach of inhuman treatment, it is not necessary that it involve an attack on the physical integrity or health of a prisoner of war but that it includes moral suffering.⁵⁵ While such an interpretation, if followed in trials for alleged grave breaches of this category, will be of some assistance in determining that a particular

⁵³ Of course, the offense of inhuman treatment includes many other acts besides torture and the use of prisoners of war as human guinea pigs.

⁵⁴ Post-World War II cases in which national courts had no great difficulty in finding punishable maltreatment include: *Trial of Babao Masao* (death march), *Trial of Tanaka Chuichi* (tying prisoners of war to a post and beating them); *Trial of Arno Heering* (forced march with inadequate supplies); *Trial of Willi Mackensen* (forced march with inadequate supplies); *Gozawa Trial* (flogging, overwork, and general maltreatment).

⁵⁵ See note 52 *supra*. In Pictet, *Commentary* 627, the conclusion of the Commission of Experts was adopted and amplified as follows:

Inhuman treatment.—The Convention provides, in Article 13, that prisoners of war must always be treated with humanity. The sort of treatment covered here would therefore be whatever is contrary to that general rule. It could not mean, it seems, solely treatment constituting an attack on physical integrity or health; the aim of the Convention is certainly to grant prisoners of war in enemy hands a protection which will preserve their human dignity and prevent their being brought down to the level of animals. Certain measures, for example, which might cut prisoners of war off completely from the outside world and in particular from their families, or which would cause great injury to their human dignity, should be considered as inhuman treatment.

This same position had earlier been taken by the I.M.T.F.E., which referred to "mental torture," giving as an example an incident in which a number of actions were taken one evening to make certain prisoners of war (several of Doolittle's fliers) believe that they were about to be executed by a firing squad, but at the last minute they were told that the Japanese executed only at sunrise and that they would be executed in the morning if they did not talk before then. I.M.T.F.E. 1063. Article 11(1) of the 1977 Protocol I provides in part that "[t]he physical or mental health and integrity of persons who are in the power of the adverse Party . . . shall not be endangered by any unjustified act or omission." See note 66, *infra*. However, it is extremely doubtful that it would be possible to find provisions in most national penal codes which would cover this type of offense.

offense falls below the lowest acceptable level of humane treatment, it does not definitively solve the problem of exactly where that level should be placed.⁵⁶

Finding a substantive national penal provision which would furnish the basis for charging an individual with the offense of inhuman treatment of a prisoner of war should present no great difficulty in the majority of cases of this category.⁵⁷ Many, if not most, of them will result in the death of the prisoner of war and thus will permit of prosecution for either murder or some lesser degree of homicide; others, not involving the death of the prisoner of war, will fall within the definitions of assault and battery, maiming, maltreatment of prisoners of war,⁵⁸ maltreatment of a person subject to one's orders,⁵⁹ etc.

b. TORTURE

Even with respect to the two categories of inhuman treatment specifically mentioned in the Convention—torture and biological experiments—questions of interpretation arise. Thus, the position has been taken that the term "torture," as used in the Convention, relates primarily to maltreatment resorted to as an illegal method of obtaining a confession or information.⁶⁰ While this has undoubtedly been the motivation for a large part of the torture of which prisoners of war have been the victims,⁶¹ such an interpretation must not be permitted to remove from the scope of the coverage of this grave breach of the Convention torture inflicted as punishment,⁶² out of sheer sadism, or, even more important in these days of the war for men's minds, to "convert" an adamant prisoner of war to the Detaining Power's

⁵⁶In a claim for pecuniary damages made to the United States-German Mixed Claims Commission established after World War I, the claimant, a former prisoner of war of the Germans, contended that the use of paper bandages in a German hospital to bandage his wounds constituted maltreatment. The claim was disallowed, 6 Hackworth *Digest* 278. Such an act, particularly where caused by force of circumstances beyond the control of the Detaining Power, would unquestionably be above the line of demarcation.

⁵⁷A few States have enacted general penal laws specifically making punishable the commission of any act constituting one of the grave breaches enumerated in Article 130. See pp. 371-374 *infra*.

⁵⁸U.S.S.R. Law of 25 December 1958, Article 32. See note 75 *infra*.

⁵⁹Article 93, *Uniform Code*, 10 U.S.C. §893.

⁶⁰Pictet, *Commentary* 627; Pilloud, *Protection pénale* 854. These two authors would put all maltreatment for any purposes other than torture to obtain information and biological experiments under the offense of "wilfully causing great suffering." Pictet, *Commentary* 628; Pilloud, *Protection pénale* 856. Physical and mental torture inflicted in order to obtain information is specifically proscribed by the fourth paragraph of Article 17 of the Convention. See pp. 106-109 *supra*.

⁶¹*I.M.T.F.E.* 1029; *Trial of Erich Killinger*.

⁶²For an example of this, see *I.M.T.F.E.* 1132-33 & 1057-58.

political ideology.⁶³ In other words, torture is, and should always be considered, a grave breach of the Convention, whatever its motive, and even if motiveless.

c. BIOLOGICAL EXPERIMENTS

The extensive use of prisoners of war during World War II as "guinea pigs" for medical experimentation was without precedent in the history of war.⁶⁴ There was no opposition to the specific inclusion of this offense among the grave breaches of the Convention to be listed in Article 130. However, there was some difference of opinion as to phraseology. It will be seen that in Article 130 reference is made solely to "biological experiments," while in the first paragraph of Article 13 the prohibition is against "medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest." An effort was made by one of the Netherlands delegates to have both articles use the term "biological experiments."⁶⁵ While the statement of the Netherlands delegate that the two terms were meant to cover the same illegal acts was undoubtedly correct, the definition contained in Article 13 appears to be far more definite and far less likely to result in legalistic disputes on interpretation. It is unfortunate that the 1949 Diplomatic Conference neither accepted the suggestion of the Netherlands delegate nor took the reverse action [that of changing Article 130 to make it coincide with the first paragraph of Article 13], and that it allowed the two different terms to remain in the Convention. However, from the history of the negotiations, it appears possible to conclude that any violation of the portion of Article 13 quoted above will constitute the grave breach of performing "biological ex-

⁶³ The following statement from U.K., *Treatment 22*, clearly demonstrates the use of torture, not as a method of interrogation, but to force a prisoner of war to abandon his loyalty to his own country and to adopt the political views of his captors:

When all of these methods of inducement had failed . . . the Chinese [Communists in Korea] had recourse to physical coercion and torture, revolting to the humane mind and expressly forbidden by the Prisoners-of-War Convention. Before the middle of 1951 the Chinese adopted the simple attitude that if a prisoner would not co-operate he was punished. If the punishment resulted in his death it was because he was an obstinate "war criminal." Later the argument was changed, and physical punishment was said to be inflicted for special offences rather than a general refusal to see "the light." Torture and ill-treatment were carried out quite cold-bloodedly for the purpose of breaking a man's resistance.

See note 34 *supra*.

⁶⁴ For some post-World War II trials which included incidents involving involuntary and illegal medical experiments on prisoners of war (and civilians) see *I.M.T.* 474; *I.M.T.F.E.* 1065; *Trial of Rudolf Hoess*; *Medical Case*; *Milch Case*.

⁶⁵ 2A *Final Record* 381.

periments" in violation of Article 130.⁶⁶

It is doubtful that the penal code of any country will have provisions directly covering the offense of involuntary "biological experiments" or "medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner [of war] concerned and carried out in his interest." Where a State has enacted general legislation making punishable all violations of the provisions of Article 130,⁶⁷ no problem exists. Where such a step has not been taken, it will usually still be possible to prosecute individuals charged with illegal actions of this nature under national penal laws defining assault and battery, maiming, unjustifiable homicide, etc.⁶⁸ Of course, statutes specifically making such actions a penal offense, or making the violation of any part of Article 130 an offense, are preferable.

It should be noted that Article 13 includes among its "serious breaches" not only the "medical and scientific experiments" already noted, but also "physical mutilation." This might be as a result of a biological experiment. However, in addition, during World War II the Germans ordered that all Soviet prisoners of war be branded.⁶⁹ Such a procedure, performed with the traditional hot branding iron, would certainly constitute a violation of the prohibition against physical mutilation. While tattooing would likewise constitute a permanent physical mutilation, it is doubtful that branding by the use of indelible ink stamped on the individual prisoner of war would fall within the

⁶⁶ Pictet, *Commentary* 627-28. The 1956 GE Report states (at 5):

The Commission discussed, but without reaching a decision, the question whether every biological experiment on a protected person should be considered as a brave breach, as some experts considered. The Commission agreed, nevertheless, that every biological, medical or scientific experiment carried out against a person's will, or dignity, or likely to cause serious physical or mental injury, was prohibited by the Conventions and should be repressed.

Article 11 (2) of the 1973 Draft Additional Protocol contained an additional prohibition against "physical mutilations or medical or scientific experiments, including grafts and organ transplants, which are not justified by the medical, dental or hospital treatment of the persons concerned and are not in their interest." With considerable editing this became Article 11 (2) of the 1977 Protocol I. However, the Diplomatic Conference found it appropriate to add further restrictions in new Article 11 (3), (5), and (6), and to provide specifically in new Article 11 (4) that a violation of Article 11 (1) or (2) would be a grave breach of the Protocol.

Ten excellent principles for use in determining the legality of the performance of medical experiments on a prisoner of war are set forth in the opinion of the U.S. Military Tribunal in *The Medical Case*, 2 T.W.C. at 181-83. These principles are reproduced in Taylor, *The Nuremberg War Crimes Trials, International Conciliation*, April 1949, No. 450 at 284-86.

⁶⁷ See note 57, *supra*.

⁶⁸ Pilloud, *Protection pénale* 855-56.

⁶⁹ Trainin, *Hitlerite Responsibility* 51-53; Vizzard, *Policy* 250-51.

prohibition as it would cause no suffering and eventually fades away, leaving no actual mutilation.

It has been observed that the prohibitions against the use of prisoners of war as scientific guinea pigs do not include prohibitions against generally recognized and medically accepted inoculations and immunizations.⁷⁰ The prohibitions are solely against experimentation, not against practices that are recognized and applied by the medical profession generally. This would be equally true of valid surgical procedures deemed necessary for the health and well-being of the individual prisoner of war.

3. Wilfully Causing Great Suffering or Serious Injury to Body or Health

As long ago as during the War of 1812 between Great Britain and the United States the Parties thereto agreed that "[n]o Prisoner [of war] shall be struck with the hand, whip, stick, or any other weapon whatever."⁷¹ While the wilful causing of great suffering by, or serious injury to, prisoners of war was clearly prohibited by both the 1907 Hague Regulations and the 1929 Convention, World War II saw the widespread commission of acts in violation of this prohibition.⁷²

It is here that the ICRC would place sadistic maltreatment, rather than in the preceding category of offenses.⁷³ The inclusion of this particular grouping as a grave breach of the Convention should serve to prevent an offender from avoiding punishment as a result of an overly restrictive interpretation of the terms "inhuman treatment" and "torture." Actually, this category of grave breaches appears to be a sort of residual provision intended to cover most of the cases of physical or mental maltreatment that may be determined not to be within the previous category of grave breaches.

It has already been indicated that mental torture and moral suffering may fall within the ambit of "inhuman treatment" or "torture," proscribed under the grave breaches discussed immediately above.⁷⁴ They may also constitute a violation of the present category of grave

⁷⁰ See note II-124 *supra*. U.S. Army Regs. 633-60, paras. 37 & 41. Para. 37, specifically requires the military authorities of prisoner-of-war camps operated by the United States to give certain inoculations and vaccinations. Paragraph 41 of those Regulations provides for the maintenance of lists of the blood types of prisoners of war "who have volunteered to furnish blood," a procedure which would also not be within the purview of the prohibitions. See also Pictet, *Commentary* 141 and Article 11 (3) and (6) of the 1977 Protocol I.

⁷¹ Article VII, *Cartel for the Exchange of Prisoners of War between Great Britain and the United States* (1813). After World War I two leading English scholars stated that "except in self-defence or to prevent escape, it is contrary to the laws and customs of war, as hitherto understood, to strike a prisoner [of war] at all." Phillimore & Bellot 58.

⁷² *I.M.T.* 474; *I.M.T.F.E.* 1088-89; *Pal Dissent* 1124 & 1158; Olson, *Soviet Policy* 53. But see Anon., *POW in Russia* 20.

⁷³ Pictet, *Commentary* 628; Pilloud, *Protection pénale* 856.

