

## CHAPTER I PRELIMINARY PROBLEMS

### A. INTRODUCTORY

The events of almost six years of armed conflict during World War II clearly demonstrated the deficiencies which existed in the 1929 Geneva Convention Relative to the Treatment of Prisoners of War,<sup>1</sup> the treaty by which most of the belligerents in that conflict were bound in their treatment of prisoners of war.<sup>2</sup> Almost before that conflict had ended, the International Committee of the Red Cross (the ICRC)<sup>3</sup> began a series of conferences of technical experts, government experts, national Red Cross officials, and other specialists, in order to obtain a cross section of views as to what was needed to bring the law for the protection of prisoners of war into the second half of the twentieth century. By 1948 a draft convention, with a number of innovations, had been prepared and it was submitted to the XVIIth International Red Cross Conference which met in Stockholm in August of that year.<sup>4</sup> The ICRC draft was modified and approved by the Red

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<sup>1</sup> Citations for all treaties and cases referred to in the text or notes will be found in the appropriate table, beginning at pp. LVII and LXV, respectively. Citations for, and the full names of, all works to which reference is made will be found in the Table of Abbreviations, Articles, Books and Documents, beginning at p. XIX.

<sup>2</sup> The Soviet Union and Japan were not Parties to the 1929 Geneva Prisoner-of-War Convention. Japan signed that Convention but did not ratify it. The Soviet Union did not participate in the drafting of the Convention and never adhered to it.

<sup>3</sup> The International Committee of the Red Cross (ICRC) is a century-old humanitarian organization composed entirely of Swiss citizens which maintains a strictly neutral status in all armed conflicts, offering its services equally to both sides. Since 1864 it has been the motivating force behind the series of humanitarian "Geneva" Conventions. See note 276 *infra*. Its status and activities in wartime are officially recognized and formalized in the 1949 Geneva Conventions, note 4 *infra*. At its behest a Diplomatic Conference had been called by the Swiss Federal Council to meet early in 1940 to revise the 1929 Convention, but the outbreak of hostilities in September 1939 had prevented this Conference from convening.

<sup>4</sup> Actually, there were four draft revised or new conventions prepared by the ICRC and presented to the Red Cross Conference. See *Draft Revised Conventions* 4, 34, 51, & 153. The Prisoner-of-War Convention was the third of the group and is therefore sometimes referred to as the "*Third Convention*." The four conventions are known collectively as the 1949 *Geneva Conventions for the Protection of War Victims*.

Cross Conference.<sup>5</sup> The Swiss Federal Council had already instituted action for the convening of a Diplomatic Conference to consider the matter and that Conference met in Geneva in April 1949. Using the Stockholm approved draft as the working document, after almost four months of discussions, negotiations, compromises, agreements, and disagreements, the Diplomatic Conference completed the drafting of, among others, the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949.<sup>6</sup>

Of course, the law relating to prisoners of war began to develop long before the drafting of the two treaties just mentioned. A complete and detailed presentation of the development of custom and law applicable to the prisoner of war over the period of the recorded history of mankind is beyond the scope and purpose of this study. Our concern is with the status of the prisoner of war under international law *today*, and, of even more importance, *tomorrow*. However, as is true of the study of most areas of contemporary life, some knowledge of the pertinent history of the subject under discussion will serve not only to ensure a better understanding of present-day law and procedures, but also to furnish a basis for the proper interpretation of some of the applicable rules which have had their origin in the need to solve a particular problem in time past. Accordingly, it is considered appropriate to lay a foundation for the discussion in depth which follows by beginning with what is admittedly an extremely abbreviated history of the treatment of prisoners of war over the ages.<sup>7</sup>

## B. HISTORICAL

In the early days of recorded history the concept of the "prisoner of war" was completely unknown. It necessarily follows that there was

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<sup>5</sup> Revised Draft Conventions 5.

<sup>6</sup> See Appendix A. Inasmuch as the complete Convention is reproduced in Appendix A, when specific articles are cited or quoted they will not be footnoted. Fifty-nine Governments participated in the Diplomatic Conference. Sixty-four (including the Holy See) signed the Conventions at the conclusion of the Conference. For a complete list of the subsequent ratifications and adherences, up to 1 June 1977, see Appendix B. In this study the 1949 Prisoner-of-War Convention will normally be referred to as "the Convention" or "the 1949 Convention."

<sup>7</sup> The three most comprehensive recent histories in English of the treatment of prisoners of war over the ages are, unfortunately, all in manuscript form. They are, in the chronological order of their preparation: Vizzard, *Prisoner of War Policy in Relation to Changing Concepts of War* (Ph.D. thesis, University of California, 1961) (Vizzard, Policy); United States Army, Office of the Provost Marshal General, *A Review of United States Policy on Treatment of Prisoners of War* (1968) (*PMG Review*); and Grady, *The Evolution of Ethical and Legal Concern for the Prisoner of War* (Dissertation, Graduate School of Theology, The Catholic University of America, 1970) (Grady, Evolution). The author is indebted to Mr. David Ellis, then of the Office of the Provost Marshal General, Department of the Army, for making copies of the latter two available. These three manuscripts are the source of much of the material which appears in this section.

no such thing as a set of customs or rules protecting individuals, either combatant or noncombatant, man, woman, or child, taken captive in battle. They were, in fact, quickly slaughtered; and the victor well knew that this would be his fate, too, should he be less fortunate on the occasion of the next battle. The Old Testament is replete with stories of the slaughter of persons captured in war, both soldier and civilian;<sup>8</sup> and the practice was one which was, and long continued to be, followed by all nations. During this period, and for many centuries thereafter, the captive taken in war became the private property of his captor, who exercised the power of life or death over him.

As early as several millennia B.C., Egyptian and Mesopotamian civilizations began to make slaves of prisoners of war rather than killing them. This change in practice was based on economic, rather than humanitarian, considerations. The agricultural economy which was just beginning to develop in that area required manpower to work in the fields; and prisoners of war as slaves constituted such manpower. However, the custom was apparently not widely adopted by other contemporary or later civilizations until the advent of the Roman era.

When Greece became the center of Mediterranean civilization, there was no improvement in the lot of the prisoner of war, unless he was a Greek of another City-State, in which event he could be ransomed. In a few cases there were exchanges of prisoners of war captured by the two sides. In general, however, the fate of most captives of this period was mutilation and death, only a few being enslaved by their captors or sold into slavery elsewhere in Greece.<sup>9</sup>

The Romans at first followed in the footsteps of their predecessors. However, by the beginning of the Christian era both exchanges of prisoners of war between opposing generals and ransoming had become quite common. Later, as the Romans—like the Egyptians 2,000 or more years earlier—came to realize the economic value of the prisoner of war, enslavement became the prevailing practice.<sup>10</sup> In the course of time the genius of the Roman law even evolved rules controlling some aspects of the treatment of these slaves; for example, it prohibited the Roman master from the wanton killing of his slave.

Generally speaking, during this early period of recorded history the slaughter of prisoners of war was also the general practice in Asia. At certain periods there were exceptions in a few Asiatic countries. Thus, both Sun Tzu's *The Art of War*, which probably dates from about the fourth century B.C., and the *Manu Sriti*, a Sanskrit treatise

<sup>8</sup> See, e.g., Numbers 31:7-8, 17; Deuteronomy 3:6, 20:13-17; Joshua 6:21, 10:35, 37, 39, 11:11; I Samuel 15:3. But see II Kings 6:22-23.

<sup>9</sup> 2 Phillipson, *The International Law and Custom of Ancient Greece and Rome* 251-52, 257-63 (1911).

<sup>10</sup> *Ibid.*, 253-57, 263-66; Davis, *Prisoner of War* 523. But see Creasy, *Decisive Battles of the World* 126 (describing German reciprocal killing of Roman prisoners of war in A.D. 9 during Arminius' victory over Vars' legions).

on law which probably dates from the period between 200 B.C. and A.D. 200, forbade the slaying of prisoners of war. Absorption into one's own army, enslavement, or ransom were the alternatives.

With the fall of the Roman Empire, Europe entered the Dark Ages. Neither combatants nor noncombatants had any rights. During this period the Catholic Church engaged in the ransoming of Christian prisoners of war; and while the Church made a number of efforts to improve the lot of the prisoner of war, these efforts related only to warring members of the Church and non-Catholic prisoners of war could expect no help from this source.

The era of chivalry saw a definite code evolve under which captured knights were well treated and were held for ransom. They might even be released on parole to raise the ransom,<sup>11</sup> but this code applied only to the knight, not to the foot soldier. For him there was no system of ransom; and when captured he could expect to be treated with historic ruthlessness. Massacres and enslavement of prisoners of war were still the order of the day during the Crusades. The Crusaders massacred all captured Saracens and enslaved all captured Eastern Christians;<sup>12</sup> while the Saracens, with equal ferocity, massacred all captured Christians.<sup>13</sup>

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<sup>11</sup> Keen, *The Laws of War in the Late Middle Ages* 156-85 (1965). Richard the Lion-Hearted of England was thus released before his full ransom had been paid to Emperor Henry VI.

<sup>12</sup> Although the Third Lateran Concilium (1179) is often stated to have made a pronouncement against the enslavement of Christian prisoners of war (see, for example, Marin, *Recueil* 655), this was actually limited to shipwrecked Christians (5 Hefele, *Histoire des Conciles* 1105) and apparently had little effect on actual practice.

<sup>13</sup> The uniformity of the practice in this early era is attested to by the following statement from Khadduri, *War and Peace* (at 126-27): "The practice of taking prisoners of war as part of the spoil is very old and goes back to antiquity. The Persians treated their captives with relentless cruelty: they were blinded, tortured, and finally killed or crucified. The Hebraic rule was no less severe than Persian practice. The Muslims, regarding captives also as part of the spoil, often treated them no less cruelly than their predecessors." Actually, the Koran provided that captured non-Muslims were to be held as prisoners of war during the continuance of hostilities and "[t]hen either release them as a favor, or in return for ransom." *Quran*, 47:4 (M. Z. Khan trans., 1971). In al Ghunaimi, *The Muslim Conception of International Law and the Western Approach* 190, the author quotes a more popular version of this Koranic statement and interprets it to mean that "the Islamic state has the choice only between two alternatives; either to set free the prisoners of war gratuitously or to claim ransom. The verse unequivocally does not entitle the Muslims to enslave their prisoners of war. . . ." He then goes on to argue that a policy of enslavement could only be justified as a sanction by way of retaliation "and not as a right *ab initio*." *Ibid.*, 190-91. But see Mahmud, *Muslim Conduct of State* 74-76. By the thirteenth century the Muslims had developed rules of war which, at least, prohibited the mutilation of prisoners of war. Marin, *Recueil* 656-57.

The breakdown of feudalism, the increased use of mercenaries, and the rise of nationalism, all of which occurred during the Renaissance, contributed to an evolution in fundamental concepts which began to make its appearance during the seventeenth century.<sup>14</sup> (The religious wars of the Reformation were the exception, continuing the traditional brutal treatment and slaughter of prisoners of war.) By the end of the Thirty Years' War (1648), a prisoner of war had come to be considered as being in the custody of the enemy State, rather than of the individual captor. There was by then a better than even chance that he would not be killed or enslaved, but he still had little or no protection against other types of maltreatment. This basic change in concept did, however, serve as a foundation upon which the principle of humanitarian treatment of prisoners of war could be erected.<sup>15</sup> It remained for Montesquieu, in his *Esprit des lois*,<sup>16</sup> and Rousseau, in his *Contrat social*,<sup>17</sup> to do the theoretical work, and for events emanating from the American and French Revolutions to lead to the practical changes which form the basis for the modern treatment of prisoners of war.<sup>18</sup>

The 1785 Treaty of Amity and Commerce between Prussia and the United States contained a provision (Article XXIV) which probably constituted the first international attempt to provide in time of peace for the protection of prisoners of war in the event that the then friend-

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<sup>14</sup> It was during this period that the great classical writers (among whom were Vitoria, Suarez, Gentilis, and Grotius) made their tremendous contributions to international law, and particularly to the law of war. See, e.g., Grotius, *War and Peace*, Book III, Ch. VII.

<sup>15</sup> Davis, *Prisoner of War* 525 & 540; Flory, *Prisoners of War* 158-60. Article LXIII of the *Treaty of Westphalia* (Münster, 30 January 1648) provided for the release of all prisoners of war by both sides without the payment of ransom. So also did Article XIV of the *Treaty of Adrianople* (1829). During the eighteenth and nineteenth centuries the practice of exchanging prisoners of war, both during and after the cessation of hostilities, became firmly established as a norm of international law.

<sup>16</sup> Published in 1748. Montesquieu asserted that the only right that the law of war gave over prisoners of war was to secure them in such a way that they could not further participate in the hostilities.

<sup>17</sup> Published in 1762. Rousseau advanced the theory that war was a relationship between States and that individuals were enemies only through accident and as soldiers.

<sup>18</sup> The following pertinent statement appears in Draper, *Recueil*, at 101: "The 18th century evolved the important idea that captivity was a device whereby the prisoner [of war] was to be prevented from returning to his own force and conducting the fight again. As a corollary to this idea it came to be accepted that the prisoner [of war] was not a criminal but a man pursuing an honourable calling who had had the misfortune to be captured. The practical implication of this was that the prisoner [of war] should not be put in irons and thrown into a penal establishment with the local convicts." To the same effect, see 2 Lauterpacht-Oppenheim 367-68.

ly relations between the two countries should be disturbed by war.<sup>19</sup> Considering the lack of existing precedent at the time the Treaty was drafted, the provisions designed "to prevent the destruction of prisoners of war" are amazing in their breadth and scope. Seven years later, in 1792, the French National Assembly enacted a decree which attempted unilaterally to establish a formal code of humanitarian rules governing the treatment of prisoners of war.<sup>20</sup> It proved to be in advance of its time,<sup>21</sup> but the rules which it contained have since been incorporated into the various conventions for the protection of prisoners of war which were drafted more than a century later and which have been widely accepted by the nations of the world.

Despite the difficulties encountered during the Napoleonic Wars,<sup>22</sup>

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<sup>19</sup> Substantially the same provision was contained in a new treaty between the same nations which was entered into in 1799. This treaty lapsed in 1810. It was revived by Article XII of the *Treaty of Commerce and Navigation* of 1 May 1828. This latter remained in force for almost a century but was not revived after World War I. A very similar provision may be found in Article XXII of the *Treaty of Guadalupe Hidalgo between the United States and Mexico*, which was signed in 1848. Even the 1805 *Treaty of Peace and Amity between the United States and Tripoli* and the 1816 *Treaty of Peace and Amity between the United States and Algiers* contained provisions for the benefit of prisoners of war.

<sup>20</sup> *Décret rendu par l'Assemblée nationale le 4 mai 1792 concernant les militaires faits prisonniers de guerre* (Decree of 4 May 1792, of the French National Assembly, 1 DeClercq, *Recueil des traités de la France* 217. The decree read in part as follows (transl. mine) :

1. Prisoners of war are under the safeguard and protection of the [French] nation.

2. All cruel acts, violence or insults committed against a prisoner of war shall be punished as if committed against a French citizen.

3. Prisoners of war shall be transported in the rear of the army to special places which the commanding generals shall have designated.

The skeptic might be inclined to ascribe to this action of the French Revolutionary legislature the same motives which impelled the Chinese Communists to institute their so-called Lenient Policy towards United Nations Command prisoners of war during the Korean hostilities. U.K., *Treatment*. 31.

<sup>21</sup> It is, indeed, a paradox that one of the worst war crimes committed against prisoners of war in modern times, prior to World War II, was the killing at Jaffa in 1799, by Napoleon Bonaparte (then a general serving under the French Directory), of more than 3,500 Arab prisoners of war for whom he was unable to spare a guard from his already understrength army. *British Manual* para. 137 n.1. (Concerning a modern massacre of prisoners of war, smaller in total numbers, but of similar inhumanity, see Whiting, *Massacre at Malmédy* 45-46 & 52-54.) Napoleon is also charged with having "destroyed the old exchange system, which has never been fully restored." Laws, *Exchange* 604-05. See also, Lewis, *Napoleon* 66-82.

<sup>22</sup> Even at this early date the treatment of prisoners of war had become a subject for legislative investigations, which resulted in findings of exemplary treatment of prisoners of war by one's own country and unprecedented cruelty in the treatment of prisoners of war by the enemy. United Kingdom, Foreign Office, *Report of the Committee of the House of Commons relative to the Treatment of Prisoners of War* (1798).

the treatment of prisoners of war continued to improve.<sup>23</sup> Obviously, the nations of Europe and the New World were slowly but surely arriving at the realization that the mutual maltreatment of prisoners of war was an anachronism which had no place in nineteenth-century civilization. An opinion of the King's Advocate, written in 1832, clearly demonstrates the extent to which prisoners of war had gained the right of protection, and the sanctions which, it was suggested, nations were prepared to take to ensure that such protection was forthcoming.<sup>24</sup> He stated:

. . . cases may possibly occur in which the treatment of Prisoners of War by a nation may be so barbarous and inhuman as to call upon other powers to make common cause against it, and to take such measures as may be necessary to compel it to abandon such practice, and to conform itself to the more lenient exercise of the rights of war, adopted by other States . . . .<sup>25</sup>

The advent of the American Civil War (1861–65) created prisoner-of-war problems which probably exceeded any previously known.<sup>26</sup> A system of exchange during the course of hostilities was agreed upon but did not operate successfully.<sup>27</sup> A Code drafted by Dr. Francis Lieber for the use of the Union army<sup>28</sup> contained a number of articles dealing with prisoners of war,<sup>29</sup> but these can scarcely be said to have

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<sup>23</sup> Although there is some question as to whether it was ever legally in force, the extensive provisions of the *Cartel for the Exchange of Prisoners of War between Great Britain and the United States of America*, signed at Washington, on 12 May 1813, indicate the great breadth of the rules which had evolved for the protection of prisoners of war by the beginning of the nineteenth century. For a discussion of this agreement and of one of 1820 between Colombia and Spain, see Basdevant, *Deux conventions* 5. See also Anon., *A Treaty for the Regulation of War in 1820*, 13 *I.R.R.C.* 52.

<sup>24</sup> Unfortunately, although, as we shall see (p. 26 *infra*), the 1949 Convention specifically provides that every Party undertakes to "ensure" respect for the agreed-upon rules for the protection of prisoners of war, third-party States are extremely reluctant to intervene even in cases of the most blatant violations.

<sup>25</sup> 3 McNair (ed.), *International Law Opinions* 119 (1956).

<sup>26</sup> See Laska & Smith, 'Hell and the Devil': Andersonville and the Trial of Captain Henry Wirz, C.S.A., 1865, 68 *Mil. L. Rev.* 77. For a fictional, but substantially factual, presentation of the treatment, or maltreatment, of prisoners of war during this conflict, see Kantor, *Andersonville*.

<sup>27</sup> See p. 398 *infra*.

<sup>28</sup> United States Army, General Orders No. 100, 24 April 1863, *Instructions for the Government of the Armies of the United States in the Field*, more generally known as the "Lieber Code." For comments on these *Instructions*, see Marin, *Recueil* 662–64; Coursier, Lieber 377; Baxter, *Codification* 171. Article 56 of the *Instructions* provided:

A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel punishment, want of food, by mutilation, death, or any other barbarity.

<sup>29</sup> Articles 56, 59, 71–80, and 105–110.

done more than to assure them of some basic protection. Moreover, while this Code had been prepared by Dr. Lieber, and it undoubtedly benefited from his prestige, it was, nevertheless, simply a unilateral act of the U. S. Government and it had no international status—except that it did provide an important source for the drafting of subsequent codes on the subject.

The balance of the nineteenth century saw a number of efforts, both unofficial and official, to codify the law of war, including that relating to prisoners of war. The Swiss international jurist, Bluntschli, produced two significant works on the subject at this time;<sup>30</sup> and Field, an American, made a major contribution to the growing literature on the subject shortly thereafter.<sup>31</sup> Then in 1874 an international conference called by the Tsar of Russia convened in Brussels and made the first attempt by governments to codify the law of war. While the Declaration of Brussels<sup>32</sup> which emanated from that conference never entered into effect as an international agreement, it unquestionably had a very considerable influence on subsequent governmental codification efforts which were successful. And finally, in 1880 the Institute of International Law produced the Oxford Manual,<sup>33</sup> another influential, but unofficial, codification of the law of war.

These numerous attempts by diplomats and international jurists to codify the law of war, including the rules relating to the treatment of prisoners of war, not only constituted important source material, but also contributed greatly to the international climate which made possible the successful drafting of the Regulations Respecting the Laws and Customs of War on Land attached to the Second Hague Convention of 1899. This was the first effective multilateral codification of the law of war. Its impact on the rules governing the treatment of prisoners of war and subsequent codifications on that subject was immeasurable.<sup>34</sup>

The Russo-Japanese War (1904–05) was the only major conflict to

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<sup>30</sup> Bluntschli, *Das moderne Kriegsrecht*, based on his friend Lieber's works, and *Das moderne Völkerrecht*.

<sup>31</sup> Field, *Draft Outlines of an International Code*. Influenced, no doubt, by events in the American Civil War (1861–65), Field was probably somewhat less humanitarian than Bluntschli.

<sup>32</sup> Articles 9–11 and 23–34 of the Declaration dealt with prisoners of war. Although the Declaration did not become effective, in the Russo-Turkish War (1877–78), the Tsar ordered that Russian troops comply with its provision and in July 1877 he issued a "Regulation concerning prisoners of war" which was extremely humane. Scott, *Resolutions* 17, 19.

<sup>33</sup> Articles 21–23 and 61–78 of the Manual dealt with prisoners of war.

<sup>34</sup> The foregoing discussion should not be construed as in any manner denigrating from the affirmative effect of the successful drafting and ratification of the 1864 *Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*. This was, of course, the first of the series of Geneva humanitarian conventions. (See note 276 *infra*.)

occur while the Second Hague Convention of 1899 and its Regulations were in effect.<sup>35</sup> They were soon replaced by the Fourth Hague Convention of 1907<sup>36</sup> and by the Regulations attached to that Convention.<sup>37</sup> It was this Convention which was in effect during World War I,<sup>38</sup> and practically all of the belligerents found the prisoner-of-war provisions to be inadequate. As a result, the prisoner-of-war provisions of those Regulations were supplemented by a great many special multilateral and bilateral agreements which were entered into during the course of the conflict.<sup>39</sup> This clear evidence of its inadequacy<sup>40</sup> enabled the ICRC to promote and secure the drafting of a new agreement dealing exclusively with prisoners of war, which was completed and signed in Geneva in July 1929.<sup>41</sup> When World War II commenced there were more than 40 Parties to this Convention.<sup>42</sup> As had been realized,<sup>43</sup> its application during that conflict demonstrated once again that a number of material provisions for the adequate protection of prisoners of

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<sup>35</sup> Despite some partisan claims (*see, for example, Takahashi, Russo-Japanese War* 102), the treatment of prisoners of war in this conflict was probably almost exemplary on both sides. Franklin, *Protection* 78-79; Ariga, *Guerre russo-japonaise* 93-130.

<sup>36</sup> Article 4 of this Convention provided that it replaced the cognate 1899 Convention as between the Contracting Parties.

<sup>37</sup> There were only very minor differences between the prisoner-of-war provisions of the Regulations attached to the two Conventions. For a detailed discussion of the law and practice of this era, see DuPayrat, *Le prisonnier de guerre dans la guerre continentale*.

<sup>38</sup> While it had a *si omnes* (general participation) clause, and at least one of the belligerents (Serbia) was not a Party to the Convention, all of the belligerent Parties apparently accepted it as being in force. 2 Lauterpacht-Oppenheim 234.

<sup>39</sup> *See, e.g., the Agreement between Great Britain and Germany concerning Combatant and Civilian Prisoners of War, executed at The Hague, 2 July 1917; Agreement between the British and German Governments concerning Combatant Prisoners of War and Civilians, 14 July 1918; the Final Act of the Conference of Copenhagen, executed by Austria-Hungary, Germany, Rumania, Turkey, and Russia on 2 November 1917; the Agreement between the British and Turkish Governments respecting Prisoners of War and Civilians, executed at Bern on 28 December 1917; the Agreement between France and Germany concerning Prisoners of War, executed at Bern on 26 April 1918; and the Agreement between the United States of America and Germany concerning Prisoners of War, Sanitary Personnel, and Civilians, executed at Bern on 11 November 1918.*

<sup>40</sup> Once again the momentum for improvement provided by international jurists should not be overlooked or underestimated. *See, e.g.,* Phillimore & Bellot 47; and Phillimore, *Suggestions* 25. Similarly, the "Final Report of the Treatment of Prisoners of War Committee," 30 *I.L.A. Rep.* 236 (1921), contained a set of "Proposed International Regulations for the Treatment of Prisoners of War."

<sup>41</sup> *The Geneva Convention Relative to the Treatment of Prisoners of War of July 27, 1929*, herein referred to as "the 1929 Convention."

<sup>42</sup> *See note 2 supra.*

<sup>43</sup> *See note 3 supra.*

war had been omitted,<sup>44</sup> and very quickly after the end of hostilities the ICRC succeeded in securing the convening of another Diplomatic Conference in Geneva. This Conference drafted a new prisoner-of-war convention<sup>45</sup> with many comparatively novel provisions directed at filling the voids which World War II had exposed in the then-existing law. This 1949 Convention has now been ratified or adhered to by 143 nations.<sup>46</sup> It is with the application of its provisions—intended, actual, and to be expected—that the discussion which follows will be concerned.

Writing in 1886, a noted American military lawyer, William Winthrop, said:

Modern sentiment and usage have induced in the practice of war few changes so marked as that which affects the status of prisoners of war.<sup>47</sup>

While that statement was undoubtedly true in 1886—and is still true when the treatment of prisoners of war today is compared with that which they received a number of centuries ago—the experiences of World War II and those after it make the situation far less roseate than when Winthrop wrote. As has been said:

A comparison between the conditions under which prisoners were held captive during the Napoleonic wars and those obtaining in Germany, Japan and Russia during the late war [World War II] reveals a progressive change for the worse, which runs exactly parallel to the progress of dictatorship from Napoleon, through Kaiser Wilhelm to Hitler and Stalin.<sup>48</sup>

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<sup>44</sup> It should not be assumed that the 1929 Convention was completely without value. As the late Josef Kunz, an eminent scholar in this field, said: “[T]he fact that millions of prisoners of war from all camps, notwithstanding the holocaust, did return, is due exclusively to the observance of the Geneva Prisoners of War Convention. . . .” Kunz, *Chaotic Status* 37, 45. The American Red Cross attributed the fact of the survival of 99 percent of the American prisoners of war held by Germany during World War II to compliance with the 1929 Convention. *New York Times*, 2 June 1945, at 8, col. 6. Conversely, it may validly be assumed that millions of Russian prisoners of war held by the Germans, Germans held by the Russians, and Allied prisoners of war held by the Japanese did not return because the 1929 Convention was not technically applicable and was not applied.

<sup>45</sup> *The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949*, Appendix A.

<sup>46</sup> For a complete list of ratifications and adherences up to 1 June 1977, see Appendix B.

<sup>47</sup> Winthrop, *Military Law* 1228. To the same effect, see *British Manual* para. 122. Spaight called prisoners of war “spoil darlings.” Spaight, *War Rights on Land* 265. Thirty-six years and two World Wars later he was more realistic. Spaight, *Air Power*, Ch. XV, *passim*.

<sup>48</sup> Laws, *Prisoners of War* 94. A similar pessimism is found in Freeman, *Recueil* 309, where the author says: “Considering the experience of United Nations troops in the Korean campaign, an excess of optimism about such matters [application of the Convention] is hardly justified should the inferno of war be unleashed again.”

The extent to which there will be compliance with the provisions for the protection of prisoners of war contained in the 1949 Geneva Prisoner-of-War Convention still largely remains to be seen. Unfortunately, very little that has occurred in this area during the quarter century since its drafting augurs well for the future.

### C. APPLICABILITY

The first question which arises with respect to any treaty, and which is very much present in the case of the 1949 Geneva Convention is, when and under what circumstances is it to be applied?

Under Article 1 of the Third Hague Convention of 1907 hostilities are instituted by a "reasoned declaration of war or [of] an ultimatum with conditional declaration of war"; and under Article 2 of that Convention the belligerents have the duty to notify neutrals of the existence of a state of war. Of course, were those provisions uniformly complied with by States, the subject under discussion would cause few difficulties, as there would never be any question as to the existence of a legal state of war and of the consequent applicability of the 1949 Geneva Convention. Unfortunately, more often than not, the above-cited provisions of the Third Hague Convention of 1907 have been honored in the breach. In 1914, just seven years after they had become a part of international legislation, Germany attacked Belgium without a prior declaration of war and started a policy which has been followed all too frequently since that time.

Despite the experiences of World War I, the subsequently drafted 1929 Geneva Prisoner-of-War Convention did not contain a provision specifying the conditions under which it was to become applicable. It was apparently believed that in future armed conflicts there would be compliance with the provisions of the Third Hague Convention of 1907, and that there would therefore be no question concerning the applicability of the 1929 Convention. Events did not bear out this expectation. Thus, during World War II a number of Powers found it profitable not to make a formal declaration of war before embarking on hostilities. The German attack on Poland in 1939, the Soviet attack on Finland that same year, and the Japanese attacks on the United States and the United Kingdom in 1941 are but a few of the many well-known instances of the commencement of hostilities during World War II without a prior declaration of war.<sup>49</sup> In addition, Powers have denied the existence of a state of war and, therefore, the applicability of the law of war protecting prisoners of war, by con-

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<sup>49</sup> 2 Lauterpacht-Oppenheim 292-93. But there were a number of cases of compliance with the provisions of the Third Hague Convention of 1907 during both World War I (*ibid.*, at 294 n.2) and World War II (*ibid.*, at 295 n.3). Italy had signed this Convention, but had never ratified it. Nevertheless, Italy did formally declare war on France in June 1940 before commencing hostilities.

testing the legitimacy of the enemy government in cases in which a sovereign State temporarily disappeared because of capitulation, occupation, or annexation, or a combination of these, even though its allies continued to fight. At the very opening phase of World War II Poland was overrun and dismembered, part of its territory going to Nazi Germany and the remainder to the Soviet Union. Thereafter the German Government refused to consider that members of the Polish armed forces who had been captured during the course of hostilities retained the status of prisoners of war.<sup>50</sup> Similarly, Germany refused to recognize the right of any government to speak for prisoners of war who, before the respective capitulations and military occupations, had served in the armed forces of Belgium, the Netherlands, Yugoslavia, etc.; and it took this position whether or not there was a government-in-exile in existence and functioning.<sup>51</sup> In 1940 France agreed to an armistice with Germany (and to another with Italy) under which a large part of its territory remained occupied while the remainder was technically unoccupied and self-governing; and it ceased to be a belligerent. Thereafter, while active hostilities continued with Germany and Italy on one side and France's former allies (principally the United Kingdom and the Commonwealth countries) on the other, the German Government took the position that the members of the French armed forces who had been captured during the hostilities were no longer entitled to prisoner-of-war status, their rights thereafter being subject to negotiations between Nazi Germany and the Vichy French Government.<sup>52</sup> Finally, it had been found advantageous on occasion to deny the existence of a state of war in a particular case by the use of subterfuge or perversion of the facts. Thus, the Sino-Japanese conflict, which dated at least from the Japanese attack at the Marco Polo Bridge in 1937 and which lasted until the end of World War II in 1945, was designated by the Japanese as an "incident" which, they claimed, did not bring the law of war—including that relating to prisoners of war—into effect. This established a pattern by which international armed conflict was termed an "incident," a "police action," a "police operation," etc.,<sup>53</sup> thereby

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<sup>50</sup> 2 *ICRC Analysis* 5.

<sup>51</sup> Bastid, *Droit des gens* 334; 1 *ICRC Report*, 35–36, 189–90; Olgiati, Croix Rouge 705. According to one author, Germany took the position that prisoners of war from Poland and Yugoslavia could not, after the capitulations of those countries, continue to be considered as prisoners of war because "their respective States having ceased to exist, the position of Power of Origin of these captives belonged henceforward to the Reich." Wilhelm, *Status* 10–11, 35 *R.I.C.R.* 525.

<sup>52</sup> 1 *ICRC Report*, 546–47. The so-called Scapini Mission appointed by the Vichy Government replaced the Protecting Power for French prisoners of war held by the Germans after the 1940 Franco-German armistice agreement. See Pictet, *Recueil* 87–88.

<sup>53</sup> *I.M.T.F.E.* 1003 & 1008; 1969 Reaffirmation 94.

purporting to establish a base upon which to deny the applicability in a specific conflict of the law of war in general and the law relating to prisoners of war in particular.<sup>54</sup>

Could a country legitimately claim that there was no war, and hence that the Prisoner-of-War Convention was not applicable, because hostilities had not been preceded by a formal declaration of war? Could it deny the applicability of the Prisoner-of-War Convention by giving some name other than "war" to the armed conflict in which it was concededly engaged? Where a country had been overrun and its territory completely occupied by its enemies, could the latter claim that the occupied country had ceased to exist as a nation, that a state of war no longer existed between occupier and occupied, and that individuals captured during the hostilities while serving in the armed forces of the occupied country were no longer entitled to prisoner-of-war status? Would the answer to this latter question be different if the allies of the occupied country were still actively at war with the occupier and if they were, perhaps, furnishing facilities on their soil for a government-in-exile and an armed force of the occupied country? What if only part of the territory of a country had been occupied but it had signed an armistice with its occupier and was no longer an active belligerent? As we have seen, all of these situations had occurred during World War II. All of them could occur again in any future war. All of them urgently required that an agreed solution be reached in advance of the event. The 1946 Preliminary Red Cross Conference recommended that the 1929 Convention be amended to include a provision making it applicable "from the moment hostilities have actually broken out, even if no declaration of war has been made and whatever the form that such armed intervention may take."<sup>55</sup> The Government Experts who met the following year concurred in the need for a provision of this nature, redrafting it to make the Convention applicable "at the outbreak of any armed conflict, whether the latter has, or has not[,] been recognised as a state of war by the parties concerned."<sup>56</sup> Based upon the suggestions it had received, the ICRC drafted a new provision<sup>57</sup> which was approved by the International Red Cross Conference at Stockholm in 1948<sup>58</sup> and was adopted by the Diplomatic Conference in Geneva in 1949<sup>59</sup> with only minor editorial changes.

The first paragraph of Article 2 of the Convention now provides:

The present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or

<sup>54</sup> *I.M.T.F.E.* 1009 & 1209.

<sup>55</sup> 1946 Preliminary Conference 15 & 70.

<sup>56</sup> 1947 GE Report 103.

<sup>57</sup> Article 2, Draft Revised Conventions 52.

<sup>58</sup> Article 2, Revised Draft Conventions 51.

<sup>59</sup> 1 *Final Record* 243.

more of the High Contracting Parties, even if the state of war is not recognized by one of them.<sup>60</sup>

The foregoing provisions appear to be plain and unambiguous. They are among those provisions of the Convention which have been given both uniform interpretation and general approval by the commentators.<sup>61</sup> Nevertheless, they have been less than fully successful in securing the application of the Convention even in situations which appear to fall directly within their ambit.

Clearly, the quoted portion of Article 2 is an attempt to cover two situations in such broad terms as to include all possible contingencies:

(1) "*Cases of declared war*": This is the classical situation, the armed conflict which is instituted in compliance with the provisions of the Third Hague Convention of 1907 discussed above. It presents no particular problems. The number of cases which will fall within its terms is comparatively negligible. Apart from the obvious reluctance of a number of nations to declare war formally, they are now confronted not only with the prohibitions of the United Nations Charter but also with the general desire to avoid any use of the term "war."<sup>62</sup>

(2) "*Any other armed conflict which may arise*": The terminology selected here was intended as a catchall, to include every type of hos-

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<sup>60</sup> This article is one of the "Common Articles" so called because they appear in identical form, *mutatis mutandis*, in all four of the 1949 *Geneva Conventions for the Protection of War Victims*.

<sup>61</sup> See Stone, *Legal Controls* 313 n.85, where the author states: "So Art. 2, para. 1, of the revised Prisoners of War Convention, 1949, declaring its provisions applicable not only to declared war but also to "any other armed conflict . . . even if the state of war is not recognised" by a belligerent Contracting Party, is a welcome recognition of the need to place the point beyond doubt." And in Pictet, *Commentary* 22-23, the following appears: "By its general character, this paragraph deprives belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations. There is no need for a formal declaration of war, or for the recognition of the existence of a state of war, as preliminaries to the application of the Convention. The occurrence of *de facto* hostilities is sufficient. . . . Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war." And, finally, in Soviet International Law 420, this statement is made: "The absence of a formal declaration of war does not deprive hostilities, which have in fact begun, of the character of war from the point of view of the need to observe its laws and customs. The Geneva Conventions of 1949 require that their signatories apply these Conventions, which are a component part of the laws and customs of war, in the event of a declaration of war or in any armed conflict, even if one of the parties to the conflict does not recognise the existence of a state of war."

<sup>62</sup> The 1969 Reaffirmation states (at 11): "By avoiding the words 'law of war', the ICRC is also desirous to take account of the deep aspiration of the peoples to see peace installed and the disputes between human communities settled by pacific means." It is extremely doubtful that diction alone can change human nature. Fortunately, there has so far been no attempt to substitute the term "prisoner of armed conflict" for "prisoner of war"!

tility which might occur without being “declared war.” The words selected were certainly broad enough to accomplish the desired result, *viz.*, that the Convention should be applicable “on the outbreak of *de facto* hostilities, even if war has not been previously declared, and irrespective of the nature of the armed conflict.”<sup>63</sup> A resolution adopted by the World Veterans Federation in 1970 demonstrates the public understanding of the interpretation to be given to this provision. That resolution recalls “that the [1949 Geneva] Conventions apply to armed conflict of *any nature* . . . without regard to how that conflict may be characterized.”<sup>64</sup> (Emphasis in original.) The ICRC has been equally comprehensive in its interpretation of this provision. The documents prepared by it for the use of the 1972 Conference of Government Experts state:

. . . There is no need for a formal declaration of war or for recognition of the existence of a state of belligerency for the application of the Conventions. The occurrence of *de facto* hostilities is sufficient. Thus any disagreement arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2 common to the Conventions, even if one of the Parties to the conflict denies the existence of a state of belligerency.<sup>65</sup>

In one of the few cases concerning the 1949 Convention to reach the courts, a major issue was the applicability of the 1949 Prisoner-of-War Convention in hostilities resulting from the “military confrontation” between Malaysia and Indonesia (1963–66). The Privy Council said:

The trials of the accused were conducted on the assumption, which their lordships do not call in question, that there was an armed conflict between Malaysia and Indonesia bringing the [prisoner-of-war] Convention into operation. Article 2 applies the Convention not only to cases of declared war but to ‘any other armed conflict’ which may arise between two or more of the High Contracting Parties even if the state of war is not recognised by one of them. The existence of such a state of armed conflict was something of which the courts in Malaysia could properly take

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<sup>63</sup> Pictet, *New Geneva Conventions* 468. The author goes on to state: “It is inadmissible that a state should be entitled to disregard treaty stipulations simply by opening hostilities without previous notification to the adversary, or by giving such proceedings any other name.”

<sup>64</sup> U.N., *Human Rights*, A/8370, para. 160.

<sup>65</sup> 1972 *Commentary*, part one, at 9. This was the position taken by the Indian government in 1963 when it contended that the refusal of the Peoples Republic of China to allow the ICRC to visit Indian prisoners of war held in China violated “the provisions of the Geneva Convention [which] apply to such situations even if a state of war [in the legal sense] does not exist.” 2 Cohen & Chiu, *People’s China* 1573–74.

judicial notice, or if in doubt (which does not appear to have been the case) on which they could obtain a statement from the Executive.<sup>66</sup>

Despite the foregoing, in at least two instances—one unofficial and one official—the applicability of the Convention has been challenged or denied because there was no “state of war” or no “declaration of war.” Thus, a leading scholar in the field of international law in the People’s Republic of China apparently went out of his way to question the applicability of the Convention to certain American airmen shot down during the hostilities in Korea (1950–53) because “no state of war exists between China and the U.S.”<sup>67</sup> And of even more importance was the refusal of the Democratic Republic of Vietnam (DRV) to apply the Convention to American airmen shot down while flying combat missions over that country (c. 1965–73), on the ground that there had been no declaration of war.<sup>68</sup>

<sup>66</sup> *Public Prosecutor v. Koi*, [1968] A.C. 853–54.

<sup>67</sup> The full story of this incident, set forth by Professor Cohen in his contribution on the People’s Republic of China to what was originally the Harbridge House study on prisoners of war, is worthy of quotation: “In the 1954 dispute over the post-Korean-armistice conviction of eleven United States Air Force personnel for espionage, another leading Chinese scholar of the day, Ch’en T’i-ch’iang, used language that unnecessarily suggested a more restrictive view of the applicability of the GPW Convention. The United States had argued that prior to the armistice the fliers had been shot down either over the ‘recognized combat zone in Korea or over international waters.’ Instead of simply limiting his argument to the official Chinese position that the fliers had been shot down deep in Chinese territory after secretly entering for purposes of espionage rather than combat, Ch’en ambiguously stated:

Only captured members of the armed forces of a belligerent can be considered prisoners of war by the captor side. No state of war exists between China and the U.S. U.S. spies who have intruded into China for espionage purposes are not prisoners of war.

Ch’en’s remarks were only the murky dicta of a single publicist, to be sure, but they suggested the possibility that the PRC could some day choose to read the phrase ‘any other armed conflict’ in article 2 restrictively, as North Vietnam appears to have done, in spite of the more conventional position voiced by Chou Keng-sheng vis-à-vis India.” Miller, *The Law of War* 239–40. Technically the statement by Ch’en was correct; but he made a poor choice of words. In the absence of armed conflict between two States, a national of one who illegally intrudes into the territory of the other does not become a prisoner of war. The situation of which Ch’en writes is exactly the same as the Powers case in the Soviet Union, except that in China the individuals who illegally intruded were undeniably members of an armed force. (This assumes, of course, the validity of the Chinese factual position.)

<sup>68</sup> A news article from Cairo which appeared in the *New York Times*, 12 February 1966, at 12, col. 3, stated:

The sources quoted the [North Vietnamese] Ambassador as having rejected the American contention that United States airmen captured in attacks on North Vietnam should be treated as prisoners of war under the terms of the Geneva conventions.

It is apparent, unfortunately, that no matter how clear and unambiguous the provisions of the Convention in this respect may concededly be, some Parties will continue to insist that, and to find reasons why, the hostilities in which they are engaged do not come within the purview of the provisions of the first paragraph of Article 2; and they will frequently, absent strong pressure from friendly Parties, for this reason refuse to apply the Convention for the protection of prisoners of war captured by them during the course of international armed conflict. There appears to be wide agreement that what is needed in this field is not new law, but some method of ensuring the application of, and compliance with, existing law—the 1949 Convention.<sup>69</sup> At the 1971 Conference of Government Experts several of the participants sought a solution to the problem created where one of the parties to an international armed conflict denied the applicability of the Convention.<sup>70</sup> The solutions offered there were, in general, concerned with methods of ensuring the presence of a Protecting Power.<sup>71</sup> While there can be no question of the importance of the Protecting Power in ensuring the application of (and compliance with) the provisions of the Convention, this does not solve the problem which exists when one party to an international armed conflict insists that there are no hostilities within the meaning of Article 2 of the Convention and that, therefore, there is no basis for designating a Protecting Power.

At the 1949 Diplomatic Conference two proposals were made which can be related to this problem. The Greek representative suggested that the existence of a state of belligerency (which would, of course, unquestionably bring the law of armed conflict into effect) should be

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He was reported to have told influential Egyptians that this was impossible “because this is a case where no war has been declared” by either country.

Another article published five months later (*New York Times*, 12 July 1966, at 7, col. 5) said: “The Tanyug dispatch, dated Pnompenh, Cambodia, said that North Vietnam ‘does not consider these United States citizens as prisoners of war for it has not declared war on the United States.’” Direct evidence of the effect of the foregoing may be found in the words of one of the American prisoners of war repatriated during the hostilities. He stated: “Any attempt on our part to bring up the fact that we were prisoners of war . . . resulted in it being very forcibly brought to our attention that we were not prisoners but criminals, because our country had not declared war, and had to answer for this.” Overly, “Held Captive in Hanoi,” *Air Force & Space Digest*, November 1970, at 86, 90. For the ICRC position that the American prisoners of war held in North Vietnam were entitled to the protection of the Convention, see *AEI*, *Problem 24*.

<sup>69</sup> U.N., *Human Rights*, A/7720: Reply of India, par. 2, at 77–78; Reply of the United States, para. 2, at 91. The ICRC subsequently pointed out that the problem was not novel and it listed 10 private organizations which had put forward initiatives in this regard. 1971 GE Documentation, II, at 22.

<sup>70</sup> 1971 GE Report, paras. 534 & 537.

<sup>71</sup> *Ibid.*, para. 538.

decided by the Security Council of the United Nations.<sup>72</sup> A French proposal, which was actually concerned with the problem of a substitute for the Protecting Power,<sup>73</sup> would have established on a permanent basis, a "High International Committee for the Protection of Humanity," consisting of 30 members elected by the Parties to the Conventions from nominations made by the Parties, by the Hague "International [Permanent] Court of Arbitration" and by the "International Red Cross Standing Committee." Nominations were to be made from

amongst persons of high standing, without distinction of nationality, known for their moral authority, their spiritual and intellectual independence and the services they have rendered to humanity—

In particular, they may be selected from amongst persons distinguished in the political, religious, scientific and legal domains, and amongst winners of the Nobel Peace Prize—<sup>74</sup>

While this proposal was not incorporated into the conventions, it was the subject of a resolution adopted by the Diplomatic Conference recommending that consideration be given as soon as possible to the advisability of setting up an international body to perform the functions of a Protecting Power in the absence of such a Power.<sup>75</sup>

These two proposals are mentioned here because they suggest alternative approaches to the attempt to solve the problem of how to ensure application of the 1949 Conventions in international armed conflict: one, by the use of an established and continuing political body; the other, by the use of a new body created specifically for the purpose and which is made as neutral and apolitical as it is possible to do in these days of hypernationalism.

The suggested use of the Security Council (or, indeed, of any political body) is not considered to be a feasible solution. That body is composed of representatives of States, voting on the basis of decisions reached in Foreign Offices—decisions which are, in turn, made on the basis of national self-interest and political expediency, and which are not necessarily consonant with the facts. It is inconceivable, for example, that the Security Council would ever have reached a decision, over the opposition of North Vietnam (and, of more importance, of the Soviet Union and, toward the end, of the People's Republic of China), that the situation in Vietnam demanded the application of the

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<sup>72</sup> 2B *Final Record* 11 & 16. Further amplification of the proposal, which was clearly required, was not forthcoming and its adoption was not pressed.

<sup>73</sup> For a discussion of this problem, see pp. 269-275 *infra*.

<sup>74</sup> 3 *Final Record* Annex. 21, at 30.

<sup>75</sup> Resolution 2, 1 *Final Record* 361. Some months after the signing of the Convention in 1949 the French Government queried the signatory Governments with respect to the possible implementation of the Resolution. The Governments so consulted displayed a complete lack of interest. 1971 GE Documentation, II, at 21.

humanitarian conventions which govern the law of international armed conflict.<sup>76</sup>

On the other hand, it is believed that a true and effective solution to this problem could be attained by a Protocol to the four 1949 Conventions assigning the power to make a determination as to the existence of a state of international armed conflict, thereby automatically bringing the Conventions into effect, to a preselected international commission; by making the decision reached by that commission as to the existence of a state of international armed conflict binding not only on the States directly involved but also on all other Parties to the Protocol and Conventions; and by providing for the automatic imposition of some type of workable sanctions (such as a ban on the supplying of arms) whenever the commission so created determines that its decision is not being respected by a State party to the international armed conflict in that such State has, despite the internationally sponsored decision as to the existence of an international armed conflict which brings the law of armed conflict into effect, continued to deny the applicability of such law. Such a specially constituted commission of perhaps 25 private individuals, each of whom is of sufficient personal international stature to be able to rise above the politics of his or her own country, each of whom would act as an individual and as his or her personal moral and ethical principles dictated, detached and unaffected by Foreign Office instructions, could well constitute an acceptable, effective international body.<sup>77</sup> The provisions for the selection of the members of such a commission would be sufficiently restrictive to ensure the choice of the type of individual described, without regard to nationality, race, religion, color, or geographical distribution. It would begin to operate as soon as the con-

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<sup>76</sup> In addition, it might be noted that the Security Council undoubtedly already has the power to make such a decision; that it has, heretofore, in effect made such a decision, but always in the context of a call for the cessation of armed conflict so found to exist (*e.g.*, S.C. Res. 233, 22 U.N. SCOR, Resolutions and Decisions of the Security Council 1967, at 2, U.N. Doc. S/INF/22 Rev.2 (1968), adopted 6 June 1967, in which the Security Council stated its concern "at the outbreak of fighting" in the Middle East and called for "a cessation of all military activities in the area"; and S.C. Res. 237, 22 *id.* at 5, adopted 14 June 1967, in which it recommended "scrupulous respect of the humanitarian principles governing the treatment of prisoners of war"), and that it has never exercised its power in the context of the proposal under discussion because to do so would be an admission of its inability to eliminate completely the breach of the peace involved.

<sup>77</sup> While it is true that States refuse to allow questions relating to their "national security" to be decided by international bodies (witness the problems encountered in this respect by the International Court of Justice), it would be difficult for a State to put forward the contention in time of peace that the delegation to a neutral international body of the right to determine when a situation has arisen in which that State must apply humanitarian law would be detrimental to its national security. (It must be borne in mind that we are dealing here solely with *international* armed conflicts.)

stitutive body, consisting of all of the Parties to the Protocol, had made the initial selections, and would be a permanent body, preferably self-perpetuating through a process of co-option.<sup>78</sup> Any Party to the Protocol, whether or not itself involved in an international armed conflict, could, at any time, request a determination by the commission as to whether the then-existing relationship between two or more States was such as to bring the Conventions into effect; the States involved would be invited to present any facts or arguments they desired but would not otherwise participate in the decisionmaking process;<sup>79</sup> an affirmative decision would immediately be binding not only upon the States involved in the armed conflict, but on all of the other Parties to the Protocol;<sup>80</sup> and a subsequent finding by this commission that one or more of the Parties involved in the armed conflict was not complying with the provisions of the applicable humanitarian law—including the law relating to prisoners of war—would automatically, and without further action of any kind, require previously prescribed action on the part of all of the other Parties to the Protocol not involved in the armed conflict.<sup>81</sup>

This proposed solution to the problem of establishing a method whereby States will not be able to deny the applicability of the 1949 Convention in international armed conflict may appear impractical, given the current international climate. However, upon reflection this

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<sup>78</sup> To gain support at the outset and to ensure complete impartiality, it would probably be necessary to deny this body jurisdiction over fact situations existing at the time of its creation.

<sup>79</sup> The United Nations General Assembly has, on a number of occasions, called upon its members "to make effective use of the existing methods of fact-finding" [*e.g.*, G.A. Res 2329, 22 U.N. GAOR, Supp. 16, at 84, U.N. Doc. A/6716 (1968)]. The basic objective of these resolutions has been to encourage the use of fact-finding bodies in the event of disputes. The present proposal would, in effect, merely create a new specialized fact-finding body and provide for certain results to flow automatically if specified facts are found. It is a variation and expansion of the idea of the ad hoc Commission of Inquiry originally provided for by the First Hague Convention of 1899 and used for the first time in the *Dogger Bank Incident* (Scott, *Hague Court Rep.* 403).

<sup>80</sup> This is really provided for in Article I of the Convention. See pp. 26–27 *infra*. The decision would have no legal effect except to require the application of the humanitarian rules contained in the 1949 Geneva Conventions. It would *not* be a determination of the existence of a legal state of war.

<sup>81</sup> The present author first made this proposal in March 1970 in the Working Paper for the Fourteenth Hammarskjöld Forum. See Carey (ed.), *When Battle Rages, How Can Law Protect?* 8–11 (hereinafter Levie, Working Paper). Subsequently, a somewhat similar suggestion was made in the context of Article 3 dealing with internal armed conflict. U.N., *Human Rights*, A/8052, at paras. 159–61; and 1971 GE Report, paras. 192–218. (There does not appear to be any reason why the same body could be empowered to act in both areas, even by different groups of States, if this were desired.) Another writer in this field has also since made a similar suggestion. Bindschedler 56. See also the proposal made to the 1974 Diplomatic Conference in para. 8 (b) of the 1973 NGO Memorandum.

reaction may become somewhat less valid. Each and every one of the 143 States that have become Parties to the Conventions considers that, should it become involved in international armed conflict, it would be the participant fighting a just war—and that the application of humanitarian provisions of the law of war would be in its favor and against the aggressor with whom it would be engaged in international armed conflict. Why, then, should it not support a proposal which will ultimately be of benefit to it should it be forced to engage in international armed conflict? Moreover, to what will it have agreed? Merely that a neutral, internationally created body, which it helped to create, may determine that a situation in which the State may unexpectedly find itself at some future time calls for the application of the humanitarian law of international armed conflict. What would that mean to it? Only that it could not kill, or otherwise maltreat, protected persons such as the sick and wounded, prisoners of war, and civilian noncombatants, and that it must meet certain minimum standards in its treatment of these individuals. Can any State advance the argument that it refuses to ratify such an international agreement because it does not wish to have its “national security” jeopardized by having its sovereign power of action limited in these respects, that it wishes to retain an unfettered ability to kill and maltreat these individuals at will? Moreover, once an international convention covering the foregoing proposal has been drafted and is presented for signature and ratification, the moral and humanitarian pressures to bring about its legal acceptance by individual States would be tremendous and there would be an excellent possibility of its general acceptance.<sup>82</sup> While certain States that have adopted obsolete attitudes magnifying national sovereignty might well strongly oppose such a proposal, it is predictable that they would participate, albeit reluctantly, in any diplomatic conference convened to draft such a Protocol and would even-

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<sup>82</sup> Certainly, the 143 ratifications and accessions to the 1949 Geneva Conventions, which were drafted before many of the acceding States were even in existence as members of the international community, were not obtained merely because of an overwhelming urge on the part of nations to be bound by these humanitarian rules in the event they became involved in international armed conflict. They were obtained because of moral and humanitarian pressures and because few nations were willing to be pointed at as not having accepted these great expressions of humanitarian aspirations. (Pressure of this same type was brought on the United States because of its failure to ratify the 1925 Geneva Gas Protocol.) At least one writer does not think that the proposal would be acceptable to States. Bond, Proposed Revisions 258. However, the final session of the Diplomatic Conference which adopted the 1977 Protocol I (*see text*, pp. 91–01) included therein an *Article 90* entitled “International Fact-Finding Commission.” This Article adopts many of the ideas set forth in the text and previously urged elsewhere insofar as inquiring into alleged grave and serious breaches of the 1949 Convention and the 1977 Protocol are concerned. (For a more detailed discussion of Article 90, *see pp.* 90–1).

tually, rather than risk international opprobrium, become parties to it. It is believed that in this era of almost ceaseless armed conflict,<sup>83</sup> the time is past when States may argue "national sovereignty" and "national security" as excuses for refusing to participate in the creation of an international institution the sole function of which will be to eliminate excuses for refusing to recognize the existence of international armed conflict, with the resultant applicability of certain specific humanitarian laws.