⁷⁴ See pp. 356-357 *supra*, and note 55 *supra*.

breaches. Reservations must be attached to any statement concerning the existence and availability in the law of many States of substantive penal statutes which could serve as a basis for prosecutions for offenses constituting this category of grave breaches.⁷⁵ Thus, it is extremely difficult to conceive of any existing statute in the United States criminal code which can be considered as proscribing the offense of causing great moral suffering in the absence of a direct physical act.⁷⁶

4. Compelling a Prisoner of War to Serve in the Forces of the Hostile Power

The last paragraph of Article 23 of the 1907 Hague Regulations forbade a belligerent "to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war."⁷⁷ During World War I the Germans attempted, albeit unsuccessfully, to persuade British prisoners of war of Irish origin to volunteer for service in an Irish brigade to be formed as a part of the German army.⁷⁸ During World War II there were many instances, particularly on the part of the Germans, of the recruitment or the compelling of prisoners of war (and enemy civilians) to serve in the armed forces of the Detaining Power and to fight against their own

⁷⁵ The Soviet Union has attempted to eliminate this as a legal problem by the enactment of a penal statute which provides that "[m]istreatment of prisoners of war, occurring repeatedly or in conjunction with special cruelty, . . . shall be punished by deprivation of freedom for a term of one to three years." Article 32, U.S.S.R. Law of 25 December 1958. The *Commentary* to that article states that "[t]he objective side of mistreatment of prisoners of war may be reflected in actions (for example, beatings) or failure to act (for example, deprivation of food)."

⁷⁶ An incident causing great mental suffering, such as that related by I.M.T.F.E. (see note 55 *supra*), might, under some penal codes, constitute the offense of communicating a threat. This would make punishable some of the acts proscribed by this category of grave breaches. But by no stretch of the imagination (and criminal courts, even when trying former enemies, are not noted for the fertility of their imaginations) can an offense presently be found to be included in the penal codes of the vast majority of nations which would permit a conviction for many other acts which would undoubtedly cause great mental suffering. There can be no dispute as to the validity of the statement that "it may be wondered if this is not a special offense not dealt with by national legislation." Pictet, *Commentary* 628.

⁷⁷ This provision was new, there having been no equivalent provision in the 1899 Hague Regulations. There was, of course, no sanction specified for violations.

⁷⁸ Of approximately 4,000 eligibles only 32 volunteered. Vizzard, Policy 239. For the details of this episode, see Inglis, *Roger Casement* 287-89. In *Rex v. Casement* he was convicted of treason by a British court. However, the German action did not violate the provision of the 1907 Hague Regulations quoted in the text as it was based strictly on volunteering.

country or its allies.⁷⁹ The prohibition contained in the 1907 Hague Regulations related only to compulsory service and included no sanctions for violations. The latter defect has now been remedied. However, as is readily seen, the only prohibition contained in Article 130 of the 1949 Convention is once again against compulsion, and no mention is made of attempts to recruit prisoners of war into the armed forces of the Detaining Power. Such action is prohibited by Article 7 of the Convention, which provides that prisoners of war may not "renounce in part or in entirety the rights secured to them by the present Convention."⁸⁰ Any holding to the contrary would, in effect, nullify the grave breaches provision under discussion, as a Detaining Power so inclined would certainly contend that the challenged enlistments were all voluntary, and would certainly have documentary and other evidence to establish the voluntariness of the recruitment of the prisoners of war into its armed forces.⁸¹

⁷⁹ For one attempt to obtain volunteers from among the prisoners of war, see Maughan, *Tobruk* 806 (attempt by the Germans to recruit British and Australian prisoners of war to fight the Russians). For an example of compulsory military service, see the concurring opinion of Judge Musmanno in *The Milch Case*, 2 T.W.C. at 821-22 (use of Russian prisoners of war to man anti-aircraft guns). The Germans had a number of military units composed of or including Russian prisoners of war (see Calvocoressi & Wint 469-70) and the Soviet Union had a number of military units composed of or including German prisoners of war, the great majority of whom had probably volunteered to serve against their own countries. See, e.g., Bethell, *The Last Secret*, *passim*; Epstein, *Operation Keelhaul*, *passim*. (While this latter book appears to be factually correct, the reader must, at times, be careful not to be misled by its unwarranted assumptions and unwarranted conclusions.) See also note I-324 *supra*.

⁸⁰ The 1949 Convention contains no specific provision other than that of Article 130 with respect to a prisoner of war's serving in the armed forces of the Detaining Power. In the 1949 Civilian Convention, the first paragraph of Article 51 affirmatively provides that "[t]he Occupying Power may not compel protected persons to serve in its armed or auxiliary forces," while Article 147 thereof parallels Article 130 of the Prisoner-of-War Convention. Moreover, that paragraph of Article 51 of the Civilian Convention contains another provision not found in the Prisoner-of-War Convention prohibiting "pressure or propaganda which aims at securing voluntary enlistment." The Netherlands Government proposed that the Prisoner-of-War Convention include a similar provision (Diplomatic Conference Documents, Proposition by the Netherlands Government, Document No. 8 at 6; 2A *Final Record* 248), but nothing appears to have come of this proposal. One writer suggests that the acceptance of voluntary enlistments is a "minor" breach of the Convention. Clause, Status 23-24. (A better term for violations of the Convention which are not among the specifically enumerated grave or serious breaches would probably be "other breaches.")

⁸¹ During the course of the hostilities in Korea the Communists announced at various times the capture of a total of from 50,000 to 75,000 prisoners of war. When the discussions of the prisoner-of-war problem began at the armistice negotiations, they claimed that they were holding a very small fraction of even the lower figure. Challenged as to the fate of the balance, the great majority of whom had been members of the Republic of Korea army, one of the assertions made by

One problem that was the subject of lengthy discussion at the 1956 Conference of the Commission of Experts, and which was not resolved by them, is the question of the definition of the term "forces" used in this grave-breaches clause.⁸² Does it include the labor service organizations, the factory guard units, the anti-aircraft artillery units, the special police units, and the various other auxiliary units which flourished during World War II, or is it limited to the regular armed forces of the Detaining Power? One member of the Commission of Experts felt that the word "auxiliary" was intentionally omitted from the grave-breaches Article of the Convention so that compelling service in the hostile force would not be a grave breach unless the prisoner of war was compelled to take part in combat against his own country;⁸³ other members of the Commission felt that the question should be left for determination by the judges trying cases which raise the problem;⁸⁴ while still others were of the opinion that the categories of organizations mentioned in Article 1 of the 1907 Hague Regulations and in Article 4 of the 1949 Convention should govern.⁸⁵ It appears that this question will, of necessity, have to be decided by the tribunals which may be called upon to sit on cases of alleged violations of this clause of Article 130 of the Convention.⁸⁶

5. Wilfully Depriving a Prisoner of War of the Rights of Fair and Regular Trial Prescribed in This Convention

After World War II a number of individuals were charged with, and tried for, having ordered or participated in trials of prisoners of war

the Communists was that many of the missing prisoners of war had been "reeducated" and had then "volunteered" to serve in the North Korean army. Acheson, *The Prisoner Question* 744. It does not require much imagination to visualize the nature of the "reeducation" or the actual extent of the "volunteering." Absorption of prisoners of war into one's own army is an old Asiatic custom. See Sun Tsu's *Art of War* and the *Manu Sriti*, pp. 3-4 *supra*.

⁸² The English version of the Convention uses the term "forces of the hostile Power" while the French version uses the term "*forces armées de la Puissance ennemie*." (Emphasis added.) It is clear that this discrepancy was the result of poor coordination and that the two provisions were intended to be identical.

⁸³ 1956 GE Report, 7th Meeting at 6. The word "auxiliary" is included in the first paragraph of Article 51 of the Civilians Convention (see note 80 *supra*), but not in Article 147 thereof, the grave-breaches Article of that Convention.

⁸⁴ 1956 GE Report 6. This is a policy of avoiding the need for reaching a decision which has been adopted all too frequently in this area of international law.

⁸⁵ *Ibid.*

⁸⁶ In Pilloud, *Protection pénale* 858, the statement is made that "this violation appears difficult to assimilate to a common law crime." (Transl. mine.) Certainly, no existing statute of the United States has been found that could be used as a vehicle for the trial and punishment of persons alleged to be guilty of this grave breach of the Convention.

which had made a mockery of justice.⁸⁷ In each of these "trials" the prisoner of war had been charged with a precapture offense. In *Matter of Yamashita* the United States Supreme Court held that prisoners of war charged with precapture offenses were not entitled to all of the protections afforded by the 1929 Convention, but said that nevertheless "it is a violation of the law of war, on which there could be a conviction if supported by evidence, to inflict capital punishment on prisoners of war without affording them opportunity to make a defense."⁸⁸

The draftsmen of the 1949 Convention included this offense among the grave breaches of the Convention—and rightly so. The "rights of fair and regular trial prescribed in this Convention" to which a prisoner of war is entitled are undoubtedly included among those substantive and procedural rights enumerated in Articles 84–88 and 99–108, inclusive, of the Convention, but it must be conceded that not all of these rights are necessarily vital to a "fair and regular trial."⁸⁹ During the 1949 Diplomatic Conference at which Article 130 was conceived, drafted, and adopted, there was some discussion as to the advisability of listing therein the specific judicial rights the denial of which would constitute a grave breach, but this proposal was rejected.⁹⁰ Hence, once again, much has been left for interpretation by each

⁸⁷ *I.M.T.F.E.* 1027; *Trial of Shigeru Sawada*; *Trial of Harukei Isayama*, *Trial of Tanaka Hisakasu*. In its recital of the evidence in the Shigeru Sawada case, the UNWCC said (5 *LRTWC* at 2–3):

The fliers were not told that they were being tried; they were not advised of any charges against them; they were not given any opportunity to plead, either guilty or not guilty; they were not asked (nor did they say anything) about their bombing mission. No witness appeared at the proceedings; the fliers themselves did not see any of the statements utilized by the court that they had previously made at Tokyo; they were not represented by counsel; no reporter was present; and to their knowledge no evidence was presented against them.

In the Tanaka Hisakasu case, the UNWCC summarized the offense for which the Japanese accused were tried as follows (5 *LRTWC* at 73):

The accused were in fact found guilty of the denial of certain basic safeguards which are recognized by all civilized nations as being elements essential to a fair trial, and of the killing or imprisonment of captives without having accorded them such a trial.

⁸⁸ 327 U.S. 1 at 24, note 10.

⁸⁹ 2B *Final Record* 117. Under Article 85 the prisoner of war tried for a precapture offense is entitled "to the benefits of the present Convention"—which means *all* of the benefits of the Convention. See pp. 379–382 *infra*. The grave breach specified in Article 130 is for depriving the prisoner of war of "the rights of fair and regular trial prescribed in this Convention." (Emphasis added.) Violation of parts or all of a number of the articles cited in the text would not necessarily derogate from a fair and regular trial. See 6 *LRTWC* 103. While such violations would not, therefore, constitute grave breaches of the Convention, they would still be "acts contrary to the provisions of the present Convention" (Article 129, third paragraph) and would thus fall within the category of "other breaches." See note 80 *supra*. See also Article 75(4) and (7) of the 1977 Protocol I.

⁹⁰ 2B *Final Record* 88.

national tribunal which is called upon to render judgment after trial of an individual charged with the commission of this grave breach of the Convention.⁹¹

6. Protection against:

a. ACTS OF VIOLENCE OR INTIMIDATION

This is one of the prohibitions of the second paragraph of Article 13 which is not specifically included in Article 130.⁹² As the paragraph begins with the word "Likewise," it appears that the intention was to bring it within the category of "serious breaches."⁹³ Most acts of violence or intimidation against prisoners of war will probably be chargeable as wilful killing, inhuman treatment, torture, or wilfully causing a great suffering or serious injury to body or health. Moreover, this is one of the areas in which personnel of the Detaining Power may be found to have committed a violation of the Convention by an act of omission. During World War II there were numerous instances of civilians being permitted to commit acts of violence, including murder, upon prisoners of war, without any attempt being made to protect them by those in whose custody they were.⁹⁴ After the war many of these latter were tried for this offense.⁹⁵

b. INSULTS AND PUBLIC CURIOSITY

In his 1863 Code, Lieber included a provision which prohibited subjecting prisoners of war to any "indignity."⁹⁶ However, this type of protection did not attain international status until it was included in the second paragraph of Article 2 of the 1929 Convention, which required that prisoners of war be protected from "insults and public

⁹¹ Article 37 of the *Uniform Code* (10 U.S.C. §837), prohibits any commanding officer from coercing or influencing the actions of any military tribunal convened under the Code, or any member thereof; and Article 98 of that Code (10 U.S.C. §898) provides for the punishment of violations of the procedural provisions thereof. However, these provisions apply only to United States courts-martial, and not to improper trials by enemy tribunals. Of course, if the accused were a prisoner of war in the hands of the United States as the Detaining Power, he would be subject to the jurisdiction of United States courts-martial for the precapture offense of wilfully depriving prisoners of war of their right to a fair and regular trial. See Article 2(9), *Uniform Code*, 10 U.S.C. §802(9).

⁹² It derives from Article 2(2) of the 1907 Hague Regulations.

⁹³ See p. 352 *supra*, and notes 42 and 44 *supra*.

⁹⁴ In *I.M.T.* (22 TMWC at 472), the following statement appears: "When Allied airmen were forced to land in Germany, they were sometimes killed at once by the civilian population. The Police were instructed not to interfere with these killings, and the Ministry of Justice was informed that no one should be prosecuted for taking part in them." For documentary evidence of the foregoing, see *The Justice Case*, 3 T.W.C. 1095-99.

⁹⁵ See, e.g., *Essen Lynching Case*; *Trial of Albert Bury*; *Trial of August Schmidt*.

⁹⁶ Article 75 of the *Lieber Code* stated that prisoners of war could be confined "but they are to be subjected to no other intentional suffering or indignity."

curiosity.”⁹⁷ During World War II events of this nature occurred both in Europe⁹⁸ and in the Far East,⁹⁹ and resulted in postwar trials of individuals for violations of this provision.

The second paragraph of Article 13 differs very little from its predecessor, except insofar as it may be construed to be specifically included among the “serious breaches” of the 1949 Convention. Unfortunately, it can be anticipated that it will be violated on occasion in any future international armed conflict as it has been in the past.¹⁰⁰ The propensity for using prisoners of war for propaganda purposes, demonstrated on two continents during World War II, has since been exhibited again in North Vietnam¹⁰¹ and in China.¹⁰²

c. REPRISALS

Reprisals in the law of war are acts, otherwise illegal, committed by one side in an armed conflict in order to put pressure on the other side to compel it to abandon a course of action that it is following which is in violation of the law of war.¹⁰³ Lieber stated specifically

⁹⁷ In 1943 the Judge Advocate General of the United States Army interpreted this provision in the following manner: “The ‘public curiosity’ against which Article 2 of the Convention protects them is the curious and perhaps scornful gaze of the crowd.” SPJGW 1943/11228. This opinion found no objection to the publication of pictures of prisoners of war as long as they were not of such a nature as to defame, to invade their right of privacy, or to expose them to public ridicule, hatred, or contempt. This is probably a dangerous and difficult line to draw.

⁹⁸ *Trial of Kurt Maelzer* (parading American prisoners of war through the streets of Rome). In *The High Command Case* the Military Tribunal held that the rights of prisoners of war to protection against violence, insults, and public curiosity were “an expression of the accepted views of civilized nations.” 11 T.W.C. 535. See also *I.M.T.*, 22 TMWC at 497. In Draper, *Recueil* 90, the opposite conclusion is reached.

⁹⁹ *I.M.T.F.E.* 1030–31 & 1092–94 (parading prisoners of war through the streets of cities in China, Korea, and Burma). But see *Pal Dissent* 1167–68.

¹⁰⁰ Humiliation and degradation is still a part of the culture of some countries. See, e.g., Miller, *The Law of War* 260. Nevertheless, the Standard Minimum Rules contain, in Article 45(1), a requirement that when civilian prisoners are being moved to or from a penal institution “proper safeguards shall be adopted to protect them from insult, curiosity and publicity in any form.”

¹⁰¹ *New York Times*, 8 July 1966 at 3, col. 1; *ibid.*, 13 July 1966 at 1, col. 7; *ibid.*, 9 May 1967 at 15, col. 1; 56 *Dept. State Bull.* 825 (1967); Haight, *Shadow War* 47; Naughton, *Motivational Factors* 11; ICRC, *The International Committee and the Vietnam Conflict*, 6 *I.R.R.C.* 399 & 404; Levie, *Maltreatment in Vietnam* 342–44.

¹⁰² Cohen & Chiu, *People's China* 1573–74 (Indian prisoners of war); *ibid.*, 1575–76 (Americans shot down over China).

¹⁰³ *British Manual*, para. 642; *U.S. Manual*, para. 497a; Pictet, *Commentary on the First Convention* 341–42. Reprisals must be distinguished from retorsion. In the latter the retaliatory act is a legal action which the party has a right to take but had not previously taken. ICRC *Report* 367. The requirements for a valid reprisal, where a reprisal is permitted by international law, are to be found in Draper, *Implementation* 49; 1972 *Basic Tests*, Article 74, para. 2; and Levie, *Mal-*

that "prisoners of war are liable to the infliction of retaliatory measures."¹⁰⁴ The 1899 and 1907 Hague Regulations did not touch upon the subject of reprisals against prisoners of war, and during World War I such reprisals occurred on both sides.¹⁰⁵ Ultimately, many of the bilateral agreements with respect to prisoners of war entered into during the course of that armed conflict included specific provisions concerning reprisals against them, but only to impose a requirement for a specified period of delay between announcement and enforcement.¹⁰⁶

The failure of the 1907 Hague Regulations to outlaw reprisals was one of the major criticisms leveled at those Regulations,¹⁰⁷ and was one of the major concerns of the Diplomatic Conference which drafted the 1929 Convention.¹⁰⁸ The ICRC had long since proposed that reprisals against prisoners of war be specifically prohibited.¹⁰⁹ This was the proposal that was made to the 1929 Diplomatic Conference;¹¹⁰ a British counterproposal would have condemned such reprisals but would have allowed them to be imposed where the enemy government had committed or sanctioned illegal acts with respect to prisoners of war detained by it.¹¹¹ The ICRC proposal for the categorical prohibition was adopted as the last sentence of Article 2 of the 1929 Conven-

treatment in Vietnam 354. (The latter did not mention proportionality inasmuch as there was no question of proportionality in the case there discussed.)

¹⁰⁴ *Lieber Code*, Article 59 (2). There is, of course, the possibility that the term "retaliatory measures" used by Lieber referred solely to retorsion and not to reprisals. In 1863, when the Federal government began to organize Negro regiments, the Confederate government announced that captured Negro soldiers would not be treated as prisoners of war. President Lincoln thereupon issued a proclamation providing that for every Union soldier killed in violation of the law of war one "rebel soldier" would be executed (reprisal) and that for every Union soldier sold into slavery "a rebel soldier shall be placed at hard labor on the public works" (retorsion). Winthrop, *Military Law* 1242; *PMG Review*, III at 28.

¹⁰⁵ Dufour, *Dans les camps de représailles*; Vizzard, Policy 241; Bower, *The Laws of War; Prisoners of War and Reprisals*, 1 *Trans.* 15, 19-25; Gray *The Killing Time* 149. *The German War Book*, issued prior to World War I, although widely condemned for its general disregard of the customary and conventional law of war, did limit reprisals against prisoners of war to cases of "extreme necessity," "self-preservation," and the security of the state. Morgan, *The German War Book* 74.

¹⁰⁶ See, e.g., *Agreement between Great Britain and Germany* (July 1917), para. 20; *Agreement between the British and Turkish Governments* (December 1917), Article XXI; and *Agreement between France and Germany* (May 1918), para. 42.

¹⁰⁷ Phillimore & Bellot 59.

¹⁰⁸ For an overall review of the background and events of that Conference with respect to reprisals against prisoners of war, see Kalshoven, *Belligerent Reprisals* 69-82.

¹⁰⁹ *Ibid.*, 71.

¹¹⁰ *Ibid.*, 78.

¹¹¹ *Ibid.*, 79. This was substantially the procedure contained in Article 13 of the ILA's Proposed International Regulations, note I-40 *supra*.

tion.¹¹² So important was this provision considered, that in reporting it to the Plenary Meeting the statement was made that even had the Conference accomplished nothing else, it would have to be considered a success!¹¹³

Despite this unambiguous provision of the 1929 Convention, reprisals and threats of reprisals against prisoners of war were resorted to during World War II.¹¹⁴ Most of these actions fell within the category of reprisals for alleged prior illegal treatment of prisoners of war by the enemy;¹¹⁵ however, some were completely unrelated to the treatment accorded to prisoners of war by the other side.¹¹⁶ Once again, the use of reprisals against prisoners of war merely revealed that each act of reprisal usually resulted in a retaliatory act by the enemy; that reprisals against prisoners of war were ineffective in accomplishing their intended purpose; that such reprisals merely made the innocent suffer for acts for which they had not been responsible and over which they had had no control; and that the draftsmen of the 1929 Convention had acted correctly in categorically banning the practice.¹¹⁷

Apart from an unimportant editorial change, the last sentence of Article 13 of the 1949 Convention exactly reproduces the cognate pro-

¹¹² Flory, *Prisoners of War* 45 states that "it seems reasonable to assume that reprisals, with prisoners of war as the objects, are permissible within limits in customary international law." It is important to bear in mind that Flory was setting forth his view of the *customary* rule in 1942, apart from the provision of the 1929 Convention.

¹¹³ Kalshoven, *Belligerent Reprisals* 80. Another author found the inclusion in the 1929 Convention of the provision prohibiting reprisals against prisoners of war "surprising" in the light of the World War I experiences. Meitani, *Regime* 301.

¹¹⁴ See generally, Anon., *Les représailles contre les prisonniers de guerre*, 29 *R.I.C.R.* 863.

¹¹⁵ Maughan, *Tobruk* 774, 791, & 808; 1 *ICRC Report*, 371. The most famous case in this respect was, of course, the series of successive reprisals resulting from the Canadian shackling of German prisoners of war during the raids on Dieppe and Sark. 1 Stacey, *Six Years of War: the Army in Canada, Britain and the Pacific* at 396-97; 1 *ICRC Report*, 368-70; Kalshoven, *Belligerent Reprisals* 178-83; *British Manual*, para. 137 n.2(a) & (b). (Whether the original shackling was a violation of the law of war is not completely clear. See, e.g., Vattel, Vol. II, Bk. III, Ch. VIII, sec. 150; and Kalshoven, *Belligerent Reprisals* 180. At the 1947 Conference of Government Experts the United Kingdom representative (Satow) proposed the specific prohibition of shackling. No action was taken on his proposal. 1947 GE Report 118.)

¹¹⁶ For example, one threat of reprisal against prisoners of war was based upon the alleged bombing of a dressing station in North Africa. 1 *ICRC Report*, 370. There were rumors, never fully substantiated, that the Japanese had threatened to execute 10 American officers for each day that American forces in the Philippines continued to fight after General Wainwright's surrender on Corregidor. This would have violated not only the last sentence of Article 2 of the 1929 Convention, but the general law of war as well.

¹¹⁷ See generally, Pictet, *Commentary* 141-42; and 1971 GE Documentation, II, at 49.

vision of the 1929 Convention. It therefore continues to be absolute in character, and may not be disregarded even in an attempt to bring about a cessation of violations of the Convention by the enemy.¹¹⁸ A right of reprisal against prisoners of war was not claimed by the North Koreans or Chinese Communists as the reason for their maltreatment of United Nations Command prisoners of war during the hostilities in Korea.¹¹⁹ It was asserted by the Vietcong that their executions of a number of American prisoners of war held by them was in retaliation for the execution of convicted Vietcong terrorists by the South Vietnamese.¹²⁰ This constituted but another post-1949 Convention violation of the provisions of that Convention and of customary international law.

A strict construction of Article 13 will result in a determination that the prohibition against reprisals contained in that Article is not one of the offenses therein designated as "serious breaches" of the Convention. While many acts of reprisal against prisoners of war will undoubtedly fall within the categories of offenses listed as grave breaches in Article 130 or as serious breaches in the first two paragraphs of Article 13, there are many which will not. Nevertheless, they will constitute violations of the Convention and will constitute "other breaches" which the Parties are required to suppress under the provisions of the third paragraph of Article 129.

7. Other Offenses

Various other prohibitions in the treatment of prisoners of war, some of which concern extremely serious actions, others of which are of less seriousness, appear throughout the Convention.¹²¹ As we shall see, the Convention contemplates that punishment will be adjudged

¹¹⁸ Draper, Implementation 50; Kalshoven, *Belligerent Reprisals* 213 & 303; *British Manual*, para. 133 (b); and *Committee Report*, 50 I.L.A. Rep. 202. Although Lauterpacht-Oppenheim 562 n.3, seems to be to the same effect, one author interprets it as taking the position that "the arguments are evenly balanced" and concludes that the use of reprisals against prisoners of war is only prohibited "for breaches of the Convention." Stone, *Legal Controls* 656 & n.21 thereon. This position does not appear to have other support.