There is one patent ambiguity in the quoted provisions of the first paragraph of Article 2 which requires mention. It will have been noted that the paragraph concludes with the phrase "even if the state of war is not recognized by one of them." What is the legal situation if a state of war is not recognized by two, or several, of the parties to the armed conflict? The legislative history of the Article is not helpful. Apparently, the drafters did not visualize the possibility that among the High Contracting Parties engaged in international armed conflict there might be more than one State that refused to recognize that the situation was such as to bring the matter within the provisions of the Convention, thereby requiring the applicability of its humanitarian provisions. Obviously, the literal wording of the Article does not cover all of the possible contingencies, including, for example, the situation which existed during the armed conflict in Vietnam where neither the Democratic Republic of Vietnam nor the United States, for different reasons, recognized the existence of a legal state of war.<sup>84</sup>

This problem was perceived within a short time after the 1949 Diplomatic Conference had completed its work. In 1952 Lauterpacht pointed it out and said: "The intention was probably to say by 'one or both of them.' This, it appears, is the correct interpretation of the Convention."<sup>85</sup> Certainly, his interpretation would seem to be fully justified—although it probably does not go far enough. We are dealing with a humanitarian convention. It should be liberally construed in order to

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<sup>83</sup> Between 1945 and 1968 there were approximately 130 armed conflicts, of which well over 50 percent had international implications. SIPRI, *Yearbook of World Armaments and Disarmament, 1968/1969*, Tables 4A.1 & 4A.2 at 366-73.

<sup>84</sup> The Republic of Vietnam (South Vietnam) did, at least for some purposes, recognize the existence of a legal state of war. *Ordinance of June 24, 1965, Promulgating the State of War throughout the Republic of Vietnam*. See Prugh, *Law at War* 62.

<sup>85</sup> Lauterpacht-Oppenheimer 369 n.6. For agreement with this view see Pictet, *Commentary* 23, and Draper, *Recueil* 73. Two years later the Diplomatic Conference that drafted the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* changed the wording of the cognate provision (Article 18(1)) of that Convention to read "even if the state of war is not recognized by one or more of them." (Emphasis added.) One author believes that even this could be improved, and any remaining ambiguity removed, by using the phrase "*par aucune d'entre elle*" ("by any of them"). Meyrowitz, *Les armes biologiques et le droit international* 22 n.46.

give the maximum protection. It simply does not make sense to say that if one of two parties to an international armed conflict (50 percent of those involved) denies the existence of a state of war the Convention is nevertheless applicable; but that if two of twenty parties to an international armed conflict (10 percent of those involved) make such a denial the Convention is inapplicable. The manifest purpose of the Convention was to afford humanitarian protection to individuals. Just as States may not make agreements derogatory of the protections so afforded,<sup>86</sup> they should not be permitted to offer an interpretation which will completely eliminate the applicability of the Convention in a situation to which it was unquestionably intended to be applicable.<sup>87</sup> Moreover, the provision should be construed in such fashion that no matter how many participants take the position that a "state of war" does not exist, the actual fact of armed conflict will suffice to make the Convention applicable. If it is not so construed, it will have all of the pejorative aspects of the much condemned general participation clause—with the additional adverse factor that the decision that the Convention is not to be applied will be based not on the indisputable fact of the participation in the hostilities of a non-Party to the Convention, but on the mere unilateral, subjective whim of belligerents.

Paragraph 2 of Article 2 makes the 1949 Convention applicable "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." Once again this was an attempt to prevent a repetition of events which had occurred during World War II. Thus, when Poland was totally occupied and, in effect, dismembered by Germany and the Soviet Union in 1939, the position was taken by the German Government that inasmuch as there was no longer a Polish State, there was no longer a legal basis for a Protecting Power to protect Polish interests—which would, of course, include the protection of the rights of members of the Polish armed forces previously taken as prisoners of war.<sup>88</sup> The German Government thereafter took a similar position with respect to Yugoslavia, the Free French, and Italy after 1943.<sup>89</sup> All of these States had been the subject of complete or partial military occupation. However, the problems arising here, insofar as the 1949 Convention is concerned, are really relative to the right of an individual to continue to be entitled to prisoner-of-war status and to the

<sup>86</sup> See the discussion of Article 6 of the Convention, pp. 84–86 *infra*.

<sup>87</sup> One commentator states with, unfortunately, some justification, that "adhering parties are not bound to know the undisclosed intentions of the drafters of conventional language that is inconsistent with words actually used." Rubín, *Status of Rebels* 447.

<sup>88</sup> Bastid, *Droit des gens* 334. The author there correctly points out that, to a considerable extent, this same position was taken by the Allies after the German capitulation in 1945.

<sup>89</sup> Pictet, *Recueil* 87–88. See also 1 *ICRC Report* 35–36, 189–90.

position of the Protecting Power. It is believed that these problems are more properly included in the discussion of those specific areas.<sup>90</sup>

The third paragraph of Article 2 deals with the problem created when one of the belligerents in an international armed conflict is not a party to the Convention. It will be recalled that the Fourth Hague Convention of 1907 included among its provisions a general participation clause.<sup>91</sup> The opposite approach was taken in the 1929 Convention, which provided that if one of the belligerents was not a party to it, "its provisions shall, nevertheless, remain binding as between the belligerents who are parties thereto."<sup>92</sup> During World War II no belligerent denied the applicability of the 1929 Convention merely because of the fact that several of the belligerents, particularly the Soviet Union and Japan, were not parties thereto. The first sentence of the third paragraph of Article 2 is merely a rephrasing of the provision contained in its predecessor. It provides that even if "one of the Powers in conflict"<sup>93</sup> is not a party to the Convention, "the Powers who are parties thereto shall remain bound by it in their mutual relations." This provision should present no problems. However, the second sentence of the paragraph constitutes a somewhat new concept. In order to encourage belligerents to comply with the provisions of the Convention even if they are not Parties thereto, it provides that contracting parties shall "be bound by the Convention in relation to the said [nonparty] Power, if the latter accepts and applies the provisions thereof." This procedure probably derived from the, at times, successful efforts of the ICRC during World War II to persuade nonparty belligerents to comply with the 1929 Convention on a reciprocal basis.<sup>94</sup> Thus, although there is a duty on parties engaged in international armed conflict to comply with the provisions of the Convention even in the face of noncompliance by an adversary which is a Party—reciprocity not being a requirement for this obligation<sup>95</sup>—it is a requirement when a nonparty is involved in the international armed conflict<sup>96</sup> inasmuch as the nonparty must both accept *and* apply the provisions of the Convention in order to create the right to expect compliance

<sup>90</sup> See pp. 66–68 *infra*, and 262–275 *infra*, respectively.

<sup>91</sup> See note 38 *supra*.

<sup>92</sup> Article 82.

<sup>93</sup> Once again it would have eliminated possible controversy had the provision been made to read "one or more of." See note 85 *supra*.

<sup>94</sup> 1 ICRC *Report*, 189. For what was a less than successful effort in this regard, see *ibid.*, 408–36.

<sup>95</sup> Pictet, *Commentary* 17–18. Concerning the problem of reciprocity, see pp. 29–32 *infra*.

<sup>96</sup> Draper, *Recueil* 74. He points out that this situation occurred during the 1956 Suez Conflict, at which time Egypt was already a Party and the United Kingdom was not. The latter made a declaration that it would accept and apply the Convention.

on the part of the Party to the Convention.<sup>97</sup>

It might be asked why a Power would not elect to ratify or accede to the Convention, even while it is engaged in international armed conflict, rather than to rely on its adversary's recognition that it has accepted and is applying the Convention. This was apparently foreseen as a possibility by the draftsmen, for, while Article 138 (which deals with normal ratifications) and Article 140 (which deals with normal accessions) both provide for a six-month delay before becoming effective, Article 141 affirmatively provides that when international armed conflict as specified in Article 2 occurs, any ratification or accession then pending or thereafter made by a belligerent shall be given effect immediately. It may be assumed that this is the procedure that any State not a party to the Convention would follow if it became involved in international armed conflict.<sup>98</sup>

Some years ago a dispute arose with respect to the applicability of the Convention in cases involving the United Nations, the suggestion having been made that the law of international armed conflict, including the 1949 Convention, was binding on any State in conflict with a United Nations armed force, but was not binding on the latter.<sup>99</sup> This suggestion caused quite a furor for a time but there now appears to be general agreement that the law of international armed conflict, including the 1949 Convention, is applicable to both sides in any United Nations enforcement action.<sup>100</sup> This is substantially the position taken by the United Nations itself.<sup>101</sup>

To summarize, the provisions of Article 2 were intended to, and do, make the 1949 Convention applicable in the following:

- (1) All cases of war formally declared between two or more Parties;
- (2) All other cases of armed conflict between two or more Parties;
- (3) All cases of armed conflict between two or more Parties no matter what designation such conflict may be given;

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<sup>97</sup> This creates a strange situation. Parties to the Convention are bound to comply with its provisions vis-à-vis nonparties only on a reciprocal basis. By acceding to the Convention during the course of the international armed conflict instead of merely "accepting and applying" it, the former nonparty can create a legal obligation on the part of the adversary party to comply with the provisions of the Convention even if the former nonparty does not, in fact comply. In other words, by becoming a Party to the Convention the former nonparty belligerent can eliminate the requirement of reciprocity on its part!

<sup>98</sup> Of course, in view of the number of States already Parties to the Convention (see Appendix B), this problem is almost moot.

<sup>99</sup> "Should the Laws of War Apply to United Nations Enforcement Action?" 1952 *Proc. A.S.I.L.* 216, 217.

<sup>100</sup> 50 *Annuaire de l'Institut de Droit International* 376 (II, 1963); 54 *ibid.* 449 & 465 (II, 1971); *Soviet International Law* 407; 66 *A.J.I.L.* 465 (1972); Bothe, *Le droit de la guerre et les Nations Unies* 187-207; Simmonds, *Legal Problems* 177-96.

<sup>101</sup> Seyersted, *United Nations Forces* 190-92.

(4) All cases of armed conflict between two or more Parties even if the existence of a legal state of war is not recognized, or is denied, by one or more of them;

(5) All cases of the occupation of a part or all of the territory of one Party by the armed forces of one or more other Parties, whether or not such occupation is preceded, accompanied, or followed by armed resistance;

(6) All cases of armed conflict between two or more Parties even if one Power, or more than one Power, to the armed conflict is not a Party; and

(7) All cases of armed conflict involving a Power, or Powers, not a Party, on a reciprocal basis, if the Power, or Powers, not a Party, accepts and applies the provisions thereof.

#### D. COMPLIANCE

Parallel with the problem of applicability is the problem of compliance. If the international armed conflict is within the provisions of Article 2 of the Convention, what are the requirements for compliance and how is compliance assured and enforced?<sup>102</sup>

Article 82 of the 1929 Convention stated that “the provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances.” The 1949 Convention made two improvements in this stipulation. In the first place, the importance attached to this provision by the 1949 Diplomatic Conference (which followed the lead of the participants in the preliminary conferences convened by the ICRC) was demonstrated by its removal from a position near the end of the treaty to one of major prominence as the very first article of the 1949 Convention. In the second place, it now provides not only that the Parties “undertake to respect” the 1949 Convention “in all circumstances”<sup>103</sup> (the sole requirement of the 1929 Convention), but also that they “undertake . . . to ensure respect for” the Convention. Thus, every Party to the Convention has explicitly accepted the obligation of “ensuring” that every other Party to the Convention complies with its provisions;<sup>104</sup> and has implicitly accepted the obligation

<sup>102</sup> See Gass, *Can the POW Convention Be Enforced?* 27 *JAG J.* 248.

<sup>103</sup> “In all circumstances” can logically only mean *under all of the circumstances set forth in Article 2*. Pictet, *Commentary* 18.

<sup>104</sup> One of the proposals made at the 1971 Conference of Government Experts said:

That there should be collective supervision and enforcement by all States Parties to the Geneva Conventions not engaged in the conflict, operating under the theory of collective responsibility implicit in Article 1 common to the Geneva Conventions of 1949.

1971 GE Report 114, Proposal No. 15. (*But see* note 110 *infra*.) Another indica-

of soliciting and encouraging compliance by nonparties who are involved in international armed conflict.

The importance of this new aspect of the Article cannot be overstated. The change first appeared in the preliminary work done by the ICRC during the period between the end of World War II and the convening of the Diplomatic Conference in April 1949.<sup>105</sup> In explaining this proposed addition to the wording of the Article, the ICRC said:

The ICRC believes it necessary to stress that if the system of protection of the Convention is to be effective, the High Contracting Parties cannot confine themselves to implementing the Convention. They must also do everything in their power to ensure that the humanitarian principles on which the Convention is founded shall be universally applied.<sup>106</sup>

It cannot be doubted that the moral pressure which could be applied to States engaged in international armed conflict, whether or not Parties to the Convention, by the many States which are Parties thereto and which are not involved in the particular conflict, would be a tremendous force for compliance—a force which would frequently be the determining factor in convincing a belligerent to decide to comply with the Convention in the international armed conflict in which it is then engaged. Unfortunately, experience since 1949 has demonstrated a strong reluctance on the part of Parties to the Convention to insist, or even to suggest, that Parties so engaged in international armed conflict have a duty to comply with its provisions.<sup>107</sup> This is

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tion of the generally broad interpretation which this obligation receives is the following:

Thus the International Committee of the Red Cross . . . appears to have taken the position that, since the United Nations had not acceded to the Geneva Conventions, each contracting party to these Conventions would remain responsible for their application by any contingents they might provide for the United Nations, and even that they had a moral obligation to do what they could to ensure such application by other contingents, too.

Seyersted, *United Nations Forces* 192.

<sup>105</sup> See, e.g., the draft convention submitted by the ICRC to the XVIIth International Red Cross Conference which met in Stockholm in August 1948 (*Draft Revised Conventions* 51) and the "Stockholm Draft" adopted by that Conference (*Revised Draft Conventions* 51).

<sup>106</sup> *Draft Revised Conventions* 5. Article 1(1) of the 1977 Protocol I is identically worded.

<sup>107</sup> *The White Paper on the Application of the Geneva Conventions of 1949 to the French-Algerian Conflict*, issued by the Algerian Office in New York in 1960, said (at 3):

In conclusion, we shall point to the need and responsibility of the signatories to the Geneva Conventions to use their good offices with the Government of France, to achieve its recognition of the obligation it has assumed "to respect and ensure respect" for the Geneva Conventions.

Despite this clarion call for nonbelligerent Parties to take the action which they had pledged to take in becoming Parties, in the detailed and well-documented discussion written by Dr. Bedjaoui concerning the attempts by the Provisional Gov-

particularly true with respect to neutral States,<sup>108</sup> but it is often true even as to allies.<sup>109</sup> Despite the clear and unambiguous provisions of the Convention, many States would very probably consider any such efforts as interference in the internal or domestic affairs of another sovereign State, even though compliance with the provisions of a

ernment of Algeria to secure compliance by the French with, first, Article 3 of the 1949 Conventions and, later, the Conventions *in toto*, there is not a single word to indicate the intervention of any other Party seeking to ensure respect for the Conventions by the French Government. Bedjaoui, *Law and the Algerian Revolution* 183-99; 207-20. Even the Government of the United Kingdom of Libya merely acted as a conduit between the Provisional Government of Algeria and Switzerland, the depositary. *Ibid.*, 183 & 189.

<sup>108</sup> One of the preambular clauses of Res. XXIII, Human rights in armed conflict, 12 May 1968, *Final Act of the International Conference on Human Rights*, U.N. Doc. A/CONF.32/41, at 18 (1968) stated:

*Noting* that States parties to the Red Cross Geneva Conventions [*sic*] sometimes fail to appreciate their responsibility to take steps to ensure the respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in an armed conflict.

While there were many private voices raised concerning the refusal of India for almost two years to comply with the specific release and repatriation provisions of the Convention after the December 1971 surrender by the Pakistani forces in East Pakistan (now Bangladesh), the official voices of Governments were conspicuous by their silence—or perhaps they were just too low in key to be heard, especially by India. During the course of the hostilities in Vietnam, some States found it possible to condemn the United States and the Republic of Vietnam for alleged violations of the Convention. However, this was probably only because of their animus due to the basic fact that the United States was involved in those hostilities. These same States made no effort whatsoever to seek to obtain compliance with the Convention by the Democratic Republic of Vietnam and by the Vietcong, despite their close relations with these two latter, both of which admittedly and publicly refused to comply with the Convention as a matter of official policy.

<sup>109</sup> Early in the United States involvement in Vietnam there was severe criticism of the United States because it appeared that no action was being taken by the latter while the armed forces of the Republic of Vietnam publicly violated the Convention. *See, e.g.*, Massachusetts Political Action for Peace, *What Are We Tied to in Vietnam?* (1964). Two years later the *New York Times* reported: "The major United States effort, besides setting up its own procedures, has been to persuade the South Vietnamese to go along. [South Vietnamese] Government officials, once openly hostile to the Convention, now grudgingly accept the American position. Much remains to be done, however, to persuade the average South Vietnamese soldier to stop using torture." *New York Times*, 1 July 1966, at 6 col. 3 Concerning the basic legal problem one commentator has stated: "The responsibility of one member of a multinational or combined force for the quality of prisoner treatment accorded by another is still undefined and awaits further debate to determine the extent to which a positive supervisory duty should be imposed." Smith, *Appraisal* 902. In Levie, *Maltreatment in Vietnam* 339, the statement was made that there was "no legal duty imposed upon the United States by the 1949 Convention to ensure that South Vietnamese troops did not maltreat personnel captured by them." As should be clear from the material immediately preceding and immediately following the quoted sentence, what was meant by that statement was that a Party was not *legally responsible* for its ally's failure to comply with the provisions of the Convention, particularly if it had used its best efforts, albeit unsuccessfully, to obtain compliance.

multilateral, almost universal, convention concerning the treatment of prisoners of war in international armed conflict would appear to be about as "external" and "nondomestic" a matter as could be found.<sup>110</sup>

In order to overcome the reluctance of States to act in this area, and to comply with the specific admonition which they accepted in Article 1,<sup>111</sup> the legal argument has sometimes been advanced that this article constitutes a waiver of the provisions of Article 2(7) of the Charter of the United Nations. However, such an argument appears to embark on too profound, too complicated, and too controversial a legal thesis. The subject matter involved is clearly international in scope; authority for the intercession of States not involved in a particular international armed conflict is clearly present in the specific wording of Article 1 and the obvious intention of the 1949 Diplomatic Conference; such intercession cannot be considered an unfriendly act or an unwarranted interference by the interceding State in the affairs of the States so engaged in international armed conflict; hence, there does not appear to be any need to support compliance with this provision with the extremely controversial argument concerning the inapplicability of the Charter restriction.

The undertaking of each Party to the Convention to respect it *under all circumstances*, together with the concomitant obligation of all other Parties to the Convention to ensure respect for it, results in an obligation which is absolute in character and which is not based upon reciprocity. It is in the nature of a statutory obligation owed to all other Parties, rather than a contractual obligation owed only to a

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<sup>110</sup> Perhaps as a result of the proposal made at the 1971 Conference of Government Experts (see note 104 *supra*), the 1972 Draft Additional Protocol prepared by the ICRC for the consideration of the 1972 Conference of Government Experts contained the following provision:

*Article 8. Co-operation of the High Contracting Parties.* 1. The High Contracting Parties being bound, by the terms of Article 1 common to the Conventions, to respect and to ensure respect for these Conventions in all circumstances, are invited to co-operate in the application of these Conventions and of the present Protocol, in particular by making an approach of a humanitarian nature to the Parties to the conflict and by relief actions. Such an approach shall not be deemed to be an interference in the conflict.

1972 *Basic Texts* 7. Obviously, this was intended as an invitation for concerted efforts by neutral Parties to obtain compliance with the provisions of the Convention in any international armed conflict in which they were not being applied. Unfortunately, but perhaps not unexpectedly, the arguments were quickly advanced at the 1972 Conference of Government Experts that this would amount to intervention, that there was a duty to respect national sovereignty, that there was a duty of noninterference in the domestic affairs of other States, etc. 1972 GE Report 185. Predictably, the proposed article was not included in the 1973 Draft Additional Protocol which was prepared by the ICRC as the working paper for the 1974 Diplomatic Conference.

<sup>111</sup> Not one State which ratified or acceded to the 1949 Convention made a reservation to the requirements imposed by Article 1.

Party's adversary in an international armed conflict.<sup>112</sup> The question then arises as to the extent to which belligerent Parties can be expected to continue compliance in the face of manifold violations, or even utter disregard, of the Convention by the other side.

When the United States Senate was determining whether it should give its advice and consent to the ratification of the 1949 Geneva Conventions, the then General Counsel of the Department of Defense made the following statement:

Should war come and our enemy should not comply with the conventions, once we both had ratified—what then would be our course of conduct? The answer to this is that to a considerable extent the United States would probably go on acting as it had before, for, as I pointed out earlier, the treaties are very largely a restatement of how we act in war anyway.

If our enemy showed by the most flagrant and general disregard for the treaties, that it had in fact thrown off their restraints altogether, it would then rest with us to reconsider what our position might be.<sup>113</sup>

During the armed conflict in Korea the United States complied with the 1949 Convention despite what amounted to almost total disregard of its provisions by the North Koreans and the Chinese Communists.<sup>114</sup> During the armed conflict in Vietnam the United States attempted to comply with the 1949 Convention despite the denial by both the North Vietnamese and the Vietcong that the Convention was even applicable.<sup>115</sup> Whether the United States, or any other Party to the Convention, will long continue to comply with the Convention in the face of a total disregard of its provisions or outright refusal to apply it by

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<sup>112</sup> U.N., *Human Rights*, A/7720, para. 82; Draper, *Recueil* 72. Unlike the 1949 Convention, the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* specifically provides, in Article II thereof, for a withdrawal of protection (limited to the particular property involved), where a violation occurs and persists.

<sup>113</sup> Testimony of Wilber M. Brucker, 1955 Hearing 11.

<sup>114</sup> None of the participants in those hostilities had as yet ratified or acceded to the Convention—but they agreed to be bound by its “humanitarian principles.” For documentation on the completely unsuccessful efforts of the ICRC to obtain compliance with the four 1949 Conventions by the North Koreans and later by the so-called Chinese People’s Volunteers during the hostilities in Korea (1950–53), see ICRC, *Conflit de Corée*, *passim*. For the manner in which compliance with the 1949 Prisoner-of-War Convention in those hostilities by the United Nations Command was used for aggressive purposes by the North Koreans and the Chinese, see U.N.C., *Communist War*, *passim*; U.K., *Treatment*, *passim*; and U.S., *POW*, *passim*.

<sup>115</sup> While there were undoubtedly numerous violations of the 1949 Convention by members of the armed forces of both the United States and the Republic of Vietnam, these were the acts of individuals, not the result of the national policy of the Parties concerned and, when evidence was available, the individual who committed the violation was punished therefor. See, e.g., *United States v. Griffen*.

the other side in a future international armed conflict remains to be seen. Certainly, should another such adversary adopt a similar attitude, it can be assumed that the United States might well do what it has said it would do—"reconsider what [its] position might be"—if for no other reason than to bring pressure to bear to obtain proper treatment for members of its armed forces held as prisoners of war, treatment which they did not receive in either of the two international armed conflicts mentioned.

Commentators generally appear to be agreed that few States can actually be expected to continue to apply the provisions of the Convention in the absence of reciprocity despite the provision to that effect contained in the Convention.<sup>116</sup> At first glance, from a humanitarian point of view, this appears to be extremely unfortunate, as it means that where one side fails to comply with the Convention, *all* prisoners of war held by both sides will be denied the safeguards of the Convention. On the other hand, however, if a Party can only ensure that members of its armed forces held as prisoners of war will receive the humanitarian treatment contemplated by the Convention by affording such treatment to the enemy prisoners of war which it holds in custody, this may, in the end, prove more humanitarian than unilateral compliance as it may well result in *all* prisoners of war held by both sides receiving Convention treatment. This outcome will, of course, depend upon many factors, the principal ones being the general national attitude of a Party toward compliance with its international commitments<sup>117</sup> and its concern for the well-being of its own

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<sup>116</sup> Miller, *The Law of War* 219, 230-31, 256, 261, & 262. This problem was demonstrated by events which occurred in the Middle East after the October 1973 hostilities. Syria refused to furnish the names of the Israeli prisoners of war held by her or to allow the ICRC to visit them. Israel, which had furnished the names of Syrian prisoners of war, then refused to allow the ICRC to visit them. The difficulties escalated and, finally, on 21 January 1974, the ICRC sent an appeal to all 135 States Party to the Convention which stated, in part:

. . . The competent authorities all too often make reciprocity a condition for the application, totally or in part, of the Geneva Conventions. This is equivalent, in prevailing circumstances, to the exercise of reprisals. . . . The ICRC emphasizes that commitments under the Geneva Conventions are absolute, and that States, each one to all others, bind themselves, solemnly and unilaterally, to observe in all circumstances, even without any reciprocal action by other States, the rules and principles which they have recognized as vital.

14 *I.R.R.C.* 76-77.