¹¹⁹ It has been suggested that in the light of the many acts of retaliation taken by the PRC in recent years for alleged violations of international law, it might well be expected to extend this practice to prisoners of war. Miller, *The Law of War* 237.

¹²⁰ Levie, *Maltreatment in Vietnam* 353-58. Although Kalshoven disagreed with both the facts and the law stated in that article (Kalshoven, *Belligerent Reprisals* 295-305), he concluded, as did this author, that "the executions of American prisoners of war carried out by the Vietcong were clear violations of [the last sentence of Article 13]." *Ibid.*, 303.

¹²¹ See, e.g., Article 16 (adverse distinction based on race, nationality, religious belief, or political opinions); Article 19 (unnecessary exposure to danger); Article 22 (interning in a penitentiary); Article 23 (use to render areas immune from military operations); Articles 50 and 51 (compelling prisoners of war to perform unauthorized or prohibited work); Article 87 (collective punishment); etc.

for these types of violations of its provisions, as well as for those which are specifically designated "grave breaches," or "serious breaches."¹²²

C. PROCEDURAL PROVISIONS

The "code of criminal procedure" for persons tried for maltreatment of prisoners of war is contained, in capsulated form, in Article 129 of the Convention.¹²³ This Article had a somewhat chaotic conception and birth and requires some preliminary historical discussion in order that it may be properly understood.

The original proposal of the ICRC was concerned only with the need for national legislation to contain substantive provisions making violations of the Convention punishable, and a requirement that the Parties search for violators of the provisions of the Convention and try or extradite them.¹²⁴ Although this provision was approved by the 1948 Stockholm Conference with only a few minor changes,¹²⁵ that Conference was apparently not entirely satisfied with the results attained, as it also requested the ICRC to continue work on this subject.¹²⁶ The ICRC responded by drafting a second proposal which contained comprehensive provisions covering numerous facets of the problem, both substantive and procedural.¹²⁷ The article ultimately adopted (now Article 129 of the Convention) included few of the new procedural provisions proposed by the ICRC.¹²⁸ By analysis and analogy we must endeavor to arrive at a conclusion as to just how successful the procedure actually adopted has been and may be expected to be in the future.

¹²² See pp. 374-375 *infra*.

¹²³ Actually, this "code" contemplates the application of national substantive and procedural statutes with the proviso that the procedures followed must guarantee certain minimal judicial standards.

¹²⁴ Article 119, *Draft Revised Conventions* 134.

¹²⁵ When the version approved at Stockholm was printed (*Revised Draft Conventions* 99-100), it erroneously contained a number of unapproved material changes. It was reprinted with those changes in the official documentation for the 1949 Diplomatic Conference (1 *Final Record* 100), but a corrected version was likewise published there (*ibid.*, 101-02 and 3 *Final Record*, Annex 50 at 43).

¹²⁶ See note 26 *supra*.

¹²⁷ See note 27 *supra*.

¹²⁸ The procedural provisions contained in Article 129 of the Convention are substantially those of "Article A" of Annex 49, 3 *Final Record* 42, plus those of Article 119(c) (2) (trial safeguards) contained in the second ICRC proposal (see note 27 *supra*; Annex 52, 3 *Final Record* 44; and 2B *Final Record* 32 & 133). Of course, the provisions concerning national legislation and extradition had originated in the first ICRC proposal (note 124 *supra*) and were also contained in the second ICRC proposal (note 27 *supra*).

1. Undertaking to Enact Any Necessary Legislation

Under the first paragraph of Article 129 each Party to the Convention undertakes "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article." It was apparent and acknowledged that few national penal codes would have substantive provisions covering all of the grave breaches described in Article 130.¹²⁹ For this reason the ICRC had early proposed a provision committing States Parties to the Convention to have on their statute books legislation which would "prohibit all acts contrary to the stipulations" of the Convention.¹³⁰ Redrafted, this ultimately became the provision of Article 129 quoted above.

States were slow to react to the obligation thus assumed by them to secure from their legislatures the enactment of the necessary legislation.¹³¹ In 1960 the ICRC could name only 3 States which had complied with the requirement laid down in the first paragraph of Article 129.¹³² In 1965 and in 1969 the ICRC requested information in this regard from the National Red Cross Societies and received reports from 49, many of which were, unfortunately, worthless.¹³³ In 1971 the ICRC was still reporting that the usual national penal legislation was inadequate to ensure the repression of the grave breaches of the Convention.¹³⁴ A brief survey will indicate that while some States have fully complied with the requirement to enact legislation providing penal sanctions for violations of Article 130 of the Convention, others have only partially complied, and still others have taken no action whatsoever.

¹²⁹ As far back as 1934 it had been determined that national penal codes lacked provisions for punishing violations of the 1907 Hague Convention and the 1929 Geneva Convention. 2B *Final Record* 85.

¹³⁰ Article 119(1), *Draft Revised Conventions* 134.

¹³¹ Article 29, second paragraph, of the 1929 *Geneva Red Cross Convention* had contained a specific requirement that Governments report the actions taken in this regard to the Swiss Federal Council, the depositary of that convention, within five years of ratification. A similar two-year reporting provision was included in the second ICRC proposal (Article 119(2), Remarks and Proposals 64). It was not adopted. However, Article 128 of the Convention does require every Party to furnish to the other Parties "the laws and regulations which they may adopt to ensure the application" of the Convention. See p. 287 *supra*. Presumably this would include the laws and regulations implementing Articles 129 and 130. See Pictet, *Commentary* 616-17.

¹³² Pictet, *Commentary* 621 n.1 (Switzerland, Yugoslavia, and The Netherlands).

¹³³ Measures to Repress (1965 and 1969). Article 73 of the 1973 Draft Additional Protocol contained a proposed provision on reporting comparable to that of Article 128 of the Convention. It became Article 84 of the 1977 Protocol I.

¹³⁴ 1971 GE Documentation, II, at 40, 47.

In 1951 Yugoslavia incorporated into its penal code an Article 127 entitled "War crimes against prisoners of war." This Article is really a national reenactment of the wording of the grave-breaches provision.¹³⁵ It provides for punishment upon conviction ranging from death to not less than 5 years' imprisonment. The United Kingdom has accomplished the same result, but by a slightly different path. Article 1(1) of its Geneva Conventions Act (1957) provides that any violation of Article 130 of the Convention shall be a felony. It then provides that the punishment upon conviction for wilful killing shall be life imprisonment; and for any of the other grave breaches it shall be imprisonment for not more than 14 years.¹³⁶

Although the Soviet Union is often heard to claim leadership in the enactment of legislation to repress violations of the law of war, including that part thereof dealing with the protection of prisoners of war, analysis discloses that this is not the case.¹³⁷ In 1958 the Soviet Union enacted its Law on Criminal Responsibility for Military Crimes.¹³⁸ Article 32 of that law is the only one in any way related to the protection of prisoners of war. It provides that "[m]istreatment of prisoners of war, occurring repeatedly or in conjunction with special cruelty" is punishable by deprivation of freedom for a period of one to three years.¹³⁹ This is scarcely a very comprehensive coverage of the grave breaches of Article 130—nor does the punishment appear to be really adequate.¹⁴⁰ Presumably, the wilful killing of a

¹³⁵ The statute reproduced in 1965 Measure to Repress 185, 186, is a translation from Serbo-Croatian into French. While it differs somewhat from the official French version of Article 130, this is probably only because of the double translation (French-Serbo-Croatian-French) and not from any intention to make changes.

¹³⁶ Another procedure which is probably intended to accomplish the same result is that adopted by Venezuela. Article 474(7) of that country's *Código de Justicia Militar* (1958, ed. of 1969) provides for a punishment of confinement for from 4 to 10 years for those who violate treaties. The Netherlands *Loi concernant le droit pénal militaire* has, in part, adopted a comparable approach by providing, in Article 8, for the punishment by confinement for a maximum of 10 years for those found guilty of a "violation of the laws and customs of war," with more severe punishment for aggravated offenses. 1956 Measures to Repress 115 & 117-18. The difficulty with this approach is that it will result in many of the same problems which arose in the "war crimes" trials after World War II.

¹³⁷ Ramundo, Soviet Criminal Legislation 83-84.

¹³⁸ The U.S.S.R. Law of 25 December 1958 is merely a reenactment of a statutory provision which originated in Russian law during the Tsarist era. *Ibid.*

¹³⁹ *Ibid.*, 74 n.7. Paragraph (b) of that article makes such an offense, committed without aggravating circumstances, subject only to disciplinary punishment.

¹⁴⁰ On the other hand, Article 29(b) of the same statute makes violence to or cruel treatment of fellow (Russian) prisoners of war, committed by one in the position of a superior, punishable by confinement for from 3 to 10 years. *Ibid.* Even the ICRC has been sufficiently pragmatic to suggest confinement for from 5 to 10 years for "other breaches" of the Convention, those presumably less serious than the grave breaches. See note 149 *infra*.

prisoner of war could be appropriately punished under the applicable provision of the general penal code; but a number of the other grave breaches will not be covered by such a code.¹⁴¹

The third category of States mentioned above, those who have taken no action whatsoever to comply with the commitment contained in the first paragraph of Article 129, is well represented by the United States. During the hearing conducted by the Committee on Foreign Relations of the United States Senate prior to the latter's giving its advice and consent to the ratification of the four 1949 Geneva Conventions for the Protection of War Victims, testimony was given to the effect that "it would be difficult to find any of these acts [grave breaches] which, if committed in the United States, are not already violations of the domestic law of the United States."¹⁴² Subsequently, the Department of Justice wrote a letter to the Chairman of the Committee in which, among other matters, the statement was made that "[a] review of existing legislation reveals no need to enact further legislation in order to provide effective penal sanctions for those violations of the Geneva conventions which are designated as grave breaches."¹⁴³ Unfortunately, the foregoing statements are not correct. There are a number of grave breaches as to which it can definitely be said that no proper national penal legislation presently exists for the punishment of individuals who commit them. And even if it should appear that there is an existing national law which may possibly be adequate for the punishment of a particular grave breach, this does not justify inaction and reliance on a controversial interpretation of that law. Should the courts later decide that the law in question has not been properly interpreted and that it does not, as claimed, cover a particular grave breach, this would probably make it impossible to prosecute any grave breach of that particular category which had been committed prior to the enactment of subsequent (*ex post facto*) remedial legislation. It scarcely seems proper to disregard a treaty commitment and to risk an inability to prosecute one

¹⁴¹ For example, under the Soviet statute it would not be possible to prosecute for the grave breach of compelling a prisoner of war to serve in the armed forces of the Detaining Power or of wilfully depriving a prisoner of war of the rights of fair and regular trial, and it is extremely doubtful that these offenses would fall within the ambit of any provision of the general penal code.

¹⁴² 1955 Hearing 24. See also, *ibid.*, 29. Note that in any event the quoted assertion was limited to "acts committed in the United States." Suppose that a member of the armed forces of the United States is alleged to have committed a grave breach of the Convention after which he returns to the United States and is discharged from the military service. No court of the United States would have jurisdiction. *Toth v. Quarles*.

¹⁴³ 1955 Hearing 58. It will be seen that mention is made only of grave breaches of the Convention. (The letter did admit that there was a need for legislation to provide penalties for the improper use of "PW" and "PG" markings! *Ibid.*, 59. See the last paragraph of Article 23 of the Convention and p. 123 *supra*).

or more of these grave breaches of the Convention solely in order to avoid bringing the need for additional penal legislation to the attention of the Congress. (Of course, the United States might, as was done after World War II, merely allege a "violation of the law of war" and then, in a specification, set forth the facts constituting the grave breach. But it is this procedure, with the criticism which it provoked, that Articles 129 and 130 were intended to remedy; and the legality of this procedure is now highly questionable.)

Consideration has also been given to the possibility that Article 130 itself created the offenses which it denounced. The report of the Senate Committee indicates that it arrived at the contrary conclusion, the specific statement being made that "the grave breaches provisions cannot be regarded as self-executing and do not create international criminal law."¹⁴⁴

The United States would be well advised to follow the example of countries such as the United Kingdom and Yugoslavia and enact all-encompassing legislation which would ensure that the United States could try individuals who commit the grave breaches of the Convention enumerated in Article 130 of the Convention.¹⁴⁵

2. Undertaking to Suppress Other Violations

Under the provisions of the third paragraph of Article 129 the Parties have accepted the general obligation to take all measures necessary for the suppression of the violations of the Convention other than the grave breaches of Article 130. This, of course, includes a requirement to enact penal legislation under which persons who are alleged to have committed such "other breaches" of the Convention may be tried and, if found guilty, punished. A reading of Chapter II hereof alone will indicate that the Convention is, and necessarily so, replete with prohibitions placed upon the Detaining Power and its personnel in the treatment of prisoners of war.¹⁴⁶ Although many of these acts were punished after World War II as violations of the laws and customs of war, few of them will fall within the prohibitions of specific penal legislation of most States. The problem here is identical with that discussed immediately above with reference to grave breaches—except that it is more far-reaching as it includes a

¹⁴⁴ 1955 Senate Report 27. To the same effect, see Toomey, *Trial of American Civilians as War Criminals in American Courts*, 31 *Fed. Bar J.* 73. While this is really the effect of the Venezuelan approach (note 136 *supra*), the provisions of the Convention have there been legislatively incorporated into the Venezuelan military criminal code. (For another possible solution, see Esgain & Solf 583-88.)

¹⁴⁵ As we shall see, the default is not limited to the failure to enact laws punishing grave breaches.

¹⁴⁶ For a very few examples of these prohibitions, see note 121 *supra*. There are also a great many affirmative mandates the failure to comply with which would be violations of the Convention. See, e.g., Article 25 (quarters); Article 26 (food); Article 27 (clothing); Article 29, 30, and 31 (medical care); etc.

considerably greater number of potential offenses, a very large majority of which have little or no resemblance whatsoever to any present statutory offense.¹⁴⁷ Once again, the need for legislation is indicated, both in order to fulfill the treaty obligation assumed by each of the Parties to the Convention and in order to enable them properly to punish those who have violated any of the provisions of the Convention, even though such violations may not, in many cases, be considered to be on the level of importance of the grave breaches. And, once again, we find that the Parties to the Convention have, by and large, completely disregarded their obligation under the third paragraph of Article 129. Indeed, some, such as the United Kingdom, have enacted the legislation concerning grave breaches called for by the first paragraph of Article 129, but have made no effort whatsoever to enact the legislation concerning other breaches called for by the third paragraph of Article 129.¹⁴⁸ Nothing less than a concerted effort by all concerned will remedy this situation.¹⁴⁹

3. Undertaking to Search for and to Extradite or Try Accused Persons

After World War II a number of former high Nazi officials and officers, many guilty of the most heinous of crimes, including those against prisoners of war, took refuge in various friendly countries and lived there under assumed names.¹⁵⁰ The countries of asylum have almost uniformly denied extradition when it has been requested,¹⁵¹ and many of the individuals concerned have avoided any punishment for their crimes. Efforts to prevent a recurrence of this situation by denying such persons places of refuge resulted in the second paragraph of Article 129 of the Convention. Under its provisions each

¹⁴⁷ It would be difficult, indeed, to identify an offense in the vast majority of national penal codes under which an individual could be charged, for example, with wilfully delaying the evacuation of prisoners of war from the combat zone in order to render the area immune from attack, in violation of the first paragraph of Article 23; or for compelling a prisoner of war to work in a chemical factory, in violation of Article 50(b); or for refusing to permit prisoners of war to send or receive mail, in violation of Article 71; etc. Here, again, the Venezuelan and Netherlands approach (note 136, *supra*) may be considered as a solution to the problem by providing the necessary legal basis for the prosecution of offenses of this nature.

¹⁴⁸ See note 46 *supra*.

¹⁴⁹ In Pictet, *Commentary* 629, the excellent suggestion is made that if a statute with separate provisions for each violation of the Convention is not deemed feasible, the minimum requirement would be for a statute with separate provisions as to each grave breach and a general provision providing for a reasonable punishment (imprisonment for 5 to 10 years) for all other violations.

¹⁵⁰ For what purports to be the true story of some of the better known members of this group, including Bormann and Eichmann, see Farago, *Aftermath*.

¹⁵¹ 1971 GE Report, para. 569. For a famous (or infamous) case of this nature, see *United States v. Artukovic*.

Party to the Convention, *whether or not a belligerent*,¹⁵² places itself under an obligation (a) to search out persons alleged to have committed, or to have ordered to be committed, any grave breach; (b) to bring such persons, regardless of nationality, to trial before its own courts; and (c) if it prefers, and subject to its laws, to turn such persons over to another Party for trial, where such other Party has made out a *prima facie* case against them.¹⁵³ It seems obvious that the basic intention of the draftsmen of this provision was to make applicable to the grave breaches of the Convention the alternative procedures found in many extradition treaties: *aut dedere aut punire*, either deliver or punish.¹⁵⁴ The Party in whose territory the person who is alleged to have committed a grave breach of the Convention is found, may, even if it is not a belligerent, and if its national laws permit, try the individual concerned in its own courts. If it does not desire to, or cannot, do so, it may, again if its national laws permit, grant extradition of the accused to the Party which has requested it and which, as is frequently required in connection with requests for extradition, has produced evidence constituting a *prima facie* case.

This procedure was undoubtedly intended to cover all conceivable contingencies in order to ensure that persons charged with grave breaches of the Convention would not be able to seek and obtain permanent asylum in neutral States and thereby avoid trial and punishment for their offenses. Admirable and salutary as the provision is, it is extremely probable that it does not attain the desired result. Assume a war between Graustark and Ruritania, both Parties to the Convention. A Ruritanian, charged with the grave breach of physical torture of Graustarkian prisoners of war detained by Ruritania on the territory of its ally, Grand Fenwick, another Party to the Convention, makes his way to the United States, a neutral and also a Party to the Convention. Graustark demands that the United States either try him in its own courts for the grave breach of the Convention allegedly committed by him or turn him over to Graustark for trial, at the same time submitting to the United States evidence constituting a *prima facie* case against him. The United States cannot try him, as he is not subject to its civil criminal law (he has committed no offense within the territorial jurisdiction of the United

¹⁵² *British Manual*, para. 639 n.1; Draper, *Recueil* 157. A proposal to limit the obligation to "search for" (and extradite) to the belligerents was made at the 1949 Diplomatic Conference but it was not adopted. 2B *Final Record* 87.

¹⁵³ It should be emphasized that this provision relates to grave breaches only and not to other breaches of the Convention.

¹⁵⁴ In Draper, *Recueil* 159, the statement is made that "[t]he Grotius principle of *aut dedere aut punire* has been rejected." This appears to somewhat overstate the case.

States),¹⁵⁵ nor is he subject to its military law¹⁵⁶ (in which case the place of the commission of the offense would not matter).¹⁵⁷ The United States cannot extradite him because, even assuming that there is an extradition treaty with Graustark,¹⁵⁸ this grave breach would not be extraditable under present United States law.¹⁵⁹ The alleged offender has acquired a haven from prosecution. And, unfortunately, there are many variations of the hypothetical set of facts given above in which the result would be the same (the neutral sanctuary is not a Party to the Convention, the fugitive is a national of the State in which he has found refuge,¹⁶⁰ the offense with which he is charged

¹⁵⁵ In Yingling & Ginnane 426, the authors state: "In the case of the United States, whose regular courts generally exercise jurisdiction only over crimes committed within their territorial jurisdiction, legislation may be required to provide for the trial, or permissively allow the extradition, of persons who are accused of having committed grave breaches in a conflict to which the United States was not a party." Article 1(2) of the United Kingdom's *Geneva Conventions Act, 1957*, obviates this problem by endowing British courts with jurisdiction to try cases falling within its purview "as if the offense had been committed" at the place of trial. The adoption of the proposal made in sec. 208(f) of the 1971 *Report of the National Commission on Reform of Federal Criminal Laws* would partially solve the problem for the United States.

¹⁵⁶ He is not within one of the categories of persons over whom United States courts-martial exercise their limited peacetime jurisdiction. See Article 2, *Uniform Code*, 10 U.S.C. §802. See also, *Toth v. Quarles*; *Reid v. Covert*; *McElroy v. Gaugliardo*.

¹⁵⁷ The *Uniform Code* has no territorial limitations. See Article 5 thereof, 10 U.S.C. §805.

¹⁵⁸ Article 129, second paragraph, of the Convention is probably an extradition treaty within the meaning of the applicable statute of the United States (see note 159 *infra*) and would serve as a basis for extradition if all of the other requirements for extradition were met. However, it would be helpful, and remove doubt, if States included the grave breaches of Article 130 in their list of extraditable offenses in the extradition treaties hereafter negotiated.

¹⁵⁹ The United States Extradition Law (18 U.S.C. §3184) requires a complaint charging the person sought to be extradited "with having committed *within the jurisdiction* of any such foreign government any of the offenses provided for. . . ." (Emphasis added.) Most extradition treaties are to the same effect. The hypothetical offense was not committed within the territorial jurisdiction of Graustark. Under national legislation of the United States, Graustark cannot obtain extradition; and under the Convention, Grand Fenwick is under no compulsion to seek it.

¹⁶⁰ While the clause of the second paragraph of Article 129 concerning trial in the courts of the asylum State requires such action "regardless of nationality," this is not so with respect to the clause concerning extradition, probably because many States, particularly those of the civil law tradition, have constitutional or statutory provisions prohibiting the extradition of their own nationals.

is deemed to be political in nature,¹⁶¹ etc.).¹⁶²

Let it not be thought that this provision of the Convention is of no value. There will be many cases which will fall within its ambit and which will result in murderers, sadists, and other malefactors receiving the punishment which they deserve.¹⁶³ It is only unfortunate that the attempt to close the loophole of asylum could not have been more successful.¹⁶⁴

¹⁶¹ Article 1 of the United Nations *Declaration on Territorial Asylum*, G.A. Res. 2312, 22 U.N. GAOR Supp. 16, at 81, U.N. Doc. A/6716 (1967), specifically excludes asylum when "there are serious reasons for considering that he has committed . . . a war crime . . . as defined in the international instruments drawn up to make provision in respect of such crimes." Certainly, offenses committed against prisoners of war and termed grave breaches by Article 130 of the Convention would come within the foregoing exception to the rule against extradition for political offenses.

¹⁶² In Draper, Implementation 52, the author enumerates his complaints concerning the ineffectiveness of the second paragraph of Article 129, stating: "These provisions are riddled with the weaknesses for ensuring the application of the conventions. In the first place, war criminals and the evidence against them are not normally to be found in the same place. Secondly, some States decline to hand over the person accused to the State holding the evidence; here political motivation is paramount. The State holding the accused may have no legislation enabling such a hand-over to the demanding State and no treaty arrangements for that purpose. Moreover, there is no legal duty to hand over. It is a power and no more. States holding the evidence may decline to transmit it to the State detaining the accused. Further, the State detaining may decline to hand over the accused to the State holding the evidence." In Pilloud, *Protection pénale* 865, the author goes to the opposite extreme, contending that the duty to extradite an individual who is accused of having committed a grave breach of the Convention is absolute if the asylum State does not try him itself.

¹⁶³ The meaning of the provision in the second paragraph of Article 129 requiring the asylum State to "hand such persons over for trial to another High Contracting Party concerned" is not clear. (Emphasis added.) Suppose that the Soviet Union had demanded that the United States either try or extradite to that country an American serviceman alleged to have committed a grave breach of the Convention in Vietnam. Would the Soviet Union be a High Contracting Party "concerned"? (The United States, unlike many countries (see note 160 *supra*), will extradite its own nationals. See *Charlton v. Kelley*.) Unfortunately, the Diplomatic Conference which drafted the 1977 Protocol I elected to draft and include as Article 88 thereof another innocuous and toothless extradition provision.

¹⁶⁴ The proposal contained in Article 78 of the 1973 Draft Additional Protocol would have solved some, but not all, of the problems connected with extradition on a charge of having committed one of the grave breaches denounced by Article 130 of the 1949 Convention. A far better model, and one which eliminates all of Colonel Draper's complaints (note 162 *supra*), would be Article 7 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, particularly if supported by other appropriate provisions comparable to those contained in Articles 5, 6, 8, and 10 of that Convention. (Almost identical provisions will be found in Articles 7, 4, 6, 8, and 11 of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civilian Aviation.)

4. Judicial Safeguards

In this chapter we have been, and we continue to be, concerned with what have been termed "war crimes," that is, violations of the law of war. However, the only war crimes which concern us here are those involving violations of that aspect of the law of war which provides for the protection of prisoners of war. In view of the rather strange history of the provision with respect to judicial safeguards to which persons accused of this type of offense are entitled, a brief historical review of the subject is warranted.