<sup>117</sup> In discussing the problem of compliance, one commentator draws what appears to be a valid distinction between States which are *law-abiding* (those which are "basically disposed toward compliance with the law of war as a matter of national policy") and States which are *law-defying* (those which are "neglectful of the law of war or disposed to violate it"). Baxter, *Compliance* 82.

captured personnel.<sup>115</sup>

One of the major reasons why the Austinian school of legal philosophy denies that international law is, in fact, law is because of its lack of sanctions, its lack of enforcement procedures in the face of violations—and the law of international armed conflict in general, and that portion thereof relating to prisoners of war in particular, is, unfortunately, largely subject to this criticism. As we have seen, great reliance was placed by the draftsmen of the 1949 Convention on the moral suasion to be applied by other Parties to the Convention who were not involved in the international armed conflict, all of whom would have agreed to “ensure respect” for its provisions. As we have also seen, this has been, and can be expected to continue to be, somewhat less than perfect as a method of obtaining substantial compliance with the Convention. What other forces for compliance with the Convention are available? One of the recognized experts in this area of the law has suggested five: (1) the threat of punishment of individual violators as criminals; (2) the threat of the award of “compensation” against States which violate the Convention and in favor of States which are the victims of such violations; (3) world public opinion; (4) third-party protection and inspection; and (5) instruction of members of the armed forces and annual reporting of the nature and extent of such training.<sup>119</sup>

The first two “forces” listed are obviously effective only as deterrents, as threats of action which will be taken after the act and, usually, against a defeated foe; the threat of punishment of individuals for violations of the Convention is probably just as effective as the threat of punishment inherent in any penal code;<sup>120</sup> the threat of the

<sup>118</sup> It is for this latter reason that it is particularly difficult to understand the attitude taken by the Soviet Union in 1941–42 when Germany, which held many, many more Russians as prisoners of war than the Soviet Union held Germans, was willing, on a strictly reciprocal basis, to take some small steps to ease the life of the captives held by both sides. The strenuous efforts of the ICRC to effectuate that willingness collapsed because of what can only be described as lack of interest on the part of the Soviet Union. 1 *ICRC Report*, 408–25. The miseries endured by, and the deaths of, literally hundreds of thousands of Russian prisoners of war in German hands can be attributed, at least in some small part, to that seemingly inexplicable decision of the Soviet Government of that time. 3 *ICRC Report* 55; Dallin, *German Rule* 426. It can only be explained by the belief, later clearly demonstrated by the same Soviet Government, that all Russian military personnel taken prisoners of war were of no further value and either had been, or had become, traitors to their country. Eisenhower, *Crusade in Europe* 469; Fehling, *One Great Prison* ix; Dallin, *German Rule* 420, 426. See notes VI-79 and VII-141 *infra*. see also Garthoff, *Soviet Military Doctrine* 251; Shub, *The Choice* 44–45; Bethell, *The Last Secret*, *passim*.

<sup>119</sup> Baxter, *Compliance*, *passim*.

<sup>120</sup> Of course, a member of the armed forces of a “law-abiding” State knows that he can anticipate punishment by his own national authorities, just as he would be punished for any other crime which he committed. See, e.g., note 115 *supra*

possible award of money damages<sup>121</sup> will not be very effective against a State which is fighting for its very existence and which is, in any event, spending much of its national treasure in prosecuting an international armed conflict.<sup>122</sup> World public opinion is both amorphous and ephemeral. It is exceedingly difficult to arouse and almost impossible to maintain for a sufficient period of time for it to be effective.<sup>123</sup> Third-party protection and inspection—on-the-spot policing of compliance by a neutral—is unquestionably an effective force for compliance. It is probably the most effective method of securing compliance with the 1949 Convention presently available.<sup>124</sup> And instruction of the members of the armed forces of Parties with respect to the conduct legally imposed upon their nation generally and on each of them personally by the provisions of the Convention is certainly a matter of absolute necessity if individual compliance from the great mass of the military is to be obtained.<sup>125</sup> But, of course, the imposition of war-time sanctions against a Party which violates, or permits violations of, the provisions of the Convention, discussed above,<sup>126</sup> is, most certainly, a sixth potential method of ensuring compliance with the provisions of the Convention—a method which has not, up to this point in time, been exploited.<sup>127</sup>

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<sup>121</sup> Compare Article 3, *Fourth Hague Convention of 1907*, and Article 131 of the 1949 Prisoner-of-War Convention, and Article 91 of the 1977 Protocol I.

<sup>122</sup> The "reparations" levied against Germany after World War I obviously did not deter Nazi Germany from embarking on World War II.

<sup>123</sup> Iklé, *After Detection—What?* 39 *For. Aff.* 208, 209. A notable exception was the success of the United States in mobilizing world public opinion against the war crimes trials of captured American pilots projected by North Vietnam in 1966. Levie, *Maltreatment in Vietnam* 344–45; Smith, *Appraisal* 902–04. Pakistan was considerably less successful in mobilizing world public opinion when India violated the Convention by continuing to detain the 90,000 Pakistani prisoners of war held by her for almost two years after the cessation of hostilities.

<sup>124</sup> See the discussion of the Protecting Power at pp. 262–293 *infra*.

<sup>125</sup> Article 127 of the Convention mandates the obligation "to include the study [of the Convention] in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population." Unfortunately, there is no requirement for reports concerning the extent of compliance with the foregoing provisions. However, see 1969 Implementation, II, at 12–137. See also 1973 Implementation, *passim*. Article 72 (3) of the 1973 Draft Additional Protocol was intended to rectify this omission. Concerning this problem, see pp. 93–96 *infra*.

<sup>126</sup> See pp. 19–22 *supra*. See also Levie, Working Paper 13–14.

<sup>127</sup> On several occasions the General Assembly of the United Nations has adopted resolutions [*e.g.*, G.A. Res. 2676, 25 U.N. GAOR, Supp. 28, at 77, U.N. Doc. A/8028 (1971)] calling upon "all parties to any armed conflict to comply with the terms and provisions of the Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949"; but it has never recommended that sanctions be imposed by the Security Council for noncompliance, no matter how patent the violation or violations may have been.

It should be obvious from the foregoing discussion that one area of the Convention which greatly needs review and improvement is that pertaining to its enforcement; and that the ideal sought—full compliance by all States engaged in international armed conflict—will only be attained when all Parties to the Convention affirmatively display a willingness to participate in the task of securing compliance without regard to the identity of the belligerents.

## E. ENTITLEMENT TO PRISONER-OF-WAR STATUS

We come now to another area of the Convention which was, foreseeably, inadequately drafted,<sup>128</sup> as has been demonstrated in the period since 1949: the identification of the individuals who are entitled to be designated prisoners of war and who therefore are entitled to the protection of all of the benefits and safeguards set forth in the Convention. Article 4, the basic Article dealing with the subject,<sup>129</sup> is the longest and most detailed Article in the Convention. Unfortunately, it contains a number of seeds of controversy.

Article 3 of the Regulations attached to the Second Hague Convention of 1899 and to the Fourth Hague Convention of 1907 both stated “[i]n the case of *capture by the enemy*, [members of the armed forces] have a right to be treated as prisoners of war.”<sup>130</sup> (Emphasis added.) Article 1 of the 1929 Convention gave prisoner-of-war status to those persons within the categories specified in the 1907 Hague Regulations who had been “captured by the enemy.” The 1947 Conference of Government Experts recommended that the new convention then under discussion “should itself enumerate these classes of persons” (and not incorporate the provisions of another treaty by reference), and that they should benefit from the protection of the convention “when they fall into enemy hands.”<sup>131</sup> These recommendations were adopted, and the draft convention prepared by the ICRC for the use of the 1948 Stockholm Conference defined prisoners of war as those individuals belonging to one of the categories listed therein “who have fallen into enemy hands.”<sup>132</sup> At Stockholm the quoted phrase was changed to “who have fallen into the power of the enemy.” This was included in

<sup>128</sup> Baxter, *Unprivileged Belligerency* 327.

<sup>129</sup> We shall here deal primarily with Articles 4 and 5 of the Convention. However, not only will a number of the other articles of the Convention—such as 33, 85, etc.—have an impact on this problem, but we must also bear in mind the cognate provisions of the First and Second Conventions.

<sup>130</sup> Only the French version of these Conventions was official. In Articles 4 and 7 of both sets of Regulations the French version defined prisoners of war as being “*au pouvoir de*” the Detaining Power; but for some unknown reason, while in Article 4 this was correctly translated into English as “in the power of,” in Article 7 it was translated as “into whose hands prisoners of war have fallen.” *See, e.g.*, 36 Stat. 2296-97; and Deltenre 258-61.

<sup>131</sup> 1947 GE Report 104.

<sup>132</sup> Article 3, *Draft Revised Conventions* 52.

the opening sentence of Article 4A of the 1949 Convention without change. While the change of wording from "captured by the enemy" to the present phrase "who have fallen into the power of the enemy" was one of the changes adopted in order to make the 1949 Convention more inclusive,<sup>133</sup> and is something of an improvement, it has, as we shall see, solved some problems while creating others.

Rhetorically, "capture" implies some affirmative act by the military forces of the capturing power. On the other hand, an individual can have "fallen into the power of the enemy" by means other than capture, *e.g.*, by voluntary surrender.<sup>134</sup> Thus, upon the final collapse of Germany in May 1945, the United States, the United Kingdom, and France contended that the hundreds of thousands of German soldiers who thereafter passed into their custody were not entitled to prisoner-of-war status because they had not been "captured" but had voluntarily submitted themselves to Allied custody; and the term "Surrendered Enemy Personnel" (SEP) was coined<sup>135</sup> in order to avoid the use of the term "prisoner of war," with all of the legal implications which adhered to it.<sup>136</sup> The major reason for substituting the term "fallen into the power of the enemy" for the word "captured" was to preclude the use of such a subterfuge in any future international armed conflict and to ensure that military personnel who surrender,

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<sup>133</sup> The representative of the ICRC (Wilhelm) who participated in the deliberations of Committee II (Prisoners of War) at the 1949 Diplomatic Conference explained that "it had been suggested that the words 'fallen into enemy hands' had a wider significance than the word 'captured' which appeared in the 1929 Convention." 2A *Final Record* 237. See also note II-377 *infra*, and Wilhelm, Status 29. For the sake of brevity, the terms will be used interchangeably herein except where the text indicates otherwise. (While the Diplomatic Conference made the first paragraph of Article 5 conform to Article 4A, it overlooked the fact that the second paragraph of Article 5 contained the phrase "fallen into the hands of the enemy"—and that the first paragraph of Article 12 contained the phrase "in the hands of the enemy Power.")

<sup>134</sup> By "voluntary surrender" is meant the act of the individual who, contrary to his long-term desire, concludes that in view of the situation with which he is then confronted (national capitulation, he is separated from the armed forces to which he belongs, he is lost and weaponless, etc.), it is not possible for him to continue resistance. (The problem of deserters and defectors is discussed at pp. 76–81 *infra*.)

<sup>135</sup> JAGA 1946/10384, 7 January 1947. The term "disarmed personnel" was also employed. *PMG Review*, III, 226–27. The same practice was followed after the surrender of Japan. 1 ICRC *Report* 539–40.

<sup>136</sup> *United States v. Kaukoreit*. The distinction was discontinued in March 1946. 1 ICRC *Report* 540. In the internal armed conflict which occurred in Malaysia in the early 1950s there was a reversal of this terminology, the term "captured enemy personnel" (CEP) being used to designate individuals who had been captured and who were to be treated as criminals, and the term "surrendered enemy personnel" (SEP) being used to designate individuals who had voluntarily given themselves up and who were to be treated as prisoners of war. This was apparently intended to encourage surrenders. Miller, *The Law of War* 258–59; Brewer, Chieu Hoi 51.

even after the collapse of their country's government or military effort, will still be entitled to receive the full protection of the Convention.<sup>137</sup>

Having specified the event (falling into the power of the enemy) the occurrence of which would entitle certain individuals to prisoner-of-war status, it was necessary to identify in some fashion the individuals who would so qualify. This was accomplished by following the method used in predecessor conventions: the enumeration of general categories. Because so many problems are involved in determining the extent of coverage in almost every category, an individual, detailed analysis is deemed necessary.

### 1. Members of the Armed Forces

All of the members of the regular armed forces of a nation fall within this category.<sup>138</sup> The precise military elements which constitute the armed forces of a State is strictly a matter of national law.<sup>139</sup> Each State may, and usually will, have laws specifying the components which are included within its regular armed forces.<sup>140</sup> As we shall see,<sup>141</sup> in the next subparagraph of this Article of the Convention there are four specific requirements which must be met in order to entitle an individual within the category there dealt with to prisoner-of-war status. These four requirements, briefly stated, are: (1) having a responsible commander; (2) wearing a fixed distinctive sign; (3) carrying arms openly; and (4) operating in accordance with the laws and customs of war. This enumeration does not appear in subparagraph 1, dealing with the regular armed forces. This does not mean that mere membership in the regular armed forces will automatically entitle an individual who is captured to prisoner-of-war status if his

<sup>137</sup> Draper, *Recueil* 109; Kunz, *Treatment* 105; Olgiati, *Croix-Rouge* 719; Krafft, *Present Position* 137-38. It will be noted that nowhere in the Convention is the term "prisoner of war" defined. Flory, *Nouvelle conception* 54.

<sup>138</sup> While subparagraph (1) of Article 4A uses the term "armed forces" and subparagraph (3) thereof uses the term "regular armed forces," this appears merely to have been bad draftsmanship, the intent of the draftsmen having been the same in both cases. And, of course, these terms include all of the uniformed services which constitute a part of the armed forces of a particular country: army, navy, air forces, marines, coast guard, frontier guards, etc. (In the United States and, perhaps, in some other countries, the word "regular" is often used to designate the professional military careerist. This is not the sense in which it is used here. The conscript, the wartime volunteer, the reservist called up for active service, and the career soldier are all members of what is here termed "regular armed forces." See, e.g., *In re Territo* 156 F2d at 146.) Article 43(1) of the 1977 Protocol I states that "[t]he armed forces of a Party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to the Party for the conduct of its subordinates." See also Article 43(3) thereof.

<sup>139</sup> Lauterpacht-Oppenheim 255. This does not mean, however, that a State may, by domestic legislation, bring otherwise unprivileged combatants within the protection of the Convention.

<sup>140</sup> See, e.g., 10 U.S.C. §101(4); and *Swiss Manual* para. 54.

<sup>141</sup> See pp. 44-45 *infra*.

activities prior to and at the time of capture have not met these requirements.<sup>142</sup> The member of the regular armed forces wearing civilian clothes who is captured while in enemy territory engaged in an espionage or sabotage mission is entitled to no different treatment than that which would be received by a civilian captured under the same circumstances.<sup>143</sup> Any other interpretation would be unrealistic, as it would mean that the dangers inherent in serving as a spy or saboteur could be immunized merely by making the individual a member of the armed forces; and that members of the armed forces could act in a manner prohibited by other areas of the law of armed conflict and escape the penalties therefor, still being entitled to prisoner-of-war status.<sup>144</sup>

As long as members of the regular armed forces are in uniform there should be no problem with respect to their entitlement to prisoner-of-war status.<sup>145</sup> There is no legal basis whatsoever for denying

<sup>142</sup> The official ICRC discussion of the Convention refers only to the need for members of the regular armed forces to comply with the requirement for a fixed distinctive sign, a requirement which is, of course, normally met by the wearing of the uniform. Pictet, *Commentary* 52. This is logical because it can be assumed that in the regular armed forces there will always be a responsible commander; that the uniformed individual may carry arms in any manner that he desires; and that if he violates the laws and customs of war he is still entitled to prisoner-of-war status even though he may be tried for war crimes. See note 144 *infra*. While the Delegate of the Soviet Union at the 1949 Diplomatic Conference appeared to argue that none of the four requirements was applicable to members of the armed forces (2A *Final Record* at 466), it is believed that the interpretation here given is more appropriate and much more widely accepted.

<sup>143</sup> Article 29, second paragraph, 1907 *Hague Regulations*; *British Manual* para. 96; *U.S. Manual* para. 74. However, if he claims to be entitled to prisoner-of-war status he is entitled to have his claim determined by a "competent tribunal." See discussion of Article 5(2), pp. 55-59 *infra*. See also *Public Prosecutor v. Koi*; *Ali and Another v. Public Prosecutor*; *Krofan v. Public Prosecutor*; and *Military Prosecutor v. Kassem and Others*. For discussions of the Privy Council decisions in *Koi* and *Ali*, see Baxter, *Qualifications* 290; and Elman, *Prisoners of War* 178.

<sup>144</sup> A distinction must be made between a conventional war crime allegedly committed by an individual concededly within the purview of Article 4 who, under Article 85, retains prisoner-of-war status at least until convicted (see pp. 379-382 *infra*), and other types of offenses such as acting as a spy or saboteur while wearing civilian clothes. *Ex parte Quirin*; *Colepaugh v. Looney*; *Krofan v. Public Prosecutor*. For a further discussion of this problem see Draper, *Recueil* 109-10. See also Article 46 of the 1977 Protocol I. (It should be observed that spying, while punishable under the law of war, is not a violation of international law. *U.S. Manual* para. 77; *British Manual* para 326; *Swiss Manual* paras. 36 & 38; Baxter, *Unprivileged Belligerency* 333.)

<sup>145</sup> The *Swiss Manual* para. 55 correctly states: "In case of capture, the uniform creates a presumption that the individual wearing it belongs to the armed forces." (Trans. mine.) See also Article 40 of the 1973 Draft Additional Protocol. Article 46(2) of the 1977 Protocol I specifically provides that a member of the armed forces gathering information in enemy territory "shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces."

the benefits and safeguards of the Convention to acknowledged members of regular armed forces on the ground that they are guilty of making "aggressive war" and are, therefore, "war criminals," as was done by the North Vietnamese during the hostilities in Vietnam (1965-73).<sup>146</sup>

This subparagraph also includes "members of militias or volunteer corps forming part of such armed forces." Of course, when such troops are, by domestic law, incorporated into and made a part of the armed forces of the country, there can be no question of their entitlement to prisoner-of-war status and to the benefits and safeguards of the Convention.<sup>147</sup>

## 2. Members of Other Militias and Members of Other Volunteer Corps, Including Those of Organized Resistance Movements, Belonging to a Party to the Conflict and Operating in or outside Their Own Territory, etc.

Here we have the most complicated, most controversial, and most unintelligible provision of the Article. In an effort to clarify the provisions of this subparagraph to the maximum extent possible, it will be necessary to analyze it clause by clause, and to include in the analysis the limiting provisions which immediately follow it.

### a. MEMBERS OF OTHER MILITIAS AND MEMBERS OF OTHER VOLUNTEER CORPS

When this subparagraph of Article 4 was being discussed and re-drafted at the 1949 Diplomatic Conference, the representative of the United Kingdom requested that there be an independent reference to militias inasmuch as in England militias were not a part of the regular armed forces nor were they voluntary corps. As this particular problem was not mentioned again in the lengthy debate on this subparagraph which followed, it must be assumed that the United Kingdom request is the reason for the reference to militias other than those

<sup>146</sup> See notes 142 and 144 *supra*, and notes 157 and VI-177 *infra*. Concerning the "Commissar Decree," issued by the Nazis in 1940, evidence was given to the IMT that it provided that "political commissars of the army are not recognized as prisoners of war, and are to be liquidated at the latest in the transient prisoner of war camps." *I.M.T.* 472. Under such an interpretation, reminiscent of the Religious Wars of the sixteenth and seventeenth centuries, law becomes irrelevant. Concerning the "Commando Order," issued by Hitler in 1942, under which uniformed members of the Allied armed forces engaged in missions behind the German lines were to be dealt with summarily ("slaughtered to the last man"), another gross violation of the rights of members of the regular armed forces, see *I.M.T.* 471; *The Dostler Case*; and Kalshoven, *Reprisals* 184-93.

<sup>147</sup> Thus, in the United States when Reserve or National Guard units are called to active duty in the Federal service they are just as much a part of "the armed forces of a Party to the conflict" as are the regular (permanent) units. The same is true in the United Kingdom with respect to the Territorial Army, the Army Emergency Reserve, and the Home Guard. *British Manual* para. 89 n.1. See Jones, *Status of the Home Guard in International Law*, 57 *L.Q. Rev.* 212.

which form a part of the regular armed forces.<sup>148</sup> It presumably would be applicable to the members of any militia which is not, under national law, a part of the armed forces of the country. This will probably be a comparatively rare occurrence.

### b. INCLUDING THOSE OF ORGANIZED RESISTANCE MOVEMENTS

The inclusion of this clause, and the limiting provisions which follow it, a direct result of the experiences of World War II, was considered to be a major breakthrough in enlarging the group of individuals who would, upon falling into the power of the enemy, be entitled to the status of prisoners of war.<sup>149</sup> It is now apparent that, considering the aforementioned limiting provisions, this attempted enlargement of the provisions of prior conventions accomplished little or nothing.

During World War II so-called resistance movements sprang up or were created within the territory of most of the countries occupied by an enemy, whether the occupation was partial or total.<sup>150</sup> It was with respect to the status of members of these types of resistance movements that the 1949 Diplomatic Conference was attempting to make provision.<sup>151</sup> However, because of a perhaps understandable reticence

<sup>148</sup> The British position is stated at 2A Final Record 237. The Working Party of the Special Committee recommended the double reference to militias (*ibid.*, 414-15) and it was adopted without real debate. *Ibid.*, 467, 477-78, & 561. The ICRC errs in asserting that the captioned provision means "other than those enlisted in the regular army." (Emphasis added.) 1973 *Commentary* 48 n.14. See note 138 *supra*.

<sup>149</sup> The official ICRC discussion of the Convention refers to this provision as "solving one of the most difficult questions—that of partisans." Pictet, *Commentary* 49. This was a reiteration of what Committee II (Prisoners of War) of the 1949 Diplomatic Conference had said. 2A *Final Record* 561. The two statements were both overly optimistic. Baxter, *Geneva Conventions* 66.

<sup>150</sup> Of course, allies, displaced governments, and governments-in-exile continued to fight on so that in most cases there was no question of the continued existence of an international armed conflict. The situation in France, where the government in power on the ground had signed an armistice agreement while a government-in-exile, newly created, continued the conflict, was different and created a number of unusual legal problems. Pictet, *Recueil* 87-88.

<sup>151</sup> It is important to bear in mind that in drafting Article 4A(2) the 1949 Diplomatic Conference was concerned solely with the World War II "partisan," "guerrilla," "resistance fighter," etc.—different names for a particular category of participant in *international* armed conflict—and not at all with the so-called "freedom fighter," or "member of a national liberation movement," participants in an *internal* armed conflict, a war of independence. The Soviet Union has implicitly admitted this distinction by opting to attempt to convert wars against colonial powers into international armed conflicts. Soviet International Law 402. That many of the newly independent States see the Soviet approach as a method of helping the various groups fighting for independence was demonstrated by the discussions concerning the amendment to Article 1 of the 1973 Draft Additional Protocol adopted by Committee I at the 1974 Diplomatic Conference and approved at the Plenary Meeting of the 1977 session of the Conference as Article 1(4) of

on the part of the representatives of some countries which had not suffered occupation and who feared the possible adverse future consequences of an overly broad provision,<sup>152</sup> a number of limitations were introduced, limitations which, in many cases, appear to negate the possibility that members of the usual resistance group could qualify for prisoner-of-war status if they should fall into power of the enemy.

If the term "organized" was used as a method of eliminating the casual soloist, it was unnecessary, as this type of individual was already denied prisoner-of-war status because he would not be "commanded by a person responsible for his subordinates."<sup>153</sup> The use of the term "organized" here can, however, certainly be accepted as a justifiable excess of caution.

### c. BELONGING TO A PARTY TO THE CONFLICT

Our concern throughout this treatise is, of course, with international armed conflict—armed conflict between States. It is understandable that it was considered appropriate that for individuals to receive the protection afforded by a convention regulating international armed conflict, they should be required to have some organizational connection with one of the States which is a Party to the conflict. This provision arose out of the events of World War II; but, strangely enough, it does not even provide with any degree of certainty for all of the situations which are recognizable as having occurred during that conflict. The Soviet Government could and did claim the resistance movement which operated behind German lines in the Soviet Union; the United States Government could and did claim the resistance movement which operated against the Japanese in the occupied Philippines. Each of these representative resistance movements was fighting in support

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the 1977 Protocol I. Forsythe, *The 1974 Diplomatic Conference on Humanitarian Law: Some Observations*, 69 *A.J.I.L.* 77; Suckow, *The Development of International Humanitarian Law*, *ICJ Rev.*, June 1974, at 50. See also 1969 Reaffirmation 101-02.

<sup>152</sup> The following apt statement appears in 2A *Final Record* 469: "During the course of further discussion Captain Mouton (Netherlands) said that there were two points of view: that of the Powers likely to be Occupying Powers in the event of another war (those were usually the great Powers) and the Powers whose countries were likely to be occupied (the smaller Powers). . . ."

<sup>153</sup> Schwarzenberger, *Human Rights* 252. See also Fooks, *Prisoners of War* 34-35. The phrase quoted in the text ("commanded by a person responsible for his subordinates"), a reiteration of one of the provisions of Article 1, 1907 *Hague Regulations*, had already been included in the draft article. It is discussed at length at pp. 45-46 *infra*. The two terms, "organized" and "commanded by a person responsible for his subordinates," should be understood in the same sense. Bindschedler 41. See also Article 41 of the 1973 Draft Additional Protocol. This Article, with editorial changes, became Article 43(1) of the 1977 Protocol I. The relevant portion now states: "Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict."

of, and with the concurrence of, a government with an army in the field and indubitably "[belonged] to a Party to the conflict." But what of the resistance movements in such countries as Norway,<sup>154</sup> Denmark, or the Netherlands? Is a "government-in-exile" a "Party to the conflict"?<sup>155</sup> And what of a situation such as that which existed in Yugoslavia where one indigenous resistance movement, which would probably have been repudiated by the government in power at the time of the occupation, fought the occupying Power, while another, which probably would have been acceptable to that government, fought the other resistance movement and supported the occupying Power? And what of the situation in Italy where, after Mussolini's downfall, an indigenous resistance movement opposed the Badoglio Government and supported the Germans? And finally, what of the situation in France where the indigenous resistance movement opposed the Government in actual power and supported the government-in-exile?<sup>156</sup> While none of these situations is specifically covered by the quoted provision of the Convention, each one of them, and others not mentioned, had actually occurred during the hostilities which had ended just shortly before the provision was drafted. It is not difficult to conclude that it was intended to cover each of the instances in which the indigenous re-

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<sup>154</sup> It is here assumed that a government such as that of Quisling in Norway during World War II was not an indigenous government but was merely a masquerade for the military government of the Occupying Power. This assumption is not made with respect to the contemporaneous Pétain Vichy Government of France.

<sup>155</sup> Subparagraph 4A(3) gives prisoner-of-war status to "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." See pp. 59-60 *infra*. At the 1949 Diplomatic Conference the suggestion was made that a similar provision should be included with respect to members of organized resistance movements. 2A *Final Record* 388. No action was taken with respect to this suggestion. Such a provision was proposed anew in Article 38(1) of the 1972 Draft Additional Protocol (1972 *Basic Texts* 14-15) and in the first paragraph of Article 42 of the 1973 Draft Addition Protocol (1973 *Commentary* 47, 50). It is now included in Article 43(1) of the 1977 Protocol I.

<sup>156</sup> Article X of the 1940 *Franco-German Armistice* required the French Government to "forbid French citizens to fight against Germany in the service of States with which the German Reich is still at war" and provided (according to the unofficial English version) that those individuals who so fought would be treated as "insurgents." (The unofficial English version of Article XIV of the 1940 *Franco-Italian Armistice* used the term "combatants outside the law.") After the Allied landing in France in June 1944 the German commander announced that captured members of the French Forces of the Interior (FFI) would be treated as unprivileged combatants and the German army actually executed 80 of them at one time. The FFI then executed 80 members of the German army captured at Annecy. The ICRC subsequently obtained informal verbal assurances that captured members of the FFI would be treated as prisoners of war. 1 *ICRC Report*, 520-24. Kalshoven, *Reprisals* 193-97. (The examples given in the text are not intended to be exhaustive.)

sistance movement was opposing an Occupying Power; it is somewhat more difficult to establish a basis for bringing under the Convention those resistance movements which supported the invader. Can it be said that they "belonged" to a Party to the conflict? It certainly must be assumed that the governmental representatives present at the Diplomatic Conference in Geneva in 1949 were cognizant of all of these variations—but did they intend that the provisions of the Convention be applicable in all of these cases?<sup>157</sup> The Record of the Conference does not answer this question.