When the war in the Pacific ended in 1945, General Yamashita, who had commanded the unsuccessful defense of the Philippines, was charged with a number of war crimes and was brought to trial before a Military Commission by the United States in Manila. His counsel contended that as a prisoner of war he was entitled to all of the judicial safeguards of the 1929 Convention. Some of these protections were denied to him and, on appeal to the United States Supreme Court (after his conviction and death sentence), the denial was affirmed on the ground that the judicial safeguards contained in the 1929 Convention applied only to trials for postcapture—not precapture—offenses.¹⁶⁵

The 1947 Conference of Government Experts recommended, as one variation from the 1929 Convention to be included in the new convention that was then being formulated, a provision that prisoners of war should enjoy the protection of that convention "until a *prima facie* case is made out against them and they are indicted of war crimes."¹⁶⁶ However, the ICRC did not follow this recommendation, the proposal that it actually made to the 1948 Stockholm Conference being a rather complex one that attempted to draw a distinction between precapture offenses constituting "serious breaches of the laws and customs of war" (the benefits of the convention would be retained until conviction) and other precapture offenses (the benefits of the convention would be retained even after conviction).¹⁶⁷ The Stockholm Conference eliminated part of the ICRC proposal, thereby itself making a proposal under which a prisoner of war accused of having committed a precapture offense, no matter what its nature, would be

¹⁶⁵ *Application of Yamashita*, 327 U.S. 1 at 22 & 24. This position was adopted generally by war crimes tribunals and national appellate courts after World War II, although in 1950 the French Court of Cassation took the opposite view. Pictet, *Commentary* 413-14. In Trainin, *Hitlerite Responsibility* 88, the following statement appears: "On account of these inhuman crimes committed by him, Ritz ceased to be a soldier, even before he was seized by units of the Red Army, and consequently did not become a war prisoner when he was seized."

¹⁶⁶ 1971 GE Report 203.

¹⁶⁷ Article 74, *Draft Revised Conventions* 105. It will be noted that each of these alternatives was contrary to the rule of the *Yamashita Case*.

entitled to the benefits of the convention even if convicted.¹⁶⁸

At the 1949 Diplomatic Conference the Soviet Union proposed an amendment to the Stockholm draft under which, once a prisoner of war had been convicted of a war crime (apparently this meant a conventional war crime) or a crime against humanity, he would be treated as an ordinary criminal until he had completed his sentence.¹⁶⁹ The Soviet delegate (Slavin) emphasized that the Soviet proposal applied only to prisoners of war who had been convicted.¹⁷⁰ The Committee to which the proposal was made reported to the Plenary Meeting, calling attention to the differences of approach between the Stockholm draft and the Soviet proposal, and stated that the great majority of the Committee considered that even after a prisoner of war had been convicted of a precapture violation of the laws and customs of war, he should continue to enjoy the protection of the Convention.¹⁷¹ The Plenary Meeting of the Diplomatic Conference rejected the Soviet proposal and approved the Stockholm draft provision,¹⁷² which became Article 85 of the 1949 Convention.

The effect of Article 85 was, then, to change the rule expounded in the *Yamashita* case and in similar cases of other countries.¹⁷³ Now a prisoner of war is to retain the full benefits of the Convention from the moment of capture to the moment of release and repatriation. If, while in captivity in the status of a prisoner of war, he is tried for a precapture violation of the law of war, including the provisions of the Convention, he is entitled to all the judicial safeguards there-

¹⁶⁸ Article 74, *Revised Draft Conventions* 82.

¹⁶⁹ The proposed amendment stated:

Prisoners of war convicted of war crimes and crimes against humanity under the legislation of the Detaining Power, and in conformity with the principles of the Nuremberg Trial, shall be treated in the same way as persons serving a sentence for a criminal offence in the territory of the Detaining Power.

2A *Final Record* 319. Note that the third category of war crimes enumerated in the *London Charter* (crimes against peace) was not included in the Soviet proposal.

¹⁷⁰ 2A *Final Record* 321. In a statement made to the Plenary Meeting, another Soviet delegate (Skylarov) said that under the Soviet proposal prisoners of war guilty of war crimes or crimes against humanity, "once their guilt has been established and they have been sentenced by a regular court," should no longer enjoy the benefits of the Convention. 2B *Final Record* 303.

¹⁷¹ 2A *Final Record* 570-71. In supporting the Soviet proposal in the discussion at the Plenary Meeting, the Czechoslovak delegate pointed out that it "concerns those prisoners of war who have been convicted" (2B *Final Record* 305), and the Bulgarian delegate stated that "it is assumed that sentence has already been pronounced" and that "we are dealing with war criminals convicted as such." *Ibid.*, 307.

¹⁷² *Ibid.*, 311. The Soviet proposal was rejected by a vote of 8-23-7. The only change made by the Diplomatic Conference in the Stockholm draft was a stylistic change in the English version.

¹⁷³ Yingling & Ginnane 410; Esgain & Solf 576; *Public Prosecutor v. Koi*, [1968] A.C. at 858.

of,¹⁷⁴ and, even if convicted, he continues to be entitled to the protection of the Convention.

The Soviet Union and all of the other Communist countries, both those present at the 1949 Diplomatic Conference and those which have subsequently adhered to the Convention, have made reservations to Article 85.¹⁷⁵ This fact caused some concern to the United States Senate when it was asked to give its advice and consent to the ratification of the Convention by the President.¹⁷⁶ That there was a basis

¹⁷⁴ Pictet, *Commentary* 425. After World War II a number of individuals were tried and convicted of being responsible for unfair trials of prisoners of war. See note 87 *supra*. The list of judicial safeguards has been considerably amplified by Article 75 (4) and (7) of the 1977 Protocol I.

¹⁷⁵ The reservation to Article 85 made by the Soviet Union at the time of signature (1 *Final Record* 355) and maintained at the time of ratification states:

The Union of Soviet Socialist Republics does not consider itself bound by the obligation, which follows from Article 85, to extend the application of the Convention to prisoners of war who have been convicted under the law of the Detaining Power, in accordance with the principles of the Nuremberg trial, for war crimes and crimes against humanity, it being understood that persons convicted of such crimes must be subject to the conditions obtaining in the country in question for those who undergo their punishment.

In response to an inquiry concerning the meaning of the foregoing reservation, the Soviet Foreign Ministry said, in a note dated 26 May 1955, to the Swiss Federal Council:

[T]he reservation . . . signifies that prisoners of war who, under the law of the USSR, have been convicted of war crimes or crimes against humanity must be subject to the conditions obtaining in the USSR for all other persons undergoing punishment in execution of judgments by the courts. *Once the sentence has become legally enforceable*, persons in this category consequently do not enjoy the protection which the Convention affords.

Quoted in Pictet, *Commentary* 424-25 (emphasis added).

¹⁷⁶ In its report to the Senate the Committee on Foreign Relations said:

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

1955 Senate Report 28-29. For some of the factors which caused the Senate perturbation, see note 36 *supra*. The ratification of the United States included an objection to the Soviet and other similar reservations, but agreed that the Convention would enter into effect between the United States and the reserving States except for the clause affected by the reservation. Pilloud, *Reservations* 412-13; Baxter, *Geneva Conventions of 1949 before the United States Senate*, 49 *A.J.I.L.* 550, 554. See also *Reservations to the Convention on Genocide*, Advisory Opinion, [1951] *I.C.J. Reports* 15 & 27. The ratifications of Australia, New Zealand, and the United Kingdom not only objected to the reservations to Article 85, but stated that those countries did not regard such reservations as valid and would regard application thereof as a breach of the Convention.

for this concern has been demonstrated by the events in Vietnam.¹⁷⁷ It is apparent that some, but hopefully not all, of the Communist reservations will be construed to permit the denial of the benefits of the Convention merely by labeling the captured individual, who clearly falls within one of the categories listed in Article 4,¹⁷⁸ a "war criminal."

With the foregoing in mind, let us now attempt to ascertain just what judicial safeguards the 1949 Diplomatic Conference sought to ensure for persons accused of precapture offenses in which prisoners of war were the victims; and what judicial safeguards, if any, they will actually receive.

As we have seen, the inclusion of a provision guaranteeing judicial safeguards to all persons being tried for grave or other breaches of the Convention originated in the second ICRC proposal with regard to the suppression of violations of the Convention.¹⁷⁹ It ultimately became the fourth paragraph of Article 129 of the Convention, and provides that the judicial safeguards "shall not be less favorable than those provided by Article 105 and those following of the present Convention." Inasmuch as judicial safeguards are included in a number of articles other than Article 105 and those following, at first reading this provision may appear to be in conflict with the provisions of Article 85, discussed above. Closer study will disclose that such is not the case.

A prisoner of war being tried by the Detaining Power for an offense, whether alleged to have been committed before or after capture, is entitled to all of the judicial safeguards enumerated in the Convention. Accordingly, when an individual falling within one of

¹⁷⁷ Despite the fact that its reservation removed prisoners of war from the protection of the Convention only after they had been "prosecuted for and convicted of [*poursuivis et condamnés*] war crimes," North Vietnam insisted that captured members of the armed forces of the United States were "major [war] criminals caught in *flagrante delicto*" and, presumably, in view of the treatment which they received, not entitled to the status of prisoners of war nor to the protections of the Convention. See 5 *I.L.M.* 124 (1966) and 5 *I.R.R.C.* 527 (1965). Thus, it stated:

The mere killing of one country-man of ours, whether combatant or not, even with a rifle shot, the mere destruction of a hut, of a bush in our countryside is enough to turn the American pirate into a criminal. . . .

Juridical Sciences Institute, *U.S. War Crimes in Viet Nam* 203. This is based upon the doctrine of the just war which was repeatedly rejected in the war crimes trials conducted after World War II. *The Justice Case*, 3 TWC at 1027; *Trial of Willy Zuehlke*, 14 LRTWC at 144; Kelly, PW's as War Criminals 94-95. But see U.N., *Human Rights*, A/8178, para. 15. See also note I-157 *supra*. Pinto apparently considers that the North Vietnamese reasoning accorded with its reservation. Pinto, Hanoi et la Convention de Genève, *Le Monde*, 27 December 1969 at 2, col. 1. This author does not (Levie, *Maltreatment in Vietnam* 348-49); nor does the ICRC. ICRC *Annual Report*, 1969 at 37.

¹⁷⁸ See pp. 34-84 *supra*.

¹⁷⁹ See note 128 *supra*.

the categories enumerated in Article 4 of the Convention allegedly commits an offense which is a violation of the Convention and is subsequently captured, he becomes a prisoner of war and is entitled to all of the benefits of prisoner-of-war status, including all of the safeguards contained in Articles 84–88 and 99–108, inclusive, if he is thereafter compelled to answer to a charge of having committed the precapture offense.¹⁸⁰ On the other hand, when an individual who does not fall within any of the categories enumerated in Article 4 allegedly commits an offense which is a violation of the Convention and subsequently comes under the power of the enemy State, he does not become a prisoner of war, and he is only entitled to the safeguards of Article 105 and those following when he is tried.¹⁸¹ Similarly, if such an individual is tried by a neutral State for a grave breach of the Convention under the second paragraph of Article 129, he would not have prisoner-of-war status and he would therefore be entitled only to the safeguards of Article 105 and those following.¹⁸²

D. MISCELLANEOUS PROBLEMS

Any discussion of the imposition of penal sanctions for maltreatment of prisoners of war would not be complete without at least a reference to a few of the major problems in this regard which arose in the post-World War II war crimes trials and some indication of how it can be expected that those problems will be solved in the future, based either upon provisions of the 1949 Convention, or the very failure of the Convention to include such provisions.

1. Type of Court

Article 102 of the Convention provides that a prisoner of war may be tried only by the same courts as in the case of a member of the armed forces of the Detaining Power.¹⁸³ There is, accordingly, no problem in this regard with respect to the trials of prisoners of war for violations of the Convention. But what of the trial of an individual who is not a prisoner of war for such an offense? There are four possible methods of trying such a person: (1) by the same national courts, civil or military, that would try a prisoner of war

¹⁸⁰ *British Manual*, para. 638(2); *U.S. Manual*, para. 505c, 178b. A discussion of those judicial safeguards will be found in Chapter V.

¹⁸¹ *British Manual*, para. 638(3); *U.S. Manual*, para. 505c; Fourth Convention, Article 146, fourth paragraph. Of course, there is nothing to preclude a State from permitting an accused who is not a prisoner of war to benefit from the more protective prisoner-of-war provisions.

¹⁸² Individuals falling within any of the categories set forth in Article 4A who enter neutral territory in order to escape capture (*not* escapees) are interned (Article 11, *Hague Convention No. V of 1907*) and, with certain specified exceptions, are entitled to "be treated as prisoners of war" by the neutral State (Article 4B(2) of the 1949 Convention), but are not prisoners of war (note I-196).

¹⁸³ See pp. 335–336 *supra*.

for such an offense;¹⁸⁴ (2) by national tribunals specifically created for the purpose;¹⁸⁵ (3) by ad hoc international tribunals;¹⁸⁶ and (4) by a permanent international tribunal, either one created by the Parties to the Convention,¹⁸⁷ or an International Criminal Court.¹⁸⁸ In view of the absence of any provision of the Convention or of international law specifically answering the question posed above, it would appear likely that some Detaining Powers will opt for the use of their national courts, civil or military as the case may be, while others will create special tribunals for the purpose, as was frequently done after World War II. (The establishment of any type of international court is not considered to be within the realm of possibility in the foreseeable future.) However, it must be borne in mind that, unlike the situation after World War II, whatever the trial court, Article 106 provides that the accused must have a right of appeal "in the same manner as the members of the armed forces of the Detaining Power."¹⁸⁹

2. Time of Trial

There is nothing in the Convention, nor in international law generally, which prohibits the trial of a prisoner of war, or other accused,

¹⁸⁴ This would be the most simple solution and a not unfair one overall. Assuming, as we have, that the 1949 Convention gives prisoners of war the maximum protection possible in this era of mankind against unfair acts of the Detaining Power, there does not appear to be any reason why persons other than prisoners of war being tried for acts directed against prisoners of war should not be tried by the same courts that would try prisoners of war for these offenses. Pilloud, *Protection pénale* 868, suggests the possibility of combining this method of trial with an appeal to an international court. A somewhat similar suggestion, in a different context, is made in paragraph 8(b) of the 1973 NGO Memorandum. See note I-214 *supra*.

¹⁸⁵ This was frequently the method following after World War II. Pictet, *Commentary* 623, rejects it rather summarily. So does Draper, *Human Rights* 340-41.

¹⁸⁶ This was the method followed after World War II which saw the creation of the I.M.T. and the I.M.T.F.E. Roling, *Recueil* 356, considers that these courts were multinational, rather than international. As long ago as 1872, Gustave Moynier, one of the founders of the Red Cross, proposed the creation of such a court. 1971 GE Documentation, II at 45 n.124.

¹⁸⁷ The International Commission proposed by the author to determine the existence of a state of international armed conflict and to impose sanctions when its decision is disregarded and the Convention is not applied by a belligerent (pp. 19-22 *supra*) could also serve in this capacity.

¹⁸⁸ There have, of course, been many attempts to create an International Criminal Court, all unsuccessful. See, e.g., the summary of United Nations actions in this regard, U.N., *Human Rights*, A/7720, para. 126. Unofficial efforts continue. See 1971 GE Report, paras. 558-60; Stone & Woetzel (eds.), *Toward a Feasible International Criminal Court*; First International Criminal Law Conference. *The Establishment of an International Criminal Court*.

¹⁸⁹ This could, but probably should not, be interpreted as meaning an appeal to the identical court to which a convicted member of the armed forces of the Detaining Power would appeal.

during the course of the armed conflict, for a violation of the Convention or of any of the other laws and customs of war. It has, however, been the custom to postpone such trials until the termination of hostilities, probably because of a fear that the enemy will counter with trials which will be only a thinly disguised form of reprisal. Inasmuch as wars usually end in victory for one side and in defeat for the other (stalemates such as Korea are the exception, rather than the rule), the impression has grown that only individuals on the defeated side are ever tried, even for conventional war crimes.¹⁹⁰ But trials of one's own personnel for breaches of the Convention and of other laws and customs of war, as they do not raise the specter of reprisals, can be, and often are, conducted during the course of hostilities by States which follow the rule of law and expect their citizens, civilian and military, to do likewise.¹⁹¹

While there was never any concrete proposal made at the 1949 Diplomatic Conference that trials of prisoners of war for precapture offenses should be postponed until the cessation of hostilities, the matter was the subject of inconclusive discussion during the debate on Article 85, two delegates (Lamarle of France and Slavin of the Soviet Union) expressing the opinion that such trials should not be postponed until the termination of hostilities and one delegate (Gardner of the United Kingdom) expressing the opposite view.¹⁹² The ICRC has long taken the position that, if such a trial is conducted during the course of hostilities, an accused does not have a fair opportunity to produce all of the evidence which might be available to disprove

¹⁹⁰ This subject is discussed in Roling, *Recueil* 336 & 429.

¹⁹¹ See Baxter, Compliance 85. The My Lai incident was investigated and charges were preferred in *United States v. Calley* in 1969 while the United States was still involved in Vietnam. See the Report of the Investigation into the My Lai Incident, 14 March 1970 (the "Peers Report"). See also *United States v. Griffen*. The U.S. Manual, para. 507b states:

The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code. (Prisoners of war detained by the United States are subject to its military law [Article 2(9), *Uniform Code*, 10 U.S.C. §802(9)] and would, therefore, be prosecuted under the Code.) The *British Manual*, para. 637 n.3 states that members of the British armed forces who commit war crimes are tried under the appropriate Service Act.

¹⁹² 2A *Final Record* 319-20. In the Yamashita case, the contention was advanced that a military tribunal was incompetent to try a case alleging a violation of the law of war after the cessation of hostilities. The United States Supreme Court held (327 U.S., at 12) that this power continued until the formal state of war had ended by treaty or proclamation, "[f]or only after their cessation could the greater number of offenders and the principal ones be apprehended and subjected to trial."

or lessen his responsibility.¹⁹³ As we have seen, a number of prisoners of war were tried for alleged precapture offenses during the course of World War II.¹⁹⁴ While their problems were not created solely by the fact of the time of trial, the patent unfairness of those trials glaringly reveals the danger of trials for precapture offenses conducted during the course of hostilities. On the other hand, when trials are postponed until after the termination of hostilities, the deterrent effect of widespread publicity of prompt punishment is lost.¹⁹⁵

3. Status of the Accused

Breaches of the 1949 Convention may be committed both by members of the armed forces and by civilians. After World War II individuals in both of these categories were tried for their offenses.¹⁹⁶ As to military personnel, there does not appear to be any problem. During the course of the hearing conducted by the Committee on Foreign Relations of the United States Senate on the 1949 Conventions for the Protection of War Victims, the question was asked whether the grave-breaches provisions of the Convention would apply to "private persons" or whether they would apply only to "Government officials."¹⁹⁷ A somewhat equivocal answer having been given to that question, the Department of Justice felt it appropriate to clarify the situation and did so in a letter to the Chairman of the Committee. It included the following statement:

In a related question, Senator Mansfield asked whether the articles dealing with grave breaches could result in imposing criminal liability upon persons without official status. Generally, the acts designated as grave breaches are to be treated as such only when they are in some way the result of action by civilian or military agents of a detaining or occupying power in violation of the conventions. Moreover, as a practical matter, only persons exercising governmental authority ordinarily would be in a position to commit grave breaches against protected persons, such as the serious mistreatment of prisoners of war . . . We are reluctant to state that the mistreatment of a person protected by the con-

¹⁹³ Pictet, *Commentary* 422 & 626. See also Kelly, PW's as War Criminals 95. Compare Draper, *Recueil* 148-49.

¹⁹⁴ See note 87 *supra*.

¹⁹⁵ Certainly, it is neither necessary nor advisable to apply this rule of delay to postcapture offenses as was done in the case of the common criminals at the prisoner-of-war camp at Koje-do, Korea, who rioted, wantonly destroyed property, murdered fellow prisoners of war, etc., and went completely unpunished because they were not promptly tried, probably because of the fear of reprisal trials.

¹⁹⁶ The trials conducted by the IMT and the IMTFE both involved military and civilian accused. While the majority of the accused in the post-World War II war crimes trials were members of the armed forces, and probably always will be, there were quite a number who were civilians. See, e.g., *Zyklon B Case*; *Belsen Trial*; *I. G. Farben Case*; etc.

¹⁹⁷ 1955 Hearing 31.

ventions by a private person (e.g., the killing of a wounded airman) could never constitute a grave breach no matter what the intent and circumstances. However, it is entirely clear that these provisions of the conventions were not intended to convert into grave breaches every common crime in which the victim happens to be a person protected by the conventions.¹⁹⁸

Except for the possible intent of the last sentence quoted, this statement appears to be appropriate. As to the last sentence, if it merely means that a member of the civilian population accused of having committed a common law offense, such as murder, against a prisoner of war, should be tried for that common law offense, and not for a grave breach of the Convention, there is no reason to dispute its propriety. However, no impression should be permitted to be conveyed that members of the civilian population, whether or not they have official status, are not amenable in some manner to punishment for grave breaches of the Convention.¹⁹⁹

4. The Defense of Superior Orders

The defense that the accused was ordered by a superior to commit the act subsequently charged as an offense, and that he had no alternative but to comply, was probably the affirmative defense most frequently advanced in post-World War II war crimes trials. It was almost uniformly rejected as a defense, but was usually considered in

¹⁹⁸ *Ibid.*, 58-59.

¹⁹⁹ See, e.g., *The Essen Lynching Case*. There does not appear to be any basis whatsoever for the statement appearing in Castrén, 86, that only uniformed military personnel can commit war crimes. Greenspan, *Modern Law* 464, properly states that war crimes may be committed "both by and against members of the armed forces and civilians." The summary on this problem appearing in the "Digest," 15 *LRTWC* 59, states the law with respect to this matter fully and clearly:

[T]o itemise the different categories of persons who have been found guilty of war crimes and related offences is important in view of the argument sometimes previously advanced that only military personnel could be held so guilty. Those actually found so guilty have included not only soldiers, but civilians coming within the categories of administrators, political party officials, industrialists, judges, prosecutors, doctors, nurses, prison wardens, and concentration camp inmates. Soldiers held guilty have included not only the rank and file, but high-ranking officers and chiefs of staff. *It is clear that the mere fact of being a civilian affords no protection whatever to a charge based upon international criminal law.* (Emphasis added.) Article 75(2) of the 1977 Protocol I prohibits a number of acts therein listed "whether committed by civilian or by military agents."

mitigation of sentence.²⁰⁰ It is a defense which has had a long and checkered history. Even prior to World War I, the German Military Penal Code provided that the subordinate could only be punished for complying with the order of a superior if he knew that the act ordered constituted a violation of a law.²⁰¹ This provision was applied during the course of the Leipzig Trials which followed that War.²⁰²

In 1940 the United States Army published a military manual which provided that members of the armed forces would not be subject to punishment for war crimes "committed under the orders or sanction of their government or commanders."²⁰³ In November 1944 this was changed by the total elimination of the provision in which the quoted matter had appeared and by the insertion of a new subparagraph providing for the punishment of individuals who violated the laws and customs of war and for the defense of superior orders to "be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment."²⁰⁴

The Charter of the International Military Tribunal (IMT) was very specific on this point. Article 8 stated:

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.²⁰⁵

²⁰⁰ This problem has been dealt with so extensively elsewhere that only a brief resumé is given here. For definitive studies of the subject of "superior orders," see Dinstein, *Superior Orders* and Green, *Superior Orders*. For a summary of national laws applied in various post-World War II war crimes trials, see 5 *LRTWC* 13-22, especially 19-22. See also, Trainin, *Hitlerite Responsibility* 80. A succinct statement presenting broad coverage of the subject may be found in *British Manual*, para. 627 n.2.

²⁰¹ *German Military Penal Code*, para. 47(2), quoted in 11 *LRTWC* 46. See also Sack, Punishment of War Criminals and the Defence of Superior Orders, 60 *Law Q. Rev.* 63, 65 (1944).

²⁰² See note 11 *supra*. In the *Llandovery Castle Case*, the Supreme Court of Leipzig refused to accept superior orders as a defense to the killing of unarmed persons in a lifeboat, an obviously illegal order, but did consider it in mitigation of sentence. On the other hand, the defense of superior orders was sustained in the *Dover Castle Case*, where the accused were found to have been unaware of the illegality of the order.

²⁰³ U.S. Army, Basic Field Manual 27-10, *Rules of Land Warfare*, para. 347. The comparable manual of the British army, *Laws and Usages of War on Land*, para. 443, was to the same general effect.

²⁰⁴ Change 1, 15 November 1944, to Basic Field Manual 27-10. The comparable provision of the *British Army Manual* had been changed in April 1944 to provide that superior orders do not "in principle, confer upon the perpetrator immunity from punishment."

²⁰⁵ The Charter of the International Military Tribunal for the Far East, Article 6 was to the same effect. The rules promulgated by the various military commanders of the United States for the trials of war criminals followed this principle and not that quoted in the text above and cited in note 204 *supra*.