It has been mentioned above that the Soviet and United States Governments, each a Government of a State which was "a Party to the conflict," publicly acknowledged the resistance movement which was acting in its support.<sup>158</sup> Unfortunately, the situation is not always so clear-cut, and the Government of the Party to the conflict is not always so eager to claim or to acknowledge the relationship. In this event the relationship may be established on behalf of the resistance movement by other means, provided that at least a *de facto* relationship is shown.<sup>159</sup> However, it is extremely unlikely that the existence

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<sup>157</sup> One extremely distressing facet of this problem is the inordinate likelihood that in any international armed conflict in which the Soviet Union is involved, it will take the position that members of any resistance movement supporting it, or its allies, are fighting in a "just" cause and are, therefore, entitled to prisoner-of-war status; but that any such individuals supporting its adversary are "aggressors" engaged in an "unjust" war and, accordingly, are not entitled to the benefits and safeguards of the Convention. Trainin, *Guerrilla Warfare* 561-62; Kulski, *Some Soviet Comments* 349; *Soviet International Law* 402 & 423; Kunz, *Treatment* 106; U.K., *Treatment* 1 & 32; Miller, *The Law of War* 223-24 & 231. The laws of war (*ius in bello*) apply equally to both sides in all international armed conflicts, no matter how they originate. Lauterpacht-Oppenheim 218; Ford, *Resistance Movements* 369; SIPRI 2-3. Moreover, "crimes against peace" (the war crime of making a war of aggression) can be committed only by national policymakers, not by individual members of the armed forces. ILC, *Nürnberg Principles*, para. 117; Levie, *Maltreatment in Vietnam* 351 n.140; SIPRI 1.

<sup>158</sup> Some of the other Governments took similar action. *See, e.g.*, the Royal Dutch Emergency Decree No. E62 of 5 September 1944. *See also* 11 Dept. State Bull. 263, containing a declaration of the United States concerning the Czechs fighting in occupied Czechoslovakia. Frequently, however, Governments are reluctant to acknowledge irregular combatants. *See* U.N., *Human Rights*, A/8052, para. 175. The ICRC has said that the requirement of belonging to a Party to the conflict "creates the link whereby a subject of international law can be held internationally responsible for acts carried out by members of resistance movements." 1973 *Commentary* 50.

<sup>159</sup> Pictet, *Commentary* 56-58. Pictet suggests that specifics such as the delivery of arms and other war supplies by the Party to the conflict to the resistance movement establish the *de facto* relationship. *Ibid.*, 57 n.1. *See also* U.N., *Human Rights*, A/8052, para. 175. A subsequent ICRC document suggested that this requirement could be met either by *de facto* liaison with a State or by obtaining "recognition by one or more States, or even by the international community." 1971 GE Documentation, VI, at 17. If the second alternative means recognition by a State other than the one to which the resistance movement allegedly "belongs," or

of even a de facto relationship would be accepted as evidence that the resistance movement "belonged" to a Party to the conflict in the face of a denial of any relationship by that Party.

The situation which was either not considered as possible by the 1949 Diplomatic Conference, or which was implicitly rejected by the Conference without discussion, was the eventuality that the claim might be put forward that individuals who are members of a group which admittedly does not belong to any Party to the conflict and which is, therefore, waging a "private war" against one of the belligerent States, are entitled to prisoner-of-war status when they fall into the power of the State against which the efforts of the group have been directed. Writers in this field have rejected such a claim;<sup>160</sup> and one well-reasoned opinion of an Israeli military court has specifically held that inasmuch as no Government with which Israel was in a state of war accepted responsibility for the acts of the Popular Front for the Liberation of Palestine, its members who fell into the power of the Israeli armed forces were not entitled to the benefits and safeguards of the Convention.<sup>161</sup>

*d. OPERATING IN OR OUTSIDE THEIR OWN TERRITORY,  
EVEN IF THIS TERRITORY IS OCCUPIED*

This is one provision of the subparagraph which liberalizes rather than limits. The usual concept of the organized resistance movement is of a group operating in home territory occupied by the enemy. Under this provision that concept is inapplicable; the group may also

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an ally thereof, this would undoubtedly be considered by many States to be an unwarranted interference in the affairs of other States. It strongly resembles the premature recognition of belligerency of another era.

<sup>160</sup> See, e.g., Bindschedler 40; and Draper, Relationship 202. The argument has been advanced that inasmuch as the French version of Article 4A(2) uses the word "*appartenant*," it is not necessary that the resistance movement actually "belong" to a Party in the English sense of that word. Apart from the fact that the English and French versions are equally authentic, one major difficulty with that argument is that French-English dictionaries translate "*appartenir*" as "to belong [to]; to be owned [by]." See, e.g., Harrap's *New Standard French-English Dictionary*, I, at A:49 (1972). It is clear that in this instance, unlike a number of others, the French and English texts are identical.

<sup>161</sup> *Military Prosecutor v. Kassem*, 42 I.L.R. at 477-78. The correctness of that decision was demonstrated by the action of an Arab guerrilla group, the headquarters of which proudly announced to the press that it had captured an Israeli soldier during a raid into Israel and that he had been "subjected to interrogation by a special committee before he was executed." *St. Louis Post-Dispatch*, 3 October 1974, at 7A, col. 2. It does not take much imagination to interpret "interrogation by a special committee" as a euphemism for torture; and as the individual captured was a uniformed Israeli soldier taken during the course of a raid into Israel, it would be interesting to learn the alleged justification for his execution. No Arab State claimed this group—but there are those who contend that if its members are captured they are entitled to the full panoply of the protections of the Convention!

operate outside of its national territory. Probably what the draftsmen had in mind was the resistance group behind enemy lines which withdraws as the enemy withdraws so that eventually it is operating in the territory of an ally which was also occupied by the common enemy, or it is operating in the enemy's own territory. This provision does not appear to create any insoluble legal problems; but what a State will actually do when members of an organized resistance movement composed of enemy subjects fall into its power in its own territory remains to be seen.

e. *THE FOUR CONDITIONS*

During the Franco-Prussian War (1870–71) the Germans summarily executed as a *franc tireur* any individual found bearing arms who was not able to produce a special authorization from the French Government.<sup>162</sup> Article 9 of the 1874 Declaration of Brussels<sup>163</sup> proposed to regularize the status of these individuals by specifically granting protection to members of militia and volunteer corps who met four listed conditions.<sup>164</sup> These conditions were repeated in Article 1 of the 1899 Hague Regulations, in Article 1 of the 1907 Hague Regulations, and in the footnote to Article 1 of the 1929 Prisoner-of-War Convention. In the 1949 Convention the four conditions were once again included in the text itself and, in addition to being applicable, as heretofore, to members of "militias and volunteer corps," they were made applicable to members of organized resistance movements. In the modern world, it is in this latter respect that the provision assumes major importance. But it must be emphasized that in order to qualify for prisoner-of-war status, the members of an organized resistance movement must clearly fulfill each and every one of these four conditions,<sup>165</sup> and that most Capturing Powers will deny the benefits and

<sup>162</sup> Fooks, *Prisoners of War* 34.

<sup>163</sup> While this Declaration, based largely on the Lieber Code (*see* note 28 *supra*), never entered into force, it has been a major source of many of the rules included in subsequent international conventions which did become effective.

<sup>164</sup> One noted Soviet jurist designated this decision as a victory for the "representatives of democratic states with militia systems." Trainin, *Guerrilla Warfare* 541. He thereafter proceeds to indicate why several of the four conditions cannot possibly be accepted for application to organized resistance movements. *Ibid.*, 555–60. However, at the 1949 Diplomatic Conference the Soviet representative strongly supported the adoption of the Stockholm draft which included the four conditions. 2A *Final Record* 242, 410, 423, 428.

<sup>165</sup> *Military Prosecutor v. Kassem*, 42 *I.L.R.* at 476 & 480. One author draws a distinction between those requirements for qualification for prisoner-of-war status which relate to the resistance group itself and those which relate to the individual. Bindschedler 40–44. The ICRC has now adopted this distinction, although its listing does not coincide exactly with that of Madame Bindschedler-Robert. 1973 *Commentary* 49. There is considerable merit to the drawing of this distinction—which means that in certain respects the individual's status is determined by matters over which he has little or no control. *See* text in connection with note 193 *infra*.

safeguards of the Convention to any such individual who is in any manner delinquent in compliance. It must also be emphasized that if an individual is found to have failed to meet the four conditions, this may make him an unprivileged combatant but it does not place him at the complete mercy of his captor, to do with as the captor arbitrarily determines. He is still entitled to the general protection of the law of war, which means that he may not be subjected to inhuman treatment, such as torture, and he is entitled to be tried before penal sanctions are imposed.<sup>166</sup>

*First condition: that of being commanded by a person responsible for his subordinates.* As we have already seen,<sup>167</sup> this condition is closely akin to the requirement that the resistance movement be one which is "organized." But exactly what is the meaning of the phrase "commanded by a person responsible for his subordinates"? Who is such a person? One interpretation is that it means "responsible to some higher authority."<sup>168</sup> However, it would seem equally important that the responsibility go down as well as up. In other words, there must be some commander who is giving orders to the individuals who are actually conducting belligerent operations: a commander who can expect that his orders will normally be obeyed and who can enforce some type of disciplinary action to ensure that those orders will be obeyed.<sup>169</sup> In the words of the ICRC, "the 'responsible leader' estab-

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<sup>166</sup> 1971 GE Documentation VI, at 19. In adhering to the Convention, the Provisional Revolutionary Government of the Republic of Vietnam (the Vietcong) made a reservation in which it stated that it would not recognize the "conditions" set forth in Article 4A(2) "because these conditions are not appropriate for the cases of people's wars in the world today." Quoted in McDowell (ed.), *Digest of United States Practice in International Law 1975*, at 812. (The adherence of the Republic of Guinea-Bissau, the former Portuguese colony of Guinea, contains an almost identical reservation.)

<sup>167</sup> See note 153 *supra*.

<sup>168</sup> Lauterpacht-Oppenheim 257 n.1. Article 42(1) (a) of the 1973 Draft Additional Protocol proposed changing the wording of this condition to: "that they are under a command responsible to a Party to the conflict for its subordinates." The ICRC explanation of the proposed change was that "responsibility for the acts of subordinates means that the command is answerable for them to the Party to the conflict which bears the responsibility on an international plane." 1973 *Commentary* 50. Such a provision is now included in Article 43(1) of the 1977 Protocol I. See note 153 *supra*.

<sup>169</sup> *British Manual* para. 91 n.1, advances the thesis that in order to meet the first condition the individual must be subject to "military law," apparently meaning the national statutory military code governing the conduct of members of the regular armed forces. For all practical purposes, this thesis would make Article 4A(2) an exercise in futility. In the example there referred to, the "Waffen S.S." divisions, it is stated that the S.S. organization "had its own code of rules, and courts of a kind." This appears to be just about all that can be asked of a unit which, by definition, is not a part of the regular armed forces. (Of course, in any event, no claim could be made that the "Waffen S.S." was a resistance movement. It did have some of the characteristics of an "other militia.") Article 43(1) of the

lishes a link with the subject of international law [the Party to the conflict], while constituting the guarantee of a certain order, a certain discipline ensuring respect for international law."<sup>170</sup> It would seem clear that this was the objective sought in the original drafting of this condition—a method of securing maximum compliance with the laws and customs of war.<sup>171</sup>

One major aspect of the problem of being commanded by a person responsible for his subordinates which appears to have been largely overlooked is how the member of an organized resistance movement who is captured by the armed forces of the Occupying Power establishes that he has complied with this condition and that he is, therefore, entitled to be classified as a prisoner of war. The other three conditions, as we shall see, present factual problems which can be resolved in the same manner as any other factual problem. But how does the captured individual establish, and to the satisfaction of an enemy not inclined to magnanimity, that he is a member of an organized resistance movement with a responsible commander? To name or otherwise identify his immediate commander or any other persons in the resistance movement's chain of command would, except in a few very unusual cases, spell extinction for the movement. It has frequently been argued that it is virtually impossible for captured members of an organized resistance movement to establish that they have complied with the four conditions and are entitled to prisoner-of-war status. This is certainly true of the first condition. If the members of an organized resistance movement wish to assure their entitlement to prisoner-of-war status if captured, their compliance with the second, third, and fourth conditions is not impossible—although it will very considerably reduce combat effectiveness; but to establish compliance with the first condition will make continued operations by organized resistance movements virtually impossible.<sup>172</sup>

*Second condition: that of having a fixed distinctive sign recognizable at a distance.* The objective of the original draftsmen of this provision was probably twofold: (1) to protect the members of the armed forces of the Occupying Power from treacherous attacks by apparently

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1977 Protocol I requires only that there be "an internal disciplinary system." See note 153 *supra*.

<sup>170</sup> 1971 GE Documentation, VI at 13.

<sup>171</sup> The word "ensuring" is frequently used (or misused) in this context. Full compliance with the laws and customs of war can never be "ensured," no matter how well trained the members of an armed force or of an organized resistance movement may be, nor how strict the discipline. Realistically, all that can be sought is maximum compliance so that violations are the exception, rather than the rule.

<sup>172</sup> Having called the four conditions a "victory" (see note 164 *supra*), Trainin asserts that the first condition is "directed against the very substance of a war of the people." Trainin, *Guerrilla Warfare* 558.

harmless individuals;<sup>173</sup> and (2) to protect innocent, truly noncombatant civilians from suffering because the actual perpetrators of a belligerent act seek to escape identification and capture by immediately merging into the general population.<sup>174</sup> Each of the two requirements for the distinctive sign (that it be “fixed” and that it be “recognizable at a distance”) can create problems, cause disputes, and give rise to charge and countercharge.

What is meant by a “fixed” distinctive sign? Must it be sewed on or will a handkerchief tied around the arm (which can be restored to its normal use with a single tug) suffice? Does a distinctive cap, which can be quickly removed and thrown away, meet the requirement? These are but a few of the problems of application which can arise. These and many others have already arisen and had not been satisfactorily resolved when the identical terms used in the two prior Hague Conventions and in the 1929 Prisoner-of-War Convention were incorporated into Article 4A(2) of the 1949 Convention.

The ICRC has made several statements attempting to offer acceptable interpretations of the meaning of the term “fixed distinctive sign.” In 1960 it stated that the sign “must be worn constantly”;<sup>175</sup> but in 1971 it backtracked somewhat when it said that the sign must be “fixed, in the sense that the resistant should wear it throughout all the operation in which he takes part.”<sup>176</sup> Moreover, at that same time the ICRC stated that the sign “might be an armband, a headdress, part of a uniform, etc.”<sup>177</sup> During World War II the listed items were, on various occasions, used by resistance groups; but they were frequently removed and disposed of at crucial moments in order to enable the individual to escape being identified as a member of the resistance and as a participant in the particular belligerent act which had occasioned the search by the Occupying Power—in order to enable him “to become invisible . . . in the crowd.”<sup>178</sup>

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<sup>173</sup> One author aptly states: “Thus, if a guerrilla were to disguise himself as an innocent peasant, overtake a group of soldiers, and turn around to fire on them, this would be treachery, and a violation of the laws and customs of war.” Bindschedler 43–44. See also Lubrano 21.

<sup>174</sup> Another apt statement by Madame Bindschedler-Robert: “[H]e may try to become invisible in the landscape, but not in the crowd.” Bindschedler 43.

<sup>175</sup> Pictet, *Commentary* 59. This conclusion was contrary to the opinion of the Working Party of the Special Committee at the 1949 Diplomatic Conference. 2A *Final Record* 424.

<sup>176</sup> 1971 GE Documentation, VI, at 11.

<sup>177</sup> *Ibid.*

<sup>178</sup> See note 174 *supra*. See also Fooks, *Prisoners of War* 36. He may legally discard the distinctive sign after the particular operation has been finally concluded. 1973 *Commentary* 51.

If this provision is to have any meaning at all,<sup>179</sup> it must be interpreted, or redrafted, in such a manner as to ensure that the “fixed distinctive sign” is indeed both *fixed* and *distinctive*. The candlestick maker by day may legally become the resistance fighter by night—but while he is so acting he must wear some item which will identify him as a combatant, thereby distinguishing him from the general population, and that item must be such that he cannot remove and dispose of it at the first sign of danger. A handkerchief, or rag, or armband slipped onto or loosely pinned to the sleeve does not meet this definition. An armband sewed to the sleeve, a logotype of sufficient size displayed on the clothing, a unique type of jacket—these will constitute a fixed and distinctive identifying insignia, effectively separating the combatant of the moment from the rest of the population.

The further requirement for the sign is that it be “recognizable at a distance.” As long ago as 1924 Fooks said of this requirement: “The distance at which the sign must be distinguishable is vague and undetermined.”<sup>180</sup> The ICRC has taken the, for it, rather unexpected position that the sign must be “recognizable at a distance by analogy with uniforms of the regular army.”<sup>181</sup> Certainly, the members of few resistance groups have possessed or worn distinctive signs analogous to the uniforms of the regular armed forces, nor could they, in the vast majority of cases, be expected to do so or be able to do so. Lauterpacht goes even further than the ICRC, stating:

. . . it is reasonable to expect that the silhouette of an irregular combatant standing against the skyline should be at once distinguishable from that of a peaceful inhabitant by the naked eye of ordinary individuals, at a distance at which the form of an individual can be determined.<sup>182</sup>

This appears to place a greater requirement on a member of a resistance group than is placed on members of the regular armed forces for, apart from a weapon, the skyline silhouette of a fully uniformed and helmeted soldier would not distinguish him from a peaceful inhabitant at maximum, or near-maximum, naked-eyesight distance, particularly at dusk or in the dark.

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<sup>179</sup> One very pithy observation concerning this condition says: “Short of prescribing colored or luminous uniforms, an air of unreality has always surrounded this particular piece of draftsmanship.” Schwarzenberger, *Human Rights* 252. Another equally critical author has stated that “the requirement that combatants carry ‘a fixed distinctive sign recognizable at a distance’ has an exotic air when seen in conditions of ‘underground’ guerrilla warfare.” Stone 565.

<sup>180</sup> Fooks, *Prisoners of War* 36. To the same effect see Schwarzenberger, *Human Rights* 252 and Lauterpacht–Oppenheim 257 n.2.

<sup>181</sup> 1969 Reaffirmation 116–17; repeated in 1971 GE Documentation, VI at 11.

<sup>182</sup> Lauterpacht–Oppenheim 257 n.2. For an example which, perhaps, offers some support for the Lauterpacht position, see *Military Prosecutor v. Kassem* 42 I.L.R. at 478.

Thus, the problems presented by the requirement of having a fixed distinctive sign recognizable at a distance appear to be such that few, if any, members of resistance groups will be able to overcome them. For this reason the thesis has been advanced that the requirement of the distinctive sign should be eliminated.<sup>183</sup> It has been suggested that the third condition, that of carrying arms openly, is adequate for identification purposes and that the wearing of the distinctive sign should only be required as an alternative or substitute for compliance with the third condition.<sup>184</sup> But weapons, like armbands, are easily disposed of when the necessity arises—and how do the armed forces of the Occupying Power identify the recent resistance fighter, identifiable only by the possession of a weapon, who, immediately upon finding himself in danger, has disposed of his weapon and has become “invisible in the crowd” among the true noncombatants who are entitled to be protected from belligerent activities, and the effects of those activities, in which they have had no part?

By Article 42(1) (b) of the 1973 Draft Additional Protocol the ICRC proposed to substitute for the second and third conditions the requirement that “they [members of organized resistance movements] distinguish themselves from the civilian population in military operations.” This would seem to limit the period of required identification to the period of actual military operations, to which, in the nature of things, there does not appear to be any major objection.<sup>185</sup> The phrase requiring them to “distinguish themselves from the civilian population” is certainly general enough to permit interpretations which would include all possible contingencies. But therein lies its weakness. Practically every case will involve a contested factual determination,

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<sup>183</sup> Trainin’s arguments to support this thesis (that even uniforms do not prevent surprise attacks at night by guerrillas and that “the intention and activity of guerrillas would be obvious even without a uniform”) appear to miss the point completely and, in any event, are not very convincing. Trainin, *Guerrilla Warfare* 558.

<sup>184</sup> 1971 GE Documentation VI, at 11. In Soviet International Law 424, the position is taken that both the second and the third conditions “would place partisans at a clear disadvantage.” Professor Kozhevnikov, the author of this chapter of the Soviet treatise, does not state why he believes that partisans should be given an advantage vis-a-vis the regular uniformed soldier, a result which would necessarily follow if those two conditions were completely eliminated.

<sup>185</sup> See note 178 *supra*, and pp. 53–54 *infra*, of the text. Such a provision, considerably modified, was ultimately included in Article 44(3) of the 1977 Protocol I which reads:

*Article 44—Combatants and prisoners of war*

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflict where, owing to the nature of the hostilities [,] an armed combatant cannot

one which will be made by the Occupying Power—and few Occupying Powers will be inclined to be magnanimous in reaching factual determinations as to the entitlement to prisoner-of-war status of individuals who have, perhaps within the hour, engaged in hit-and-run tactics that have severely hurt the Occupying Power, particularly the morale of its armed forces. Nevertheless, the proposed provision does have merit and could, to a limited extent—if reasonably applied—solve some of the problems involved in attempting to balance the protection to which captured members of organized resistance movements would be entitled with the protection to which members of the regular armed forces are entitled against the activities of illegal combatants.

*Third condition: that of carrying arms openly.* This is, unquestionably, the least ambiguous of the four conditions.<sup>186</sup> A sidearm or hand grenade or dagger concealed in the clothing does not constitute compliance with this condition.<sup>187</sup> A rifle or a submachine gun carried openly would constitute compliance. In each case the facts should not be particularly difficult of ascertainment nor subject to insoluble dispute.

*Fourth condition: that of conducting their operations in accordance with the laws and customs of war.* It would seem indisputable that if the members of organized resistance movements are to be permitted to claim the protection of the relevant laws and customs of war, they must, in turn, themselves comply with those laws and customs. Obviously, it would be of little practical avail to attempt to urge upon a

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so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- (a) during each military engagement, and
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c).

<sup>186</sup> 1971 GE Documentation, VI, at 13. *But see* U.N., *Human Rights*, A/8052, para. 178; and Soviet International Law 424. Article 42(1) of the 1973 Draft Additional Protocol did not include the requirement of carrying arms openly. *But see* Article 44(3) of the 1977 Protocol I, quoted in note 185 *supra*.

<sup>187</sup> Lauterpacht–Oppenheim 257 n.3. *See also* *Military Prosecutor v. Kassem*, 42 *I.L.R.* at 478–79. In Vietnam individuals who were apparently civilian noncombatants (women, children, working farmers, etc.) would approach American servicemen in seeming innocence and then suddenly toss a hand grenade at them. (*See* note 173 *supra*.) After a very few such incidents the soldiers understandably came to distrust all civilians while they were in the field and frequently took definitive action upon suspicion and without waiting to ascertain the facts. Thus, the original illegal actions taken by the guerrillas subsequently endangered the members of the civilian population who, as noncombatants, were entitled to be protected in their status. One author believes that this provision is contrary to the principle that compliance with the Convention is not based on reciprocity, Kleut, *Guerre de partisans* 103. *See* the reference to Article 42(1) of the 1973 Draft Additional Protocol and to Article 44(3) of the 1977 Protocol I in note 186 *supra*.

State engaged in international armed conflict that captured members of an organized resistance movement were entitled to prisoner-of-war status and to treatment in accordance with the laws and customs of war, including the 1949 Convention, even though those same resistance fighters had been conducting their operations against the armed forces of that State in complete disregard of those very laws and customs—as, for example, by killing members of the State's armed forces captured by them, thus denying the very protection which they themselves would now be seeking.<sup>188</sup> Moreover, if members of organized resistance movements were not held to this standard, this could even be advanced as an excuse for noncompliance with the various other provisions of this subparagraph already discussed!

Despite the weight of the foregoing arguments, the contention has at times been advanced, in an attempt to justify the elimination of this condition, that to require compliance with the laws and customs of war by resistance fighters would render it impossible for them to operate.<sup>189</sup> This same argument has, of course, been put forth with respect to every limitation, or attempt to place limitations, on the operations of irregular combatants. But if one side in an international armed conflict is to be permitted to operate with no restraints whatsoever on its conduct, it is inevitable that the other side will eventually do likewise—and we have then turned the calendar back many centuries to the days when international armed conflict was almost com-

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<sup>188</sup> Pictet, *Humanitarian Law* 105. See note 161, *supra*. Article 41(1)(c) of the 1973 Draft Additional Protocol would have required only that the “new category of prisoners of war” therein created conduct their military operations “in accordance with the Conventions and the present Protocol.” Since Article 2 of that Protocol defined “Conventions” as meaning only the four 1949 Conventions, compliance with other laws and customs of war, such as those contained in the *1907 Hague Regulations*, would not have been required. This has been rectified in the 1977 Protocol I where Article 43(1) requires the enforcement of “compliance with the rules of international law applicable in armed conflict” and Article 44(2) specifies that “all combatants are obliged to comply with the rules of international law applicable in armed conflict,” while Article 2(b) defines the term as meaning “the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable to armed conflict.”

<sup>189</sup> See the arguments collected in Bindschedler 41–43 and in U.N., *Human Rights*, A/8052, para. 180. See note 161 *supra*. Those who advance this thesis are really concerned with the so-called freedom fighter who is engaged in armed conflict with the armed forces of a colonial power. See G.A. Res. 2852, 26 U.N. GAOR, Supp. 29, at 90, U.N. Doc. A/8429 (1972; and note 151 *supra*. See also Article 1(4) of the 1977 Protocol I. They would probably be among the strong supporters of the condition if the resistance movement were operating against them in an international armed conflict.

pletely lacking in restraints. Fortunately, there appears to be comparatively little real support for this position.<sup>190</sup>

One rather difficult problem can arise with respect to the fourth condition. Does violation of the laws and customs of war by one, or several, members of an organized resistance group constitute a failure to comply with the requirements of the condition and thereby disqualify all of the members of the group? Perhaps an even more difficult question is the entitlement of an individual member of an organized resistance group to prisoner-of-war status upon capture when he has himself scrupulously complied with the laws and customs of war, but the group of which he is a member has perhaps announced that it does not consider itself bound by such laws and customs and it has, in fact, admittedly violated them.

It would seem that where, as a matter of policy and official direction, the great majority of the members of an organized resistance movement conduct their operations in accordance with the laws and customs of war, there has been compliance with the fourth condition, even if there have been individual instances of violations.<sup>191</sup> The converse is

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<sup>190</sup> 1971 GE Documentation, VI, at 14 & 16; Bindschedler 41; U.N., *Human Rights*, A/8052, para. 179. The Soviet position, as set forth in Soviet International Law 423, states: "The laws and customs of war apply not only to armies in the strict sense of the word, but also to levies, voluntary detachments, organized resistance movement [*sic*] and to partisans." Trainin's arcane statement on this matter is probably to the same effect. Trainin, *Guerrilla Warfare* 560. *But see* note 164 *supra*. This condition was probably the most objectionable to the Vietcong. See note 166 *supra*. Nevertheless, this condition, considerably strengthened by the Diplomatic Conference, was ultimately included in the 1977 Protocol I. See note 188 *supra*.

<sup>191</sup> The *U.S. Manual* para. 64 (d) states:

This condition is fulfilled if most of the members of the body observe the laws and customs of war, notwithstanding the fact that the individual member concerned may have committed a war crime.

See also 1971 GE Documentation, VI, at 14; and U.N., *Human Rights*, A/8052, para. 179. Article 42 (2), 1973 Draft Additional Protocol, specifically provides that nonfulfillment of the conditions listed in Article 42(1) by individual members of a resistance movement does not deprive the other members of that movement of the status of prisoners of war if captured. It further provides that the particular individual who fails to fulfill those conditions would, if prosecuted, be entitled to the judicial safeguards of the Convention and, even if sentenced, would retain his status as a prisoner of war. See note 197 *infra*. The Diplomatic Conference did not deem it necessary to include a provision in the 1977 Protocol I protecting the law-abiding members of the movement, probably because Article 44(1) thereof gives entitlement to prisoner-of-war status to *all* "combatants," except those who have allegedly violated the law of war prior to capture. These latter are, under Article 44(3) and (4), entitled to protections equivalent to those contained in the 1949 Convention and the 1977 Protocol I, including specifically the judicial safeguards.

not true. Inasmuch as compliance with all four of the conditions is "constitutive" in nature,<sup>192</sup> the failure of the organized resistance movement as a whole to meet the fourth condition makes it impossible for any of its members to qualify for prisoner-of-war status. This is one of the several instances where the individual member of an organized resistance movement has only indirect and limited control over the factors which will determine his right to prisoner-of-war status in the event that he should fall into the power of the enemy.<sup>193</sup>

It is believed that the foregoing discussion has demonstrated the validity of the qualms earlier expressed concerning the problems inherent in the interpretation and implementation of this aspect of Article 4 of the Convention. That the present author is not alone in questioning the possibility of a truly humanitarian interpretation and implementation of these provisions during a period of international armed conflict is obvious from the numerous works that have been written dealing with this subject, many of which have been noted.

In 1971 the ICRC concluded that "the accent should be placed on" the third and fourth conditions: carrying arms openly and operating in accordance with the laws and customs of war.<sup>194</sup> It then went on to say that "throughout each military operation" the guerrilla in international armed conflict must "clearly mark his status as a combatant" and that this could be done either by a distinctive sign or by carrying arms openly, the objective being to make it possible for any observer to discern immediately the fact that an individual is a combatant and not a member of the civilian population.<sup>195</sup>

Article 38 of the 1972 Draft Additional Protocol proposed by the ICRC was an attempt to eliminate some of the problems discussed above. It provided that the resistance movement could belong to a "government or . . . authority not recognized by the Detaining Power"; that in order to qualify, the resistance movement had to comply with the laws of armed conflict; that in conducting military operations the members of the resistance movement had to show their combatant status by displaying their arms openly or had to distinguish themselves from the civilian population by a distinctive sign or by other means;

<sup>192</sup> 1971 GE Documentation, VI, at 14; Bindschedler 41. In other words, it is only by complying generally with all of the conditions that the organized resistance movement brings its members within the provisions of Article 4A(2) of the Convention. See also 1973 *Commentary* 51. For conduct which precludes recognition of the entire resistance movement as legal combatants, see note 161 *supra*.

<sup>193</sup> See note 165 *supra*. Other instances are the requirements that the group be organized, that it belong to a Party to the conflict, and that it have a responsible commander. The individual would still be entitled to the protection of the last paragraph of Article 5 of the Fourth Convention. Stone, *Legal Controls* 566.

<sup>194</sup> 1971 GE Documentation, VI, at 16. As the ICRC there notes these are the only two conditions mentioned in Article 4A(6) as requirements to qualify members of the *levée en masse* for prisoners-of-war status. See pp. 64-66 *infra*.

<sup>195</sup> *Ibid.*, 17.

that they had to be organized and to have a responsible commander; that individual violations would not forfeit the right of the other members of the resistance group to prisoner-of-war "treatment";<sup>196</sup> and that individuals not meeting these requirements would, as a minimum, receive the treatment provided for in Article 3 of the Convention (dealing with armed conflict not of an international character).

Finally, Article 42 of the 1973 Draft Additional Protocol proposed by the ICRC, drafted after the intervening 1973 Conference of Government Experts, while basically only a redraft of the 1972 proposal, had two major changes: the provision concerning the requirement of carrying arms openly or wearing a distinctive sign was changed to require merely "that they distinguish themselves from the civilian population in military operations"; and members of the resistance movement guilty of violating the 1949 Conventions and the Protocol were to be given the protection of the judicial guarantees of the Convention "and, even if sentenced, retain the status of prisoners of war."<sup>197</sup>

Neither of these proposals adequately solves many of the problems which exist with respect to the attempt to bring the members of organized resistance movements within the protection of the 1949 Convention; nor does it appear that there is much likelihood of the drafting and general acceptance of any other useful substitute for the present provisions which are, for the most part, both ambiguous and comparatively ineffective despite the fact that they have four times been adopted by the international community and now have three quarters of a century of international usage.<sup>198</sup>

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<sup>196</sup> If the word "treatment" was used as a synonym for the word "status," it was improperly used. "Prisoner-of-war treatment" is not legally the equivalent of "prisoner-of-war status." Rubin, *Status of Rebels* 479-80. It may be that the use here was intentional. See U.N., *Human Rights*, A/8781, para. 161. See also note 256 *infra*.

<sup>197</sup> The latter provision is found in Article 42(2) of the 1973 Draft Additional Protocol. Presumably, it refers to violations of Article 13, 130, etc., of the Convention, offenses which constitute conventional war crimes, and not to a failure to meet the requirements of Article 42(1) of that Protocol. 1973 *Commentary* 51-52. This provision would, then, merely reiterate the provisions of Article 85 of the Convention. If this presumption is incorrect, it was indeed a strange proposal inasmuch as those who failed to meet the requirements for qualification for prisoner-of-war status, set forth in Article 41(1) of the Protocol, and were convicted of being illegal combatants, would "retain" prisoner-of-war status! Article 44 of the 1977 Protocol I is more clearly drafted. See note 191 *supra*.

<sup>198</sup> An excellent summary of the difficulties which confront the draftsman who attempts to solve the problem just discussed is to be found in Schwarzenberger, *Human Rights* 253, where the author says: ". . . any proposed change of the law in the direction of relaxing any of the existing conditions of the legality of irregular armed forces and armed risings is unlikely to result in a greater protection of guerrilleros. If a belligerent must expect that in combat zones and occupied ter-

Before leaving this subject it is appropriate to point out that the probability of controversy in areas involving the identification of persons entitled to prisoner-of-war status was not overlooked by the draftsmen of the Convention. During World War II the decision that an individual was not entitled to prisoner-of-war status had frequently been made summarily and by persons of very low rank.<sup>199</sup> There was no formal "recognition" process as such and, concededly, for the most part no such process was required.<sup>200</sup> Nevertheless, the problem had arisen on occasion—and it was not difficult to foresee that a new and greatly enlarged provision on entitlement to prisoner-of-war status would correspondingly increase the number of problems arising in this area. Accordingly, the 1948 Draft Revised Convention contained a new and novel proposal which ultimately became the second paragraph of Article 5 of the 1949 Convention. That paragraph states:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.<sup>201</sup>

Obviously, this provision serves a double purpose: (1) it prohibits the procedure sometimes followed in the past of executing first and

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ritories daytime civilians become nighttime irregulars, he is likely to cease distinguishing between genuine civilians and irregulars in civilian disguise and treat the whole of the civilian enemy population as potential—and unprivileged—belligerents.

"More likely than not, excessive permissiveness in the redrafting of the relevant rules would merely lead to total repression practiced against guerrilleros and the civilian population alike."

Moreover, as stated in Prugh, *Current Initiatives* 263: "They [humanitarian objectives] cannot be achieved by drafting protocols that will not stand up to the test of the battlefield, they cannot derive from conventions that few nations will sign, fewer ratify, and fewer still adhere to [i.e., comply with]."

<sup>199</sup> 2B *Final Record* 270; Ford, *Resistance Movements* 377.

<sup>200</sup> When he made his study of prisoners of war immediately after World War II, Feilchenfeld concluded that "there is no such thing under existing law as a formal 'recognition' of prisoners of war." Feilchenfeld, *Prisoners of War* 23. He went on to urge that "the growth of such a new institution should not be encouraged. Every captive should enjoy the treatment of a prisoner of war until he is proved otherwise." *Ibid.* The draftsmen of the 1949 Convention apparently disregarded his admonition against institutionalizing the process of recognition of prisoner-of-war status, but did adopt the suggestion that all combatants falling into the power of the enemy should be afforded the protection of the Convention until their nonentitlement is formally established.

<sup>201</sup> The provisions of this Article are, of course, applicable to the identification of persons allegedly falling within any of the various categories enumerated in Article 4. It is discussed at some length at this point because it is with respect to Article 4A(2) that the vast majority of cases requiring such a determination will arise.

investigating later—the individual who falls into the hands of the enemy is entitled to the protection of the Convention until the contrary is established;<sup>202</sup> and (2) it provides for the determination of cases involving disputes as to the entitlement of individuals to prisoner-of-war status to be made by a “competent tribunal”—without, however, indicating exactly what is meant by the term.<sup>203</sup>

When the *Law of Land Warfare* was issued by the United States Army in 1956, it stated that the “competent tribunal” should consist of “a board of not less than three officers.”<sup>204</sup> Similarly, a Royal Warrant issued in 1958 included *Prisoner of War Determination of Status Regulations* which provide that in the British army the determination of the entitlement to prisoner-of-war status in questionable cases will be made by a “board of inquiry.”<sup>205</sup> Neither of these provisions had

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<sup>202</sup> In legal jargon it would be said that there is a presumption of entitlement to prisoner-of-war status subject to rebuttal by the Detaining Power. While there is no indication as to where the ultimate burden of proof is placed, it would probably be on the individual inasmuch as he is advancing the claim to a privileged status. See *Public Prosecutor v. Koi*, [1968] A.C. at 855. But see Baxter, *Qualifications* 293–94. Article 45(1) of the 1977 Protocol I provides that a person who has participated in hostilities and who has fallen into the power of the enemy “shall be presumed to be a prisoner of war” and, therefore, entitled to the protection of the 1949 Convention, “if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf.” It further provides that if there is doubt as to his entitlement, he shall continue to have prisoner-of-war status until his actual status has been determined by a “competent tribunal.” (See note 203 *infra*.) Article 45(2) of the Protocol provides that the decision as to entitlement to prisoner-of-war status shall be made by a “judicial tribunal” and that “[w]henver possible . . . this adjudication shall occur before the trial for the offence.” (But see note 216 *infra*.)

<sup>203</sup> The provision first appeared as Article 4 of the *Draft Revised Convention* submitted by the ICRC to the 1948 Stockholm Conference (*Draft Revised Conventions* 55: “some responsible authority”) and was there approved with minor editing (Revised Draft Conventions 53–54: “a responsible authority”). At the 1949 Diplomatic Conference the wording moved to “by military tribunal or by a competent military authority with officer’s rank” (2A *Final Record* 480), to “military tribunal” (*ibid.*), to “competent tribunal” (2B *Final Record* 270–72). It is clear that the term “competent tribunal” was not intended to limit jurisdiction to make the decision to the “regular” courts (2A *Final Record* 563). Conversely, there is no reason to believe that a regular civilian court would not constitute a “competent tribunal.”

<sup>204</sup> *U.S. Manual* para. 71(e). Note that the burden is placed on the individual to assert that he is entitled to prisoner-of-war status in order to activate the procedure. *Public Prosecutor v. Koi*, [1968] A.C. at 855, 859. See note 202 *supra*. The *U.S. Manual* further provides [in para. 71(d)] that if a board’s decision is against entitlement to prisoner-of-war status, the individuals concerned still “may not be executed, imprisoned, or otherwise penalized without further judicial proceedings to determine what acts they have committed and what penalty should be imposed therefor.”

<sup>205</sup> *British Manual*, Appendix XXVII, First Schedule. The constitution and procedure of a “board of inquiry” is governed by the Army Act, 1955, and by the Rules issued thereunder.

ever been implemented or applied, and no reported use had been found for the provisions of the second paragraph of Article 5, during most of the international armed conflicts which have occurred since 1949.<sup>206</sup> It was only in Vietnam, with its large-scale irregular warfare, that the problem assumed Homeric proportions which required the implementation and application of the above-quoted provisions. As early as May 1966, the United States Army reacted to the problem of the need to have a formalized procedure for deciding the doubtful cases of entitlement to prisoner-of-war status of individuals captured by its forces. It issued a directive on the subject<sup>207</sup> which was probably the first one issued by any armed force fully implementing the provisions of the second paragraph of Article 5.<sup>208</sup>

Briefly stated, the directive provided that when a detained person had committed a belligerent act and it was doubtful that he was entitled to prisoner-of-war status, or it had been determined informally that he was not so entitled and he disputed this determination, his case would be referred to an "Article 5 tribunal";<sup>209</sup> the tribunal was to consist of three or more officers who should be, and at least one of whom was required to be, military lawyers;<sup>210</sup> the tribunal was directed to conduct a hearing in accordance with the procedure therein specified at which the person whose status was in question had a right to counsel;<sup>211</sup> and the tribunal had to reach a decision as to entitlement or nonentitlement to prisoner-of-war status, a decision of entitlement being final, but a decision of nonentitlement being subject to legal review and an order for a rehearing or an administrative grant of

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<sup>206</sup> Few disputes concerning the identity of individuals entitled to prisoner-of-war status occurred during the several Middle East armed conflicts or in the several Indo-Pakistani armed conflicts. In fact, in the armed conflict between India and Pakistan which occurred in 1971, some thousands of individual Pakistanis were categorized as prisoners of war who obviously did not fall within that classification. Levie, *Indo-Pakistani Agreement 95 n.6*. Even in Korea the problem was relatively minor.

<sup>207</sup> United States Military Assistance Command, Vietnam (MACV), Directive 20-5, 17 May 1966, *Prisoners of War—Determination of Status*. This directive was subsequently refined and reissued on several occasions. The version to which reference will be made herein is that of 15 March 1968 which is reproduced in part at 62 *A.J.I.L.* 768.

<sup>208</sup> In *Military Prosecutor v. Kassem*, decided in 1969, the Israeli Military Court said (42 *I.L.R.* at 472): "We do not know whether a 'competent tribunal,' within the meaning of Article 5, has been set up in any part of the civilized world either under the Geneva Convention or any other international agreement." At that time the United States Army directive being used in Vietnam was almost three years old, had been redrafted and reissued on at least two occasions in the process of its refinement based on experience, and had probably been applied in a substantial number of cases. Unfortunately, it had received very little publicity.

<sup>209</sup> MACV Directive 20-5, 15 March 1968, para. 5f.

<sup>210</sup> *Ibid.*, para. 6e(1) and Annex A, para. 3.

<sup>211</sup> *Ibid.*, Annex A, particularly paras. 8 & 9.

prisoner-of-war status by the commanding general.<sup>212</sup> (This directive has been set forth in some detail because of the fact that it undoubtedly broke new ground in the area of the determination of the entitlement of a particular individual to prisoner-of-war status. Of course, the value of such a directive depends largely upon the spirit in which it is applied. In this respect, unfortunately, little information appears to be available.)<sup>213</sup>

Several proposals have been made with respect to the "judicial" determinations of entitlement to prisoner-of-war status. Thus, it has been suggested that any international agency created for the purpose of ensuring the protection of human rights in armed conflicts could also perform the functions of the "competent tribunal" of Article 5;<sup>214</sup> and it has also been suggested that the determinations could be made by the use of a writ to a proposed "Special Tribunal of World Habeas Corpus."<sup>215</sup> Neither of these suggestions appears to be of a nature which would be acceptable to States. It does appear, however, that when the "competent tribunal," however established, finds against entitlement to prisoner-of-war status, there should be a required review procedure, even if it is no more than review of the file by a senior commander, or even by a specifically designated senior member of his staff. The membership of the tribunals will, in all probability, frequently include lower echelon and low-ranking combat officers who, understandably, will not be overly inclined to be generous towards a recent enemy. By requiring review by a senior commander of decisions

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<sup>212</sup> *Ibid.*, para. 6g. The directive also provided for the reference to a tribunal of all cases in which an original informal classification as a prisoner of war was later challenged by the authorities of the Republic of Vietnam, the Power to whom custody had been transferred under Article 12 of the Convention, and the individual concerned claimed that he had been properly classified. *Ibid.*, Annex E. See Haight, *Shadow War* 49.

<sup>213</sup> The subject has not been mentioned in any of the Annual Reports of the ICRC issued during the relevant period. According to one author the ICRC Delegate in Saigon was highly complimentary of this and a parallel directive [United States Military Assistance Command, Vietnam (MACV)], Directive 381-46, 27 December 1967, Military Intelligence: Combined Screening of Detainees). See Haight, *Shadow War* 47.

<sup>214</sup> U.N., *Human Rights*, A/8052, para. 116. It has also been suggested that there should be a right of appeal to an international body when there has been an adverse decision made under proposed Article 42 of the 1973 Draft Additional Protocol. See para. 8(b) of the 1973 NGO Memorandum. (There is no indication in this Memorandum that the draftsmen were aware of the existence of the provisions of the last paragraph of Article 5 of the Convention.)

<sup>215</sup> Kutner, *World Habeas Corpus* 744. It seems extremely unlikely that the very States with respect to which the need for third-party decision would be most compelling would ever become parties to a treaty creating an individual right of habeas corpus to an international tribunal. *But see* the McDougal & Reisman Working Document, "Establishing a Convention for World Writ of Habeas Corpus and Regional Courts of World Habeas Corpus."

adverse to the individual, there would be more assurance that a proper decision had been reached, while at the same time avoiding a procedure that would be completely unacceptable to many States—intervention on an international basis.<sup>216</sup> Of course, the individual would retain the protection of the Convention until any adverse decision had been finally approved by the reviewing authority.

### 3. Members of Regular Armed Forces Who Profess Allegiance to a Government or an Authority Not Recognized by the Detaining Power

Once again the 1949 Diplomatic Conference was attempting to supply a rule which would cover situations which had caused numerous problems during World War II with its many “governments-in-exile” and, not infrequently, with competing such governments.<sup>217</sup> In June 1944 the French Provisional Government, then located in Algiers, sought, through the ICRC, to ensure that prisoner-of-war status would be accorded to captured members of the “French Forces of the Interior” (FFI) fighting in occupied France in support of the Allied landing in Normandy. It was contended, and apparently not disputed, that these forces and their members conformed fully to the four conditions of the 1907 Hague Regulations and, thus, to Article 1 of the 1929 Prisoner-of-War Convention. The German Government replied to the ICRC that “it has no knowledge of the existence of any Provisional Government at Algiers.”<sup>218</sup> As such problems multiplied, the ICRC addressed a note to all of the belligerent States in which it said, in part, with respect to the entitlement to prisoner-of-war status of all persons who fell into enemy hands and who had complied with the four conditions:

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<sup>216</sup> It will be recalled that the MACV directive provided for the type of review suggested herein. See text in connection with note 212 *supra*. Article 45(2) of the 1977 Protocol I requires that “whenever possible” the adjudication of entitlement to prisoner-of-war status by the “judicial tribunal” should take place prior to the trial for the offense and, normally, in the presence of the Protecting Power. See note 202 *supra*. There is no provision for review of the decision on status. It is believed that the adjudication of entitlement of prisoner-of-war status will, not infrequently, have to be made by the court to which a case has been referred for trial of the substantive offense. This was the procedure followed in such cases as *Public Prosecutor v. Koi*; *Ali and Another v. Public Prosecutor*; *Military Prosecutor v. Kassem and Others*; etc.

<sup>217</sup> See, e.g., 1 ICRC Report 525 n.1.

<sup>218</sup> *Ibid.*, 522. See note 156 *supra*. (While that particular episode involved the status of members of a resistance group, rather than of the regular armed forces, it is indicative of the problems which occur when a government participating in an international armed conflict is not recognized by the enemy Power.) Pictet says that the ICRC was successful in obtaining prisoner-of-war status for captured members of the uniformed de Gaulle armed forces in Africa and in Italy and for captured members of the regular Italian armed forces who fought the Germans under Badoglio after the 1943 Armistice. Pictet, *Humanitarian Law* 101.

The International Committee are of [the] opinion that the principles stated must be applied, irrespective of all juridical arguments as to the recognition of the belligerent status of the authority to whom the combatants concerned belong.<sup>219</sup>

The opinion so expressed became the basis for Article 3(2) of the Draft Revised Convention submitted by the ICRC to the 1948 Stockholm Conference<sup>220</sup> which, with one major change, became Article 4A(3) of the 1949 Convention.<sup>221</sup>

There is little question but that in such cases as the uniformed forces of the Danes, Dutch, French, Poles, etc., who continued to fight the Germans after the original defeats, each did profess allegiance to a "government" and, moreover, to a government which was not recognized by the Germans.<sup>222</sup> But what is the meaning of the term "authority"? Apparently, it was intended to cover such contingencies as a government which had ceased to exist and had not been replaced, even by a "government-in-exile."<sup>223</sup>

One very interesting problem with respect to this provision has already been the subject of official discussion. Does the provision preclude trials for treason under domestic law where the individual has fought in support of a government installed in a country by the Occupying Power? The Nordic Experts, no doubt concerned about future Quisling governments which might recruit forces to fight on behalf of the enemy, answered this question in the negative.<sup>224</sup>

#### 4. Persons Who Accompany the Armed Forces without Actually Being Members Thereof

Article 13 of the 1907 Hague Regulations provided that certain individuals who followed the armed forces without directly belonging to it ("such as newspaper correspondents and reporters, sutlers and contractors") and who fell into the hands of the enemy, were to be treated as prisoners of war *provided they were in possession of a certificate from the military authorities of the army which they were accompanying*. This article was carried over into Article 81 of the 1929 Geneva Prisoner-of-War Convention.<sup>225</sup> Subsequently, with an

<sup>219</sup> 1 ICRC Report, 518.

<sup>220</sup> Draft Revised Conventions 52.

<sup>221</sup> The original draft article contained a final clause which read "particularly if they act in liaison with the armed forces of one of the Parties to the conflict." *Ibid.* This clause was eliminated at Stockholm. Revised Draft Conventions 52. See also the comment contained in note 155 *supra*.

<sup>222</sup> It has been suggested that "there must be some recognition by third States." Draper, *Recueil* 114.

<sup>223</sup> 2A *Final Record* 415.

<sup>224</sup> Nordic Experts 166.

<sup>225</sup> The French (official) versions of the 1907 Regulations and of the 1929 Articles are substantially identical except for verb tense.

enlargement of the enumeration of categories and some other changes, this became Article 4A (4) of the 1949 Convention.<sup>226</sup>

The first of three additions to the enumeration of categories was "civilian members of military aircraft crews." This was, of course, a new phenomenon and one which was considered to include a sufficient number of individuals to warrant special mention.<sup>227</sup> The second addition to the enumeration of categories was "members of labour units." During World War II questions arose, for example, concerning the status of civilians captured while working for the German *Organisation Todt* in France.<sup>228</sup> It was apparently this type of individual for whom the added protection of specific reference was intended. And the third addition to the enumeration of categories was members of "services responsible for the welfare of the armed forces," Presumably this category would include entertainers,<sup>229</sup> civilian ambulance drivers,<sup>230</sup> and the like—individuals who are either temporarily or permanently concerned with the well-being of the troops.<sup>231</sup> (As a result of events in Vietnam, where a number of war correspondents covering that conflict were captured by the Vietcong and were then killed, or were captured by them and then disappeared, efforts were initiated to give members of the press exceptional protections, beyond that of prisoners of war.<sup>232</sup> Inasmuch as the Vietcong refused to apply the 1949 Convention, it is doubtful that the existence of any such new provision would have changed the course of events.)

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<sup>226</sup> Apart from minor editorial changes, the paragraph adopted by the 1949 Diplomatic Conference was that adopted the year before at Stockholm. Revised Draft Conventions 52. A British proposal, which was not adopted, would have completely eliminated the enumeration of categories. 3 *Final Record* 60–61 (Annex 90).

<sup>227</sup> The Finnish representative proposed to eliminate the mention of this category on the ground that "civilians had no place in military aviation." 2A *Final Record* 417. He was dissuaded by arguments which the Rapporteur did not consider it necessary to include in the record. *Ibid.*

<sup>228</sup> See Lewis & Mewha 214.

<sup>229</sup> For example, individuals brought into the combat area to entertain the troops by such entities as the United Services Organization (USO), an American organization.

<sup>230</sup> For example, the American Field Service of World War I and the Friends Field Service of World War II.

<sup>231</sup> In the past, some armies have provided prostitutes for their combat forces. Presumably, these ladies would fall within the compass of the provision under discussion.

<sup>232</sup> See, e.g., *Protection of Journalists on Dangerous Missions in Areas of Armed Conflict*, G.A. Res. 3058, 28 U.N. GAOR, Supp. 30, at 73, U.N. Doc. A/9030 (1974). See also, Pilloud, *Protection of Journalists on Dangerous Missions in Areas of Armed Conflict*, 11 *I.R.R.C.* 3 (1971). Article 79 and Annex II of the 1977 Protocol I are concerned with journalists. They appear to have added little to the provisions of Article 4A (4) of the 1949 Convention.

The problem presented by this provision for entitlement to prisoner-of-war status is not so much who falls within its provisions as how this fact is established. Each successive convention has included a proviso concerning identifying matter to be issued to these individuals by the armed force which they accompany.<sup>233</sup> A subtle change has, however, now been introduced into the language used. The 1929 Convention and its predecessor gave prisoner-of-war status to persons within the enumerated categories of civilians accompanying the army "provided they are *in possession of* a certificate from the military authorities." (Emphasis added.) Possession of the identity card was, then, a *sine qua non* to entitlement to prisoner-of-war status. What of the individual who has had such a certificate issued to him but who, for some reason, perhaps beyond his control, is no longer in possession thereof?<sup>234</sup> The Stockholm Draft made no change in the 1929 Convention.<sup>235</sup> At the 1949 Diplomatic Conference the suggestion was made that the wording be changed so that an individual who had been issued a card but who no longer had it in his possession would not thereby be deprived of the protection of the Convention.<sup>236</sup> The ICRC representative pointed out that the Stockholm Draft continued to make the actual possession of the official identification card mandatory for entitlement to prisoner-of-war status;<sup>237</sup> and he later proposed an amendment to the paragraph which, it was agreed, established that if, in the absence of an identity card, the individual could prove that such a card had in fact been issued to him, this, too, would suffice to entitle him to prisoner-of-war status.<sup>238</sup> This proposal, with some editorial changes, was adopted.<sup>239</sup> Thus, the status of the civilian accompanying the armed forces is no longer dependent entirely upon the actual possession of an identity card issued to him by the military authorities of the armed force which he is accompanying; it is now dependent upon proof that he had received authorization from the military authorities to accompany that armed force—and that proof may consist of an identity card itself, or of some other evidence.

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<sup>233</sup> The provision of the 1949 Convention goes a step further than heretofore by specifying that the identity card issued shall be "similar" to the model set forth in Annex IVA of the Convention.

<sup>234</sup> During World War II it was not uncommon for the capturing troops to take custody of identity cards along with all other documents in the possession of captured individuals and this procedure can undoubtedly be expected in any future international armed conflict. For an analogous problem which reached gargantuan proportions, see note III-29 *infra*.

<sup>235</sup> Revised Draft Conventions 52. The suggestion for change had been made and rejected. 1947 GE Report 113.