The defense was, of course, raised at the trial and the Tribunal dealt with it in short order, holding:

That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.²⁰⁶

The Commission of Experts convened by the ICRC in December 1948 in connection with the grave-breaches provisions which had been approved and the Resolution which had been adopted by the 1948 Stockholm Conference, drafted a proposed article relating solely to the defense of superior orders.²⁰⁷ The 1949 Diplomatic Conference did not include such a provision in the Convention as finally approved. Accordingly, this problem will once again have to be resolved on a national basis. Efforts to solve it on an international basis in related areas have been undertaken by various organs of the United Nations, but those efforts have complicated, rather than clarified, the problem.²⁰⁸ It is obvious that there is no clear and well-defined rule which will be applied to the defense of superior orders when it is advanced, as it undoubtedly will be, in future trials for violations of the grave-breaches and other provisions of the 1949 Convention. However, it is believed that it may be safely stated that, as after World War II, the mere fact that the act complained of was committed pursuant to superior orders will not suffice as a defense.²⁰⁹

²⁰⁶ *I.M.T.* 466. The extent of the "moral choice" referred to by the IMT was the subject of discussion in two of the major cases which followed the IMT trial, *High Command Case* (at II T.W.C. 509) and *Einsatzgruppen Case* (at 4 T.W.C. 71).

²⁰⁷ Proposed Article 119(b), Remarks and Proposals 64-65. It stated:

The fact that the accused acted in obedience to the orders of a superior or in pursuance of a law or regulation shall not constitute a valid defence, if the prosecution can show that in view of the circumstances the accused had reasonable grounds to assume that he was committing a breach of this Convention. In such a case the punishment may nevertheless be mitigated or remitted, if the circumstances justify.

²⁰⁸ See Dinstein, *Superior Orders* 217-23 & 226-52; Green, *Superior Orders* 235-41 & 357-65. The 1971 GE Report, para. 566, indirectly suggests as a guide Principle IV of the ILC Nuremberg Principles. See also Article IV, ILC Draft Code.

²⁰⁹ *U.S. Manual*, para. 509 states:

a. The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, *unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful*. In all cases where the order is held not to constitute a defense to an allegation of

5. Command Responsibility

In discussing the defense of superior orders it appears appropriate to give at least passing notice to two connected problems: the responsibility of the superior himself for the illegal act committed pursuant to his order; and his responsibility for the illegal acts of his subordinates committed without his orders. As to the first such problem, the 1949 Diplomatic Conference specifically provided the answer, at least insofar as grave breaches are concerned, when it provided in the first paragraph of Article 129 that the national penal legislation to be enacted should provide for "effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention."²¹⁰ (Emphasis added.) There is no reason to believe that this provision, which expresses a rule which had previously been true, is not equally applicable to *all* violations of the Convention. Any other decision would be completely illogical. Even in the absence of such a provision of law as that now to be found in the first paragraph of Article 129, persons guilty of ordering a war crime to be committed, although not themselves participating in the actual offense, were punished after World War II.²¹¹

As to the problem of the responsibility of the superior for the illegal acts of his subordinates committed without his orders and, perhaps, without his knowledge, no provision is made in the Convention, so once again it will be necessary to have recourse to the general rules of international law. It was fairly well established after World War II that a commander is responsible when he fails in his duty to control the operations of the members of his command by permitting them to commit violations of the laws and customs of war and, hence, of the

war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.

b. In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; . . . (Emphasis added.)

See also *Manual for Courts-Martial*, para. 216d. The comparable provision of the *British Manual*, para. 627 is much less detailed but is to the same general effect. (Article 77 of the 1973 Draft Additional Protocol contained a provision with respect to the defense of superior orders. However, it was not included in the 1977 Protocol I.)

²¹⁰ Pictet, *Commentary* 622 points out that the provision does not establish responsibility for those who could, but do not, intervene to prevent or to put an end to a breach of the Convention. (Of course, this limitation would not apply to the responsible commander.) Articles 62 and 63 of the *Code pénal français* specifically make such failures to act punishable offenses.

²¹¹ See, e.g., *Dostler Trial*; *Abbaye Ardenne Case*; and the *Trial of Baba Masao*.

Convention;²¹² or when, having learned of such violations, he fails to take any action to punish the individuals responsible or to prevent their recurrence.²¹³ There seems little doubt that the same rule will be applied in future cases.²¹⁴ However, if the commander did not know, and could not reasonably have learned, of the intent to commit a violation of the Convention, and does not thereafter learn that it has been committed, it would be difficult to advance a legal basis upon which he could be held responsible.²¹⁵

6. Permissible Punishments

After World War II all of the nations trying war crimes cases took the position that under international law the punishment of death could be adjudged against any person tried and found guilty of *any* violation of the laws and customs of war. However, as a matter of practice, in only a very few cases not involving the death of the vic-

²¹² The decision in the Yamashita case, which firmly established this principle, was generally followed. See, e.g., *I.M.T.F.E.* 29-32.

²¹³ The following appears in *I.M.T.F.E.* 32:

If crimes are committed against prisoners [of war] under their control, of the likely occurrence of which they had, or should have had knowledge in advance, they are responsible for those crimes. If, for example, it be shown that within the units under his command conventional war crimes have been committed of which he knew or should have known, a commander who takes no adequate steps to prevent the occurrence of such crimes in the future will be responsible for such future crimes.

In his dissenting opinion, Judge Röling said (at 59-60):

To hold an official criminally responsible for certain acts which he himself did not order or permit, it will be necessary that the following conditions are fulfilled:

1. That he knew or should have known of the acts.

* * * *

2. That he had the power to prevent the acts.

* * * *

3. That he had the duty to prevent these acts.

There can be no quarrel with these requirements.

²¹⁴ In *U.S. Manual*, para. 501 the following rule is laid down:

The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.

British Manual, para. 631 is practically identical with the foregoing. For a similar problem of vicarious responsibility, see pp. 52-53 *supra*. Article 86(2) and 87 of the 1977 Protocol I affirmatively create such command responsibility.

²¹⁵ Article 131 precludes a Party from absolving itself or an ally from any "liability" for a breach of any of the provisions of Article 130. The meaning of this provision is far from clear. Lauterpacht-Oppenheim 395. Article 3 of the *Hague Convention No. IV of 1907* provides for monetary compensation for violations of the Regulations attached thereto, a number of which relate to prisoners of war. After World War I (1914-18) the *Treaty of Versailles* (1919) included (in Annex 1 to Article 232), as an item of German reparations, "[d]amage caused

tim or victims was the death penalty adjudged, or, if adjudged, confirmed.²¹⁶

There has been a noticeable tendency to adopt on a permanent basis a more flexible policy with respect to the punishment to be adjudged against individuals convicted of offenses such as the grave breaches of the 1949 Convention—a policy of “letting the punishment fit the crime.” Thus, the United Kingdom’s *Geneva Convention Act* (1957) provides for life imprisonment in the event of the wilful killing of a prisoner of war and for imprisonment for not more than 14 years for any other grave breach of the Convention.²¹⁷ The Netherlands has enacted a law which punishes with death or with imprisonment for periods ranging from 10 years to life various violations of the laws and customs of war committed under varying circumstances.²¹⁸ The Soviet Union has enacted a law which provides for imprisonment for a period of from 1 to 3 years for the ill-treatment of prisoners of war which occurs frequently or is characterized by particular cruelty.²¹⁹ And the official United States Army interpretation of the rule of international law as to permissible punishments for violations of the laws and customs of war is that, while the death penalty may be adjudged for grave breaches of the Convention, the punishment actually imposed “must be proportionate to the gravity of the offense.”²²⁰ The ICRC has taken a position which displays an understanding of the problem and an appreciation that any solution pro-

by any kind of maltreatment of prisoners of war.” Article 91 of the 1977 Protocol I is quite similar to Article 3 of the *Hague Convention No. IV of 1907*. The ICRC apparently takes the position that Article 131 was intended to prevent the victor from compelling its defeated foe to relinquish claims which it might validly have for monetary compensation in any armistice agreement or peace treaty into which they enter. Pilloud, *Sanctions pénales* 311; Pictet, *Commentary* 630. If this is the intent of the article, it seems rather unimportant as a method of ensuring compliance with the provisions of the Convention.

²¹⁶ Digest, 15 *LRTWC* 200–02. In preparing that study in 1949, the United Nations War Crimes Commission said (at 201):

It seems that, despite the fact that international law has previously permitted the death sentence to be passed for any war crime, some kind of international practice is growing according to which Allied Courts, apart from avoiding inhumane punishments, have themselves attempted to make the punishment fit the crime; any habitual practice of this kind would tend in time to modify the general rule that any war crime is punishable by death.

²¹⁷ See p. 372 *supra*. It will be noted that no provision is made therein for the punishment of other than grave breaches of the Convention. The *British Manual*, para. 638 still provides that “all war crimes are punishable by death,” but a note added by Amendment No. 1 calls attention to the fact that under the Act life imprisonment is the maximum authorized punishment for a grave breach of the Convention.

²¹⁸ See note 136 *supra*.

²¹⁹ See p. 372 *supra*. This law apparently applies only in trials of Soviet military personnel and not in trials of enemy nationals.

²²⁰ *U.S. Manual*, para. 508.

posed must not be based upon undue sympathy for the individuals found guilty of maltreatment of prisoners of war in violation of the provisions of the Convention. While urging the rejection of the position that *all* violations of the law of war are punishable by death,²²¹ it proposes punishment proportionate to the gravity of the offense²²² and, specifically, laws providing individually for the authorized punishment for each grave breach; a general provision authorizing imprisonment for perhaps from 5 to 10 years for other breaches of the Convention which are not otherwise punished by national penal codes; and disciplinary punishment for minor offenses.²²³

E. CONCLUSIONS

It was only as a result of the atrocious maltreatment which many prisoners of war received during World War II—maltreatment which was contrary to all criteria of civilized conduct in the twentieth century—that punishment was meted out to offenders on a scale commensurate with the number and nature of the offenses committed. The need to punish those who had, in their treatment of prisoners of war, violated the laws and customs of war, highlighted the fact that pious statements guaranteeing humane treatment for prisoners of war contained in international conventions are only of moral value unless they are backed up by the guarantee of specific sanctions for violations of those statements.²²⁴ To the individuals who violated the laws and customs of war during World War II, moral values were of little import. Through the initiative of the ICRC, provisions relating to violations of the several proposed Geneva Conventions for the Protection of War Victims were drafted and, eventually, after redrafting by the 1949 Diplomatic Conference, they became integral parts of each of those conventions, including the 1949 Prisoner-of-War Convention. Their value as a deterrent has not yet really been tested, but they have now been ratified or adhered to by all but a very few of the States constituting the world community, and sufficient time has elapsed to permit knowledge with respect to their contents to be disseminated to all levels of the armed forces, as well as to the civilian populations.²²⁵ Should another holocaust descend upon the world, there is now advance warning to all persons who may come in contact with prisoners of war that a definite minimum standard of treatment has been established

²²¹ Pilloud, *Sanctions pénales* 300 n.1. Although the courts of all of the nations which tried war crimes cases after World War II took this same position, Pilloud designates it as the "Anglo-Saxon system."

²²² *Ibid.*, 300.

²²³ See note 149 *supra*.

²²⁴ In Roling, *Recueil* 445, he paraphrases another scholar by stating: "The way to international hell seems paved with 'good' conventions."

²²⁵ See the discussion of the first paragraph of Article 127 at pp. 93-96 *supra*.

for them by international legislation, which likewise prescribes that punishment must and will be meted out to those who wilfully fail to comply with that minimum standard, no matter where they may seek refuge.²²⁶ While instances of maltreatment of prisoners of war will undoubtedly continue to occur in future armed conflicts, it is to be hoped that, unlike the events of World War II, they will become the exception rather than the rule, and that the unbridled cruelties suffered by prisoners of war during that conflict will prove to have been the end of an era.²²⁷

²²⁶ Motivated by the fact that the program of war crimes prosecutions in Germany had barely escaped being terminated by the running of the German statute of limitations for criminal actions, in 1968 the General Assembly of the United Nations adopted and recommended to its members for ratification a *Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity*. This Convention, as its title indicates, would eliminate the normal statutory time limitations with respect to prosecutions for war crimes, including "grave breaches" of the 1949 Convention. It has not been widely ratified.

²²⁷ The Diplomatic Conference which adopted Article 85 of the 1977 Protocol I clearly was not optimistic in this regard. Neither is this author.