<sup>236</sup> 2A *Final Record* 238.

<sup>237</sup> *Ibid.*, 250.

<sup>238</sup> *Ibid.*, 416-18.

<sup>239</sup> *Ibid.*, 389.

## 5. Member of Crews . . . of the Merchant Marine and the Crews of Civil Aircraft of the Parties to the Conflict, Who Do Not Benefit by more Favorable Treatment under Any Other Provisions of International Law

Chapter III (Articles 5–8) of the Eleventh Hague Convention of 1907 provided that when a merchant vessel of a belligerent was captured, the members of its crew who were enemy nationals were not to be made prisoners of war but were to be released upon making a formal promise not to undertake services connected with the operations of war. This provision proved ineffective during World War I, and at the Diplomatic Conference which drafted the 1929 Geneva Prisoner-of-War Convention a proposal was made that the crews of captured enemy merchant vessels be considered to be prisoners of war. The proposal met with such a clear-cut rejection that a Conference report went to the extreme of including a negative—pointing out specifically that the crews of captured enemy merchant vessels were *not* included within the term “prisoners of war.”<sup>240</sup> During World War II the provisions of the Eleventh Hague Convention of 1907 were again completely disregarded,<sup>241</sup> with the result that there was no assurance as to exactly what the status of a captured merchant seaman would be.<sup>242</sup> In order to remedy this situation, it is now specifically provided that merchant seamen will be prisoners of war. This applies to all members of the crew, officers and men. It also applies to the crews of civil aircraft, a category which was no doubt included because civil aircraft are more and more frequently used instead of merchant cargo vessels for quick deliveries to the combat area, and the position of the two types of crews is, so far as relevant, identical. It should also be noted that for the members of the crew to be entitled to prisoner-of-war status upon capture, the merchant vessel or civilian aircraft must fly the flag of a Party to the conflict.<sup>243</sup>

<sup>240</sup> 1 ICRC Report 552; Scott, *Reports* 737.

<sup>241</sup> Perhaps because of the *si omnes* clause (2A *Final Record* 419), but more probably because it was not in the national interests of the Powers concerned.

<sup>242</sup> 1947 GE Report 110–11; de La Pradelle, *Nouvelles conventions* 46.

<sup>243</sup> During the 1971 Indo-Pakistani hostilities neither government granted prisoner-of-war status to the captured members of the crews of enemy merchant vessels. ICRC *Annual Report*, 1972, at 50. Article 4A(5) even contemplates the possibility that these crew members may “benefit by more favorable treatment [than that to which they would be entitled as prisoners of war] under . . . other provisions of international law.” In the light of actual State practice during two World Wars, this appears extremely unlikely. Yingling & Ginnane 405.

**6. Inhabitants of a Nonoccupied Territory, Who . . . Spontaneously Take Up Arms to Resist the Invading Forces . . . Provided They Carry Arms Openly and Respect the Laws and Customs of War**

This is the so-called *levée en masse*<sup>244</sup> which first attained widespread attention in modern warfare in the Franco-Prussian War (1870–71), when many members of the civilian population of France rose up spontaneously to oppose the advance of the invading Prussian army.<sup>245</sup> It has been given institutional status by Article 10 of the unratified Declaration of Brussels of 1874 and by every convention on the law of land warfare which was subsequently adopted,<sup>246</sup> even though it has, as a practical matter, probably disappeared as a phenomenon of modern warfare.<sup>247</sup> However, because it has been included in the Convention and because historical incidents do have a way of recurring, it is deemed appropriate to mention some of the problems raised by this provision.

The paragraph begins with the clause “inhabitants of a *non-occupied territory*” (emphasis added), a specification used originally in the 1874 Declaration of Brussels and since maintained. It is a logical provision which, in effect, properly distinguishes between the attempt of the civilian population in unoccupied national territory to resist the forward movement into, and the occupation of, the homeland by the enemy army [the *levée en masse* of Article 4A(6)] and the opposition mounted by the civilian population to the enemy army which has already occupied some or all of the national territory [the organ-

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<sup>244</sup> There appears to be no well-recognized English translation of this term. “Mass levy” does not have the nuances of the French term. Lauterpacht calls it a “levy *en masse*,” an unsatisfactory half-solution. Lauterpacht–Oppenheim 257. For discussions of the *levée en masse*, see Greenspan, *Modern Law* 62–64; Flory, *Prisoners of War* 31–33.

<sup>245</sup> The Prussian army treated these members of the French civilian population as *francs tireurs* (another untranslatable term), as illegal combatants, and summarily executed those who did not possess documentary identification from the French Government. See text in connection with note 162 *supra*. But see Lieber’s *Code*, Article 51 and 52.

<sup>246</sup> Article 2, 1899 *Hague Regulations*; Article 2, 1907 *Hague Regulations*; note to Article 1, 1929 Prisoner-of-War Convention; and the captioned provision of the 1949 Convention.

<sup>247</sup> 2A *Final Record* 239; 1947 GE Report 107. This appears to be one of those cases where the draftsmen were not making law on the basis of the last previous war, as they are usually accused of doing, but on the basis of a war several times removed! (However, the *levée en masse* may have occurred in Crete during World War II. *Swiss Manual* para. 61n.)

ized resistance movement of Article 4A(2)].<sup>248</sup> It is clear that the *levée en masse* can, by definition, legally exist only in territory not yet occupied.<sup>249</sup>

The paragraph continues with a requirement that the action of the civilian population be "spontaneous." Lauterpacht includes under the term *levée en masse* the situation which exists when a belligerent "calls the whole population of the country to arms."<sup>250</sup> This is very probably the origin of the term itself, inasmuch as the word *levée* implies an act by a qualified authority; but whatever it may have meant originally, under the provision of the Convention spontaneity of action by the members of the civilian population (the "inhabitants") is required in order to bring captured individuals within the coverage of the Convention.

The "four conditions" required in order to qualify captured members of organized resistance movements for prisoner-of-war status have already been discussed at length.<sup>251</sup> Here, logically, only the third (carrying arms openly) and the fourth (respect for the laws and customs of war) conditions are imposed as requirements for the qualification of a captured member of the *levée en masse* for prisoner-of-war status.<sup>252</sup>

A *levée en masse* will, as the very term itself indicates, be a mass action by a substantial part of the civilian population in the area which the enemy army is approaching. Under the circumstances, the advancing army will have no way of identifying specific individuals as being,

<sup>248</sup> *British Manual* para. 97. A proposal to do away with the distinction was specifically rejected at the 1949 Diplomatic Conference. 2A *Final Record* 421-22 & 435. The *British Manual* para. 89 n.8 (a), appears to suggest a third possibility: the "spontaneous" organization of the civilian population and its attack on the occupying armed forces in conjunction with the advance of the national armed forces seeking to drive the enemy out of the homeland. This seems to resemble quite closely one of the major activities of any organized resistance movement operating against the Occupying Power. /

<sup>249</sup> U.N., *Human Rights*, A/7720, para. 87. Soviet International Law (at 423) lumps the two situations together. This could be an intentional effort to obfuscate which will permit the Soviet Union to justify advancing one contention if confronted again with a situation such as that of 1941-44 (enemy troops occupying Soviet territory), and the opposite contention if confronted with a situation such as that of 1945 (Soviet troops in enemy territory). Miller, *The Law of War* 223.

<sup>250</sup> Lauterpacht-Oppenheim 257. This is what the Prussian Government did to resist Napoleon in 1813. Flory, *Prisoners of War* 31. However, this interpretation was specifically rejected at the 1949 Diplomatic Conference. 2A *Final Record*, 420-21.

<sup>251</sup> See pp. 44-54 *supra*.

<sup>252</sup> *British Manual* paras. 89 (iii) & 97. For some inexplicable reason Lauterpacht has substituted the requirement of "some organization" for the requirement of carrying arms openly. Lauterpacht-Oppenheim 257. The substitution is particularly inappropriate because the Convention provision itself specifically includes reference to the fact that the inhabitants must have acted "without having had time to form themselves into regular armed units."

or not being, a part of the *levée en masse*. It will, therefore, in all probability, in its own defense, consider all of the inhabitants of the area as being included in the *levée en masse*<sup>253</sup> and make prisoners of war of all such inhabitants whom it captures, thereafter denying prisoner-of-war status to those who, it determines, have failed to meet the requirements of the provision of the Convention.<sup>254</sup> A number of statements have been made to the effect that the enemy army would be justified in treating "all the males of military age as prisoners of war."<sup>255</sup> Under modern conditions, with women serving in the armed forces of a great many countries and otherwise demonstrating that they are competent and willing to handle a rifle or a grenade as expertly as the male, it is extremely unlikely that the suggested action on the part of the enemy army would be limited to the men of the area involved.

It was believed that two other general categories of individuals warranted specific coverage in the Convention in order to eliminate some of the obviously unjust actions which had been taken during World War II. These two categories are dealt with in Article 4B(1) and (2).<sup>256</sup>

## 7. Members of the Armed Forces of an Occupied Country

During World War II the German armed forces occupied, wholly or in part, a substantial number of the States of continental Europe. In many such cases, the military personnel of the occupied country who had been captured or who had surrendered were released from custody and converted to civilian status ("demobilized") by the Germans. Thereafter they were not considered to be entitled to the benefits and safeguards of the provisions of the 1929 Prisoner-of-War

<sup>253</sup> *British Manual* para. 99.

<sup>254</sup> The determination would, of course, have to be made in accordance with the provisions of the second paragraph of Article 5, discussed at pp. 55-59 *supra*. If the determination is against prisoner-of-war status, the individual concerned would usually fall within the provisions of Article 4 of the Fourth Convention and would be entitled to the protection of that Convention, subject, of course, to the right of the Occupying Power to try him for illegal acts of belligerency.

<sup>255</sup> *British Manual* para. 100; *U.S. Manual* para. 65; Greenspan, *Modern Law* 63.

<sup>256</sup> It is interesting to note that while paragraph A of Article 4 opens with the sentence "[p]risoners of war. . . are persons belonging to one of the following categories. . ." paragraph B opens with the statement "[t]he following shall likewise be treated as prisoners of war. . ." (Emphasis added.) See note 196 *supra*. The ICRC representative at the discussion of this article at the 1949 Diplomatic Conference (Wilhelm) indicated that paragraphs A and B dealt respectively "with prisoners of war and with persons assimilated to prisoners of war." 2A *Final Record* 436.

Convention, even if they were again taken into custody.<sup>257</sup> If they attempted to escape to England to join the forces of their government-in-exile and were caught, they were severely punished, although as prisoners of war they would have been subject only to disciplinary punishment for "attempted escape."<sup>258</sup>

At the 1949 Diplomatic Conference the Soviet representative raised a question with respect to this procedure which, unfortunately, he did not put in the form of an amendment to be added to the provision then under discussion. He questioned whether an Occupying Power has the legal authority to "demobilize" the members of the armed forces of the occupied State, or whether all that the Occupying Power could do was to release prisoners of war from its custody without changing their legal status.<sup>259</sup> Clearly, as he indicated, only the government of a State can change the status of members of its own armed forces. If an Occupying Power (or any other Detaining Power) releases prisoners of war from custody, this does not change their juridical status as members of the regular armed forces of their country; and if they are subsequently taken back into custody by the Occupying Power, they would once again be prisoners of war.<sup>260</sup> A formal acknowledgment of the foregoing in the Convention could only have helped to clarify the matter.

What the 1949 Diplomatic Conference did approve was a paragraph [Article 4B(1)] granting prisoner-of-war treatment to members of the armed forces of an occupied country who, *while hostilities continue outside of the occupied territory*: (1) are released by the Occupying Power and then are subsequently interned; or (2) are unsuccessful in an attempt to rejoin the armed forces to which they belong; or (3) fail to respond to a recall order of the Occupying Power, the purpose of which is to take them into custody. It is important to bear in mind that the foregoing provisions explicitly contemplate that the government of the unoccupied part of the territory of the State the members of whose armed forces are in question, or that State's allies if it has been completely occupied, are continuing the hostilities. The mere ex-

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<sup>257</sup> *Ibid.* 431; *British Manual* para. 125 n.1. See *German Regulations*, No. 15, para. 116, which stated: "These persons are 'internees', regardless of whether they have previously belonged to the enemy armed forces, and include, for instance, *released* prisoners of war." (Emphasis in original.)

<sup>258</sup> Article 54 of the 1929 Convention. See *In re Siebers*, 17 *I.L.R.* at 399-400. For a discussion of the comparable provision of the 1949 Convention, see pp. 405-407 *infra*.

<sup>259</sup> 2A *Final Record* 432.

<sup>260</sup> Of course, frequently this would be academic because the Occupying Power could certainly exert sufficient pressure on an indigenous government (such as the Vichy Government in France or the Quisling Government in Norway during World War II) or on a Chief of State in its custody (such as Leopold of Belgium during World War II) to obtain an order of demobilization.

istence of a government-in-exile after the complete cessation of hostilities would not suffice to make the provision applicable. In other words, this provision was not intended to apply to the situation which arises when the capitulation of a State is followed by the complete termination of armed hostilities.<sup>261</sup> It was apparently felt that this latter situation was adequately covered by the first paragraphs of Articles 5 and 118, the former making the Convention applicable “from the time they [covered personnel] fall into the power of the enemy and until their final release and repatriation,”<sup>262</sup> and the latter requiring that prisoners of war “be released and repatriated without delay after the cessation of hostilities.”<sup>263</sup>

#### 8. Members of Belligerent Armed Forces in Neutral or Non-belligerent Countries

The Fifth Hague Convention of 1907 contains provisions establishing the rights and duties of a neutral State with respect to members of the armed forces of a belligerent (Article 11–13), or the sick and wounded of the armed forces of a belligerent (Articles 14–15), who enter its territory during the course of the hostilities.<sup>264</sup> Article 4B(2) supplements those provisions, once again attempting to provide specific solutions for problems that arose during World War II.

Under general principles of international law, a neutral Power has no obligation to give asylum to troops attempting to enter its territory in order to avoid capture by the enemy, or to individuals who have escaped from prisoner-of-war camps and who attempt to enter its territory either as a place of refuge or as a lap in the route back home.<sup>265</sup> Under Article 11 of the Fifth Hague Convention of 1907 the

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<sup>261</sup> The provision would, therefore, not apply in a situation such as that which existed upon the capitulation of Japan in 1945.

<sup>262</sup> Were it not for the provisions of Article 4B(1), an Occupying Power that released members of the armed forces of an occupied State from custody in the territory of their own country might well have contended that this was a “final” release pursuant to the first paragraph of Article 5 and that the individuals so “released and repatriated” were not thereafter entitled to the benefits and safeguards of the Convention even if again taken into custody.

<sup>263</sup> Yingling & Ginnane 405–06. For unstated reasons, the United States representative unsuccessfully proposed the elimination of Article 4B(1). 2A *Final Record* 431–32.

<sup>264</sup> Article 15 of the Fifth Hague Convention of 1907 refers to “[t]he Geneva Convention.” This reference was to the 1906 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field*, later replaced by the 1929 Convention of the same name and, still later, by the First Convention of 1949.

<sup>265</sup> When World War II ended, the Swiss Government closed its borders to escaped prisoners of war, while the Spanish Government admitted them. 1, ICRC *Report* 564–65. Each Government was completely within its rights in acting as it did.

neutral Power has an obligation to intern individuals falling within the first class mentioned immediately above when it does permit them to enter its territory.<sup>266</sup> Under Article 13 of that same Convention, the neutral Power must leave at liberty individuals falling within the second class mentioned immediately above when it does permit them to enter its territory, although it may assign them a place of residence.<sup>267</sup> Article 4B(2) of the 1949 Convention only relates to the first class of individuals, as it specifies that it applies to the persons falling within the provisions of the overall Article 4 who are permitted to enter the neutral territory "and whom these Powers are required to intern under international law."<sup>268</sup> It provides that individuals so interned shall be "treated" as prisoners of war under the Convention, certain specifically enumerated provisions thereof being excepted.<sup>269</sup> These excepted provisions include Articles 8 (Protecting Powers), 10 (Substitutes for Protecting Powers), 15 (Maintenance), 30 (Medical Attention),<sup>270</sup> 58-67 (Financial Resources of Prisoners of War), 92 (Unsuccessful Escape),<sup>271</sup> and 126 (Supervision).<sup>272</sup>

<sup>266</sup> This was a custom which was merely codified in the 1907 Convention. *See, e.g.,* von Moltke, *The Franco-German War of 1870-71* at 398-99; and Howard, *The Franco-Prussian War* 430-31 & 431 n.2. During the course of World War II well over 100,000 members of various belligerent armed forces were interned in neutral States. 1 ICRC *Report*, 557. Perrot, *L'internment en Suisse (1940-1941)*, 23 *R.I.C.R.* 132.

<sup>267</sup> *See* pp. 404-405 *infra*. Switzerland and Sweden, the sole neutrals adjacent to belligerents, were the meccas sought by almost every escaped prisoner of war.

<sup>268</sup> Nordic Experts 166. Article 4B(2) of the 1949 Conventions refers to "neutral or non-belligerent Powers." The Fifth Hague Convention of 1907 refers only to "neutral Powers." "Nonbelligerency" is a comparatively recent phenomenon of the law of international armed conflict.

<sup>269</sup> During World War II Switzerland and Sweden both replied negatively to an ICRC request that the 1929 Convention be applied to military internees. Switzerland objected primarily because of the restrictions on the punishment which could be adjudged for attempted escape; and Sweden felt that it would impose unnecessary and complex problems on the neutral Power of refuge. 1 ICRC *Report*, 559; 2A *Final Record* 244.

<sup>270</sup> Article 15 provides that the Detaining Power must provide maintenance and medical care "free of charge." The last paragraph of Article 30 provides that the cost of medical care "shall be borne by the Detaining Power." By eliminating these provisions as far as neutral Powers are concerned, Article 12 of the Fifth Hague Convention of 1907 remains applicable. This Article provides that on the conclusion of peace the expenses incurred by the neutral State "shall be made good." Presumably, this means that the neutral State will be reimbursed by the Power of Origin for all expenses incurred for the maintenance and medical care provided to its military internees.

<sup>271</sup> *See* note 269 *supra*. The other provisions of the Convention relating to penal and disciplinary sanctions (Article 82-108) are applicable to military internees. Baxter, *Asylum* 494.

<sup>272</sup> Article 126 is one of the provisions relating to visits to prisoner-of-war installations by representatives of the Protecting Power and the ICRC. *See* pp. 281-284 and 309-311 *infra*. In view of the general practice followed during World War

Even though Articles 8 and 10, relating to the designation of Protecting Powers and their substitutes, are thus specifically stated not to be applicable under any circumstances, for some reason the draftsmen of the Convention found it appropriate to be redundant in this respect and to provide additionally in general terms that, where diplomatic relations continue to exist between the neutral Power and the Power of Origin of the interned military personnel (as they undoubtedly will in most cases), the articles of the Convention with reference to the Protecting Power would be included among the excepted provisions;<sup>273</sup> and that, in this event, the Power of Origin is itself authorized to perform the functions of the Protecting Power.<sup>274</sup> This latter procedure appears both logical and adequate, as there certainly can be no question but that the diplomatic representatives of the Power of Origin will be capable of, and motivated toward, supervision of the treatment which their interned fellow nationals are receiving in the territory of the neutral Power. It is regrettable, however, that by including Article 126 among the excepted articles, the ICRC, with its wealth of expertise, has been deprived of the right to visit the military internee camps located in the territory of neutral Powers which maintain diplomatic relations with the Power of Origin.<sup>275</sup>

### 9. Medical Personnel and Chaplains

The final paragraph (Article 4C) admonishes that the provisions of that Article "shall in no way affect the status of medical personnel and chaplains." A discussion of the significance of this provision appears also to provide an appropriate point for a brief review of the cognate provisions of the First and Second Conventions relevant to the status of the wounded, sick, shipwrecked, members of the medical profession, and chaplains—on land and sea—when they fall into the power of the adverse Party.

Both the First and Second Conventions contain an Article 13 which

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II of permitting ICRC visits to military internee camps in neutral States (1 ICRC Report 560-62), it is difficult to understand why Article 126 was included among the exceptions.

<sup>273</sup> 3 *Final Record*, Annexes 91 and 93, at 62; 2A *Final Record* 466.

<sup>274</sup> But Article 126, probably the most important article with respect to the functions of the Protecting Power, has been specifically excepted. See note 272 *supra*. Surely, this does not mean that visits to military internee internment installations are to be omitted from the functions of the Protecting Power which are to be performed by the representatives of the Power of Origin.

<sup>275</sup> It should be mentioned that Article 9, the Article which establishes the basic international juridical status of the ICRC under the Convention, is not among the excepted articles and it may be that the ICRC could use this and other provisions to support the argument that, just as it may normally operate in parallel with the Protecting Power, here it may so operate with the Power of Origin.

is identical with Article 4A of the Third Convention.<sup>276</sup> Article 14 of the First Convention (Article 16 of the Second) provides that "the wounded and sick [and shipwrecked] of a belligerent who fall into enemy hands shall be prisoners of war."<sup>277</sup> This means that the Third Convention is applicable in its entirety to any individual who comes within any of the classifications established by Article 4A (or its identical counterparts, Article 13 of the First and Second Conventions), and who, while wounded, sick, or shipwrecked, falls into the hands of the enemy. Actually, it would appear that these articles were included in the First and Second Conventions from an excess of caution inasmuch as, even without them, the individuals concerned would have come within the purview of Article 4A of the Third Convention. If an individual is, for example, a member of the regular armed forces of a belligerent, the fact that he was wounded or sick at the time that he fell into the power of the enemy could scarcely affect his entitlement to prisoner-of-war status. It is therefore obvious that the only problems which will arise in this respect are those which have already been discussed and which will arise whether the individual who falls into the power of the enemy is hale and hearty, wounded or sick, conscious or unconscious. The unique problems which arise in this area arise not with respect to the patients, but with respect to the people whose function it is to care for them.<sup>278</sup> Medical personnel, and the assisting staff, engaged exclusively in the collection, transport, and treatment of the wounded and sick, or in the prevention of disease, are entitled to

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<sup>276</sup> The First Convention is concerned with the wounded and sick of land armies; the Second is concerned with the wounded, sick, and shipwrecked at sea. As the provisions of these two Conventions that are of interest here are largely identical, all references will be solely to the First Convention and its provisions except where specific reference to the Second Convention is deemed appropriate. The First Convention of 1949 is the fourth chronologically (1864, 1906, 1929, and 1949) of the series known as the "Red Cross" Conventions. Prior to 1949 they had been made applicable to naval warfare by "adaptation" treaties (*Third Hague Convention of 1899 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864*; and *Tenth Hague Convention of 1907 for the Adaptation of the Principles of the Geneva Convention [of 6 July 1906] to Maritime Warfare*).

<sup>277</sup> The Coordination Committee of the 1949 Diplomatic Conference, charged with coordinating the language and substance of the several conventions being drafted, failed to note that at Stockholm the year before the term "fallen into enemy hands" in the Third Convention had been changed to "fallen into the power of the enemy." See p. 34 *supra*.

<sup>278</sup> See generally, Watson, Status of Medical and Religious Personnel in International Law, 20 *JAG J.* 41. For the most part medical personnel and chaplains are dealt with together in this area of the Conventions. See, e.g., the first two paragraphs of Article 33 of the Third Convention. Accordingly, references in the text hereof to medical personnel should be construed as including chaplains unless the wording used clearly indicates otherwise.

be respected and protected at all times.<sup>279</sup> When they fall into the power of the enemy, they are *not* prisoners of war—but they are entitled, *as a minimum*, to the benefits and protections of the Third Convention;<sup>280</sup> they may be retained by the Detaining Power only to the extent that their services are required for the care of prisoners of war;<sup>281</sup> while their services are so used, the Detaining Power must afford these “retained personnel” the opportunity and the facilities for performing their professional functions;<sup>282</sup> and the Detaining Power has an obligation to release them and to return them to their Power of Origin if their retention is not “indispensable.”<sup>283</sup>

The 1929 Wounded-and-Sick Convention provided for the return of medical personnel “as soon as the way is open for their return,” absent an agreement to the contrary between the Detaining Power and the Power of Origin.<sup>284</sup> A number of such agreements were reached;<sup>285</sup> and very few retained persons were ever returned to their Power of Origin during the course of hostilities.<sup>286</sup> Realizing that similar problems would be presented by the very provisions that it was including in the new First Convention, the 1949 Diplomatic Conference adopted a resolution which requested the ICRC to draft model agreements implementing Articles 28 and 31 of the First Convention, dealing with the relief and retention of medical personnel and chaplains.<sup>287</sup>

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<sup>279</sup> Article 24, First Convention; Article 37, Second Convention. The latter provides that the retained “religious, medical and hospital personnel” are, upon landing, subject to the provisions of the First Convention.

<sup>280</sup> First paragraph, Article 33, Third Convention; second paragraph, Article 28, First Convention. Pictet, *Commentary on the First Convention* 243.

<sup>281</sup> The prisoners of war for whom their professional services are required should be “preferably those of the armed forces to which they themselves belong.” Second paragraph, Article 28, First Convention.

<sup>282</sup> See the first two paragraphs of Article 33, Third Convention. The author was told by several officers of the Pakistani Army Medical Corps that after two embryonic escape tunnels (with which they had had no connection) were discovered by the authorities at their prisoner-of-war camp in India in the spring of 1972, the seven retained medical officers were no longer permitted to perform their professional functions on behalf of the prisoners of war. Nevertheless, they were only released by the Indian authorities a year and a half later, in February 1974, as a part of the general repatriation. This was, of course, a blatant violation of Articles 28 and 30 of the First Convention and of Articles 4C and 33 of the Third Convention.

<sup>283</sup> Article 30, First Convention.

<sup>284</sup> Article 12, 1929 Wounded-and-Sick Convention.

<sup>285</sup> 1 ICRC *Report* 202; Rich, *Brief History* 497–98.

<sup>286</sup> 1 ICRC *Report* 202; 1947 SAIN 5.

<sup>287</sup> Resolution 3, 1 *Final Record*, 361. Article 31 of the First Convention provides for special agreements concerning medical personnel “to be retained”; Article 28 of the First Convention and the third paragraph of Article 33 of the Third Convention both provide for special agreements concerning the relief of retained personnel.

The ICRC did so,<sup>288</sup> but, of course, this merely means that models exist and will be available for possible use when the occasion arrives. Whether, and to what extent, States will make use of them will only become evident in the event. The ICRC itself has said that “[i]t can be foreseen that, in a future conflict, retention will become the rule.”<sup>289</sup>

Individuals who, although trained in a medical or dental profession, are not attached to the medical service of the armed force in which they are serving at the time that they fall into the power of the adverse party may, nevertheless, be required by the Detaining Power to perform medical functions on behalf of prisoners of war who depend on the same Power of Origin that they do. While they are so engaged, they are entitled to the same treatment as retained personnel, and they cannot be required to do any other work. However, they continue to be prisoners of war.<sup>290</sup>

In most armies there are a number of functions that are performed by individuals who are not normally involved in combat. These individuals frequently have a secondary duty to act as stretcher-bearers and emergency medical personnel in time of need.<sup>291</sup> If they fall into the power of the enemy while they are engaged in their primary functions, they are, of course, ordinary prisoners of war. However, if they fall into the power of the enemy while actually engaged in medical functions, although they are prisoners of war, their employment in a prisoner-of-war camp is to be on medical duties “in so far as the need arises.”<sup>292</sup> There is no indication as to the method by which a prisoner of war will be able to establish the exact function that he was performing at the time when he fell into the power of the enemy.

One problem in the medical personnel area which was not covered in the 1929 Wounded-and-Sick Convention, and which is only tangentially covered in the 1949 Conventions, concerns the disciplinary powers of the Detaining Power when medical personnel act improperly. During World War II the Germans issued an order providing that attempted escapes by medical personnel could be punished by “a temporary or permanent suspension of their privileges, in full or in part.”<sup>293</sup> There was probably no legal basis for the issuance of this order, but certainly the Detaining Power has to have some power of discipline.

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<sup>288</sup> ICRC, *Model Agreement*.

<sup>289</sup> *Ibid.* at 8 (Trans. mine).

<sup>290</sup> Article 32, Third Convention.

<sup>291</sup> For example, bandsmen, mess personnel, clerks, etc. For a problem of identification encountered during World War II, see Rich, *Brief History* 517.

<sup>292</sup> Articles 25 and 29, First Convention.

<sup>293</sup> *German Regulations*, No. 6, para. 5. One writer has raised the issue of the effect on medical personnel of the United States armed forces of the provisions of the so-called *Code of Conduct*, Sec. III of which makes it the duty of *any* member of the United States armed forces who has been captured to “make every effort to escape.” Smith, *Code of Conduct* 98-99.

Article 33(c) of the Third Convention now provides that these individuals are "subject to the internal discipline of the camp in which they are retained."<sup>294</sup> It would therefore appear that they could now legally be disciplined for attempted escape to the same extent as a prisoner of war.<sup>295</sup> But what of the physician in the power of the enemy who, perhaps for some ideological reason, refuses to perform any professional duties and will not provide medical treatment for the sick and wounded members of the armed forces of his own Power of Origin? This was the procedure followed by most of the North Vietnamese medical personnel captured in Vietnam.<sup>296</sup> The South Vietnamese responded by treating them as ordinary prisoners of war.<sup>297</sup> Once again, there was probably no specific legal basis for such action; but certainly, if a member of the medical profession refuses to employ his professional abilities, even for the benefit of his own countrymen, he is denying his professional status and, under those circumstances, there is little that a Detaining Power can do except to remove him from the category of a retained person and to place him in a general prisoner-of-war status (unless his recalcitrance is to be rewarded by repatriation).

## 10. Problems of General Import

There are a number of categories of individuals concerning whom special problems arise when they fall into the hands of a belligerent Power; and while in some such categories the numbers of individuals involved have been comparatively small, nevertheless the problems which they create are considered worthy of mention.

### a. NATIONALITY

Normally, the nationality of the individual falling within one of the categories enumerated in Article 4 is that of the belligerent Power for

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<sup>294</sup> The Article goes on to prohibit the Detaining Power from compelling them to do any work other than medical or religious. The provision quoted in the text refers only to disciplinary matters (Articles 89-98, Third Convention. See pp. 324-330 *infra*. Presumably, there is no question of the right of the Detaining Power to impose penal sanctions for crimes (Articles 99-108, Third Convention). See pp. 330-342 *infra*.

<sup>295</sup> See Articles 91-94, Third Convention, and the discussion thereof at pp. 403-407 *infra*.

<sup>296</sup> Actually, those doctors who refused to function in their professional capacities probably did so because of specific orders received before capture, orders based upon the desire to place a greater burden on the medical facilities of the armed forces in South Vietnam.

<sup>297</sup> *Vietnam, Article-by-Article Review*, Article 32. In Korea many of the captured North Korean medical personnel had participated in the prisoner-of-war camp mutiny conspiracy. U.N.C., Communist War, part II, sec. B, para. 10, at 16. No action was taken against them.

which he is fighting.<sup>298</sup> However, he may have the nationality of a neutral, or of an ally of the belligerent in whose armed forces he is serving at the time that he falls into the power of the enemy—or even of the adverse Party, or one of its allies. Does this affect his entitlement to prisoner-of-war status? Apparently there is no dispute with respect to the entitlement to prisoner-of-war status of an individual who is a national of a neutral State or of a State which is an ally of the belligerent in whose armed forces he is serving.<sup>299</sup> However, the entitlement to such status of an individual who is a national of the Capturing Power, or of one of its allies,<sup>300</sup> is the subject of dispute.

Several writers, notably Lauterpacht, have taken the position that the national of the Capturing Power who falls into its power while serving in the armed forces of the enemy is not entitled to prisoner-of-war status or to the protection of international law.<sup>301</sup> This position has been cited and approved by the Privy Council<sup>302</sup> in a decision which has been the subject of criticism.<sup>303</sup> Certainly, the individual concerned could be tried for treason under the municipal law of the Capturing Power whose nationality he carries; but this does not mean that he is not entitled to the protection of prisoner-of-war status at

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<sup>298</sup> This is undoubtedly the basis for the invention of the term "Power of Origin" to indicate the Power upon which the prisoner of war depends, although it may, in a particular case, be a complete misnomer.

<sup>299</sup> Flory, *Prisoners of War* 33–35; Lauterpacht–Oppenheim 261; Greenspan, *International Law* 32; Elman, *Prisoners of War* 180. In *German Regulations*, No. 32, para. 513, the German order said:

513. *U.S. prisoners of war in British uniforms.* Prisoners of war of U.S. nationality captured as members of Canadian armed forces are considered British prisoners of war regardless of whether they joined the Canadian services before or after the entry of the United States into the war.

The German orders on this subject systematically followed the principle that the nationality of the individual for prisoner-of-war purposes was decided by the uniform which he was wearing at the time of his capture. *Ibid.*, No. 1, para. 1; No. 13, para. 56; No. 32, para. 513; No. 33, para. 561. This was also the position of the United States. See 12 Dept. State Bull. 864 (1945).

<sup>300</sup> No specific discussion has been found of the problem involved when the captured individual is a national of an ally of the Capturing Power. However, this would probably make no difference as the Capturing Power could transfer the individual to its ally under Article 12 of the Convention and the individual would then be in the custody of his own nation as Detaining Power.

<sup>301</sup> Lauterpacht–Oppenheim 268. See also Flory, *Prisoners of War* 29–30. The latter emphasizes that the contrary is true if the individual has been naturalized by the belligerent State in whose armed forces he was serving at the time of capture. Dual citizenship in the two opposing belligerents would also present a problem under Lauterpacht's thesis.

<sup>302</sup> *Public Prosecutor v. Koi*.

<sup>303</sup> Baxter, *Qualifications* 291–94; Elman, *Prisoners of War* 180–95.

least up to and during the trial.<sup>304</sup>

The problem has been adverted to by the courts of the United States on two separate occasions. Writing in 1942, the United States Supreme Court said:

. . . Citizens [of the United States] who associate themselves with the military arm of the enemy government . . . are enemy belligerents within the meaning of the [Fourth] Hague Convention [of 1907] and the law of war.<sup>305</sup>

And in 1946, in a case involving an Italian prisoner of war who had sought habeas corpus on the ground that he was an American citizen and that he could not, therefore, be held as a prisoner of war by the United States, the United States Court of Appeals said:

We have reviewed the authorities with care and we have found none supporting the contention of petitioner that citizenship in the country of either army in collision necessarily affects the status of one captured on the field of battle.<sup>306</sup>

It is believed that the principle to be extracted from these two opinions expresses the proper rule of international law, and that any individual who falls into the power of a belligerent while serving in the enemy armed forces should be entitled to prisoner-of-war status no matter what his nationality may be, if he would be so entitled apart from any question of nationality; subject to the right of the Detaining Power to charge him with treason, or a similar type of offense, under its municipal law and to try him in accordance with the guarantees contained in the relevant provisions of the Convention.<sup>307</sup>

#### b. DESERTERS AND DEFECTORS

There has been much confusion in the use of these and related terms.<sup>308</sup> In the discussion which follows, the word *deserter* is used to

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<sup>304</sup> Lauterpacht said: "The privileges of members of armed forces cannot be claimed by . . . traitorous subjects of a belligerent who, without having been members of his armed forces, fight in the armed forces of the enemy. . . ." Lauterpacht-Oppenheim 268. If he refers solely to the right of the Detaining Power to try them for treason under its municipal law, he is correct. However, if he would deny them the protection of the Convention from the very outset of captivity, then it is believed that the quoted statement no longer represents the international law rule, the Privy Council in *Public Prosecutor v. Koi* to the contrary notwithstanding. Elman, *Prisoners of War* 180 & 184. See also Wilhelm, *Status* 32-34, 35 *I.C.R.* at 686-87.

<sup>305</sup> *Ex parte Quirin*, 317 U.S. at 37-38.

<sup>306</sup> *In re Territo*, 156 F.2d at 145. This case was found to be unpersuasive by the Privy Council in *Public Prosecutor v. Koi*.

<sup>307</sup> See pp. 330-342 *infra*.

<sup>308</sup> Thus, when García-Mora writes at length concerning *deserters*, it is patent that the individuals to whom he is referring are actually those who will be here referred to as *defectors*. García-Mora, *Asylum* 103-07. The same confusion is found in Clause, *Status* 34-35. Although it is believed that he errs in other re-

connote one who absents himself from his place of duty without the permission of his proper authorities. In the context of this study he thereafter comes into the custody of the enemy armed forces, perhaps by voluntary surrender, seeking the dubious refuge of a prisoner-of-war camp primarily as a means of escaping from the fears and dangers of the battlefield.<sup>309</sup> His change in status is motivated by a lack of amenability to military life in general, and to combat in particular, and *not* by ideology. The word *defector*, on the other hand, is used to connote one who deliberately seeks refuge with the enemy because he disagrees with the policies and politics of his own Government and agrees with those of the enemy.<sup>310</sup> He is motivated by ideological considerations, and when he leaves his place of duty he probably desires and intends, if possible, to join the enemy armed forces in order to help hasten the attainment of his ultimate objective: the victory of the enemy and the defeat of his own country. Obviously, both these categories involve some identical and some different problems.

The *deserter*, like any other member of the regular armed forces of his country who falls into the power of the enemy, becomes a prisoner of war.<sup>311</sup> The fact that he deserted and, perhaps, on his own initiative, sought an opportunity to surrender does not change his position under international law and, insofar as the Capturing Power is concerned, whatever may be his legal status under the civil and military law of his own country. One man, wounded, surrenders because he is physically unable to continue to fight; another man, a deserter, surrenders because he has lost the will to fight. The reason for the surrender is immaterial. Both of these men, as members of the regular armed forces of their country, come within the provisions of Article 4A(1) of the

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spects, Hess draws the proper and necessary distinction between deserters and defectors. Hess, Post-Korea 55. So, too, do Esgain & Solf 555.

<sup>309</sup> The deserter does not necessarily come under the power of the enemy. He may seek refuge in a neutral country; or, if he is located in his own national territory, or in territory contiguous to his own national territory, he may return home or seek to lose himself among the civilian population.

<sup>310</sup> For this reason, one author writing shortly after World War I speaks of defectors as "refugees." Fooks, *Prisoners of War* 83. A SEATO directive defines a defector as follows:

A defector. . . is any person who is voluntarily or involuntarily serving the enemy, either as a member of its Armed Forces or otherwise, who voluntarily terminates his service to the enemy for the purpose of bearing arms on behalf of SEATO, or to otherwise assist the SEATO cause, and who immediately upon capture or submission to SEATO control, gives express notice that he no longer desires to serve the interests of the enemy state.

SEASTAG No. 2033, Interrogation of Captured or Otherwise Detained Personnel (GDP), Annex C, para. 4 (1970).

<sup>311</sup> Flory, *Prisoners of War* 30.

Convention and are entitled to prisoner-of-war status.<sup>312</sup>

It has been suggested that the deserter is not entitled to prisoner-of-war status on the basis of either of two arguments: (1) that the failure to mention deserters specifically in the enumeration contained in Article 4 was a deliberate omission;<sup>313</sup> and (2) that deserters do not "fall" into the power of the enemy.<sup>314</sup> The first argument is unconvincing because the member of the armed forces who deserts and surrenders to the enemy is, nevertheless, a member of the armed forces within Article 4A (1) of the Convention; hence, it was no more necessary to include deserters as specifically being within that category than it was to include cooks, artillerymen, or noncommissioned officers, all of whom are equally members of the armed forces. And the second argument is also unconvincing because, as we have seen,<sup>315</sup> the words "fallen into the power of the enemy" were substituted for the word "captured," previously used, precisely in order to ensure prisoner-of-war status to those who surrender voluntarily.

One other problem remains with respect to deserters who surrender to the enemy—their disposition upon the cessation of active hostilities. Historically, for obvious reasons, they were not repatriated upon the termination of hostilities. However, this policy changed during the nineteenth century.<sup>316</sup> Under the 1949 Convention the Detaining Power would be required to repatriate *all* prisoners of war, including deserters, upon the cessation of active hostilities. However, if the policy of "voluntary repatriation," and "no forcible repatriation," can be considered as a proper interpretation of Article 118, and as indicative of the manner in which belligerents will interpret and apply Article 118 as a matter of practice—and it is believed that it is<sup>317</sup>—the deserter could, and presumably in most cases would, elect to decline to be repatriated.

A *defector* has been defined above as one who seeks refuge with the enemy because, in effect, ideologically he supports its objectives and opposes those of his own country. As a member of the armed forces

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<sup>312</sup> So-called surrender leaflets—leaflets released behind enemy lines by artillery shells or by air drops encouraging surrender—usually promise good food and good treatment as prisoners of war in a comfortable prisoner-of-war camp far removed from the perils of war, promises which are not always kept. Shub, *The Choice* 63–64.

<sup>313</sup> Clause, Status 16; García-Mora, *Asylum* 103–04.

<sup>314</sup> Wilhelm, Status 29, 35 *R.I.C.R.* at 682.

<sup>315</sup> See pp. 34–36 *supra*.

<sup>316</sup> García-Mora, *Asylum* 104. He further states that the practice of incorporating amnesty clauses in peace treaties gave the necessary protection to repatriated deserters. *Ibid.* This may have been true at one time but it certainly is not so at present.

<sup>317</sup> See the discussion of voluntary versus involuntary repatriation at pp. 421–426. *infra*. See generally, Schapiro, Repatriation 310–11; García-Mora, *Asylum* 103–06; Clause, Status, *passim*.

of his country he, too, has a right to prisoner-of-war status; and under Article 7 of the Convention this is a right which he cannot renounce.<sup>318</sup> However, there have been numerous occasions upon which defectors have affirmatively sought, or have been encouraged, to serve in the armed forces of the Detaining Power.<sup>319</sup> To permit them to do so is a violation of Articles 4, 5, and 7 of the Convention.<sup>320</sup> This does not mean that defectors may not *voluntarily* assist the Detaining Power while remaining prisoners of war. They may, for example, without bringing the Detaining Power into conflict with the provisions of the Convention, act as interpreters, draft surrender leaflets,<sup>321</sup> write radio propaganda scripts, give indoctrination lectures, and even act as undercover informers on their fellow prisoners of war.<sup>322</sup> Defectors were permitted to give up their prisoner-of-war status and to join the armed forces of the Detaining Power during World War I<sup>323</sup> and World War II.<sup>324</sup> This was one of the major reasons for the inclusion in the Con-

<sup>318</sup> See pp. 91–93 *infra*.

<sup>319</sup> Article 130 makes it a grave breach of the Convention to *compel* a prisoner of war “to serve in the forces of the hostile power.” See pp. 361–363 *infra*.

<sup>320</sup> Under Article 4A (1) they are, upon falling into the power of the other side, prisoners of war. Under Article 5 this status continues from the time of falling into the power of the other side until “final release and repatriation.” And under Article 7 prisoners of war may not renounce in part or in their entirety the rights secured to them by the Convention.

<sup>321</sup> During the armed conflict in Korea (1950–53) a question arose within the United Nations Command (U.N.C.) concerning the legality of the use of Chinese prisoners of war who had volunteered to draft surrender leaflets to be disseminated among the members of the “Chinese People’s Volunteers.” The decision reached was that they could be given this task but that it would be necessary to notify the ICRC (the *de facto* Protecting Power for prisoners of war captured by the U.N.C.) of their location as a work detachment so that the ICRC could continue to assure that only true volunteers were being so used.

<sup>322</sup> The North Koreans and the Chinese both made extensive use of this latter technique during the armed conflict in Korea. U.S. *POW* 27; U.K. *Treatment* 20; Schein, *Patterns* 257; Anon., *Misconduct* 727–28. It is, of course, extremely demoralizing to the great body of prisoners of war who are and remain loyal to their own country, so it serves a dual purpose for the Detaining Power. It was a major reason for the promulgation by the President of the United States of the *Code of Conduct for Members of the Armed Forces of the United States*, Sec. IV of which is a direct attempt to reduce participation in this type of activity by members of the armed forces of the United States who become prisoners of war. Prugh, *Code of Conduct* 687–88.

<sup>323</sup> For example, the German-created “Irish Brigade” composed of captured Irish members of the British armed forces. U.S., *POW* 55–56. See p. 361 *infra*.

<sup>324</sup> The Soviet Union created units of captured Germans, the Germans created units of captured Russians, etc., etc. See Harrison, *Cross-Channel Attack* 145. Concerning the recruitment of Indian prisoners of war by the Germans and by the Japanese during World War II, see Calvocoressi & Wint 804–05 & 806–09. (It should be noted, however, that in both World Wars the majority of the individuals who served in the enemy’s armed forces after having been captured were not ori-

vention of the provisions of Article 130, prohibiting involuntary, and Article 7, effectively prohibiting voluntary, service by a prisoner of war in the armed forces of the Detaining Power.<sup>325</sup>

The defector, then, like the deserter, is a prisoner of war and the 1949 Convention, with all its prohibitions and safeguards, is fully applicable to him.<sup>326</sup> Obviously, the question of whether he is to be repatriated upon the cessation of active hostilities is even more important to him than it is to the deserter, particularly if he has been permitted to serve in the armed forces of the Detaining Power. Once again, it would appear that this question presents no problem if legal and humanitarian considerations require that Article 118 be so interpreted as to permit each prisoner of war to make his own personal determination as to whether he desires to be repatriated, particularly when it is obvious that his repatriation inevitably means either a very long term in prison or even a death sentence.<sup>327</sup>

It must be emphasized that the foregoing discussion of deserters and defectors is strictly from the point of view of international law in

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ginally defectors but were ordinary prisoners of war who were induced by promises, or by more forcible methods of persuasion, to join the Detaining Power's armed forces.) See also note VI-79 *infra*.

<sup>325</sup> During the armed conflict in Korea the North Koreans justified the disappearance of literally tens of thousands of admittedly captured members of the Republic of Korea Army by insisting that after "reeducation" they had all elected to join the armed forces of North Korea. See note VI-81 *infra*. In Vietnam both sides "reeducated" their captives and then inducted them into their respective armed forces. The "Chieu Hoi" ("open arms" or "welcome return") program of the Republic of Vietnam was, to a considerable extent, a violation of the Convention. For a discussion of this latter program and the results which it is claimed to have attained, see Brewer, Chieu Hoi, *passim*. One author argues that as the Republic of Vietnam was dealing with its own citizens, and not foreign nationals, "the Chieu Hoi program may be defended as an act of amnesty or pardon." Bond, Proposed Revisions 238. There are merits to this contention, particularly as the Republic of Vietnam itself decided that permitting members of the armed forces of the People's Republic of Vietnam (North Vietnam) to join the Chieu Hoi program violated Article 7 of the Convention. *Vietnam, Article-by-Article Review*, Article 7.

<sup>326</sup> For a contrary view, see Hess, Post-Korea 52. However, that author does seem to indicate that this is a matter which is subject to individual national political decisions, decisions which can be based upon the arguments discussed above (see text in connection with notes 314 and 315 *supra*) with respect to the interpretation of the term "fallen into the power of the enemy." *Ibid.*, 58. See also U.N., *Human Rights*, A/7720, para. 88; *British Manual* para. 126. (The latter draws a distinction between defectors, who are stated not "to be entitled to be treated as prisoners of war" and prisoners of war who defect during captivity who "retain their status and cannot be deprived of it." *Ibid.*, n.1. This position would, of course, preclude "Irish Brigades" (see note 323 *supra*) in future armed conflicts.

<sup>327</sup> See the discussion of Article 118 at pp. 417-429 *infra*. With respect to the humanitarian considerations, see Garcia-Mora, *Asylum* 106-07.

general and the 1949 Convention in particular, and does not purport to concern itself with municipal law questions. Certainly, if the deserter is, by any means, returned to the custody of his national armed forces he may be tried for desertion,<sup>328</sup> or for any other appropriate violation of municipal law. Under similar circumstances, the defector may likewise be tried for desertion,<sup>329</sup> treason, or any other appropriate violation of municipal law. And, of particular relevance, it appears to be generally accepted that the defector who subsequently falls into the power of his own national armed forces—the armed forces from which he defected—while serving in the armed forces of the enemy, is *not* entitled to prisoner-of-war status.<sup>330</sup>

### c. COMMANDOS

It has long been a generally accepted rule of the law of war that members of the armed forces of a belligerent, captured in uniform while engaged in missions behind the enemy lines, are entitled to prisoner-of-war status.<sup>331</sup> During World War II Hitler became incensed as a result of the successful operations of the Allied commandos. He thereupon issued the so-called Commando Order,<sup>332</sup> under which all commandos were “to be exterminated to the last man, either in combat or in pursuit” and no quarter was to be given to them. After the war a number of German officers were tried and convicted of war crimes arising out of their implementation of what was almost universally regarded as an obviously illegal order.<sup>333</sup> Post-World War II service manuals emphatically reiterated the old rule.<sup>334</sup> And Article 37 of the 1972 Draft Additional Protocol was even more specific in attempting to assure prisoner-of-war status for uniformed members of the armed forces captured while behind the enemy lines.<sup>335</sup>

<sup>328</sup> Clause, *Status* 33.

<sup>329</sup> *Ibid.*

<sup>330</sup> Flory, *Prisoners of War* 142; Lauterpacht-Oppenheim 268; *British Manual* para. 103; Draper, *Recueil* 110.

<sup>331</sup> Second paragraph of Article 29, 1899 *Hague Regulations* and 1907 *Hague Regulations*.

<sup>332</sup> This is the *Führerbefehl* of 18 October 1942, reproduced at 1 *L.R.T.W.C.* 33–34 and at 11 *L.R.T.W.C.* 20–21. See note 146 *supra*.

<sup>333</sup> See, e.g., the *Dostler Case* and the *Falkenhorst Case*. See also, Kalshoven, *Reprisals* 184–93. The various aspects of the order were directly violative of Articles 23 (c) and (d) of the 1907 *Hague Regulations*.

<sup>334</sup> *U.S. Manual* para. 63; *British Manual* para. 105; *Swiss Manual*, paras. 41–42.

<sup>335</sup> 1972 *Basic Texts* 14. The article was somewhat ineptly drafted in that it merely referred to the need to comply “with the conditions laid down in Article 4 of the Third Convention.” 1973 *Commentary* 46. Article 46 (2) of the 1977 Protocol I provides specifically that a member of the armed forces who gathers information in enemy territory does not engage in espionage “if, while so acting, he is in the uniform of his armed forces.” In *Military Prosecutor v. Kassem* (42 *I.L.R.* at 483) the opinion indicates that being in possession of civilian clothes at the time of capture, even if they were not being worn, might be a basis for a denial of prisoner-

One matter collateral to the problem of commandos, that of airmen, should be mentioned, if for no other reason than because they are frequently referred to in tandem with commandos in service manuals.<sup>336</sup> There appears to be no dispute that parachute troops are active combatants during the course of their jump and may be fired upon while in the air and subsequently on the ground until they are actually captured by the enemy and become prisoners of war. However, the treatment of airmen in distress, the members of crews who have bailed out of their aircraft after it has been rendered nonairworthy, has occasioned some problems. During World War II the Nazis adopted an official policy of failing to protect these individuals from the wrath of the much-bombed civilian population even after they were in official custody and were, therefore, entitled to be protected as prisoners of war.<sup>337</sup> And the Egyptians have taken the rather novel position, which has no precedent in practice and no legal justification in either customary or conventional international law, that the distressed airman is entitled to protection en route to the earth (and to prisoner-of-war status thereafter) if he will land in territory controlled by the enemy, but not if he will land in territory controlled by forces friendly to him.<sup>338</sup>

#### d. SPIES AND SABOTEURS

Little discussion of these two categories is required here. As we have seen,<sup>339</sup> even individuals who fall within the categories specifically enumerated in Article 4 are not entitled to prisoner-of-war status if, at the time of capture by the enemy, they were dressed in civilian

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of-war status. As the defendants in that case were found not to be entitled to the protection of the Convention for other reasons, the statement in the opinion may be regarded as debatable dictum.

<sup>336</sup> See, e.g., *U.S. Manual* para. 63.

<sup>337</sup> IMT 472. After the war ended a number of members of the German armed forces were convicted of the war crime of failing to protect prisoners of war from physical attacks by civilians. See, e.g., the *Essen Lynching Case* and the *Trial of Bury*.

<sup>338</sup> The argument advanced by Egypt was that a pilot was more valuable than the plane he flew and that a pilot shot down over friendly territory could be flying another plane in combat a few hours later. (Under this thesis the Germans could have machine-gunned British fighter pilots parachuting from their destroyed planes during the Battle of Britain.) The ICRC apparently supported the position of "modern military manuals" which prohibited attacks on air crews in distress even when they would land in friendly territory. 1973 *Commentary* 45. As adopted in committee during the 1976 session of the Diplomatic Conference, Article 39(1) included the Egyptian proposal ("unless it is apparent that he will land in territory controlled by the party to which he belongs or by an ally of that party"). However, at the 1977 session of Committee III that phrase was eliminated in its entirety from what became Article 42(1) of the 1977 Protocol I.

<sup>339</sup> See pp. 36-37 *supra*. See also *Ex parte Quirin* 367 U.S. at 31; Draper, *Recueil* 109-10.

clothes and were engaged in an espionage or sabotage mission behind enemy lines. It necessarily follows that all other individuals—those who do not fall within the enumeration contained in Article 4 of the Convention—are likewise denied prisoner-of-war status when they are captured while engaged in such a mission.<sup>340</sup>

e. *OTHERS*

Historically, a number of other categories of persons were subject to capture and to prisoner-of-war status, persons such as the Chief of State, whether sovereign or president, members of his family, and his chief ministers.<sup>341</sup> This is no longer true.<sup>342</sup> If such individuals fall into the power of the enemy when the latter overruns their national territory, they will come within the protection of the Fourth (Civilians) Convention, and they may only be placed in assigned residence or interned. If they are taken into custody by the enemy as a result, for example, of a commando raid into territory controlled by their own national armed forces, or of the capture of a vessel on the high seas, they would not come within the ambit of the Third Convention, but, once again, they would benefit from the appropriate provisions of the Fourth Convention.

In the past, military attachés or other diplomatic representatives of neutral nations have sometimes been permitted by the country to which they are accredited, or to which they are sent for the specific purpose, to accompany its armed forces in the field as observers. When taken into custody by the armed forces of the adverse Party, they are not prisoners of war but they may be ordered out of, or removed from, the theater of war by the Party into whose hands they have fallen.<sup>343</sup> This assumes that they have taken no part in the hostilities.<sup>344</sup> If they have acted as “military advisers,” thus actually rendering military assistance to the armed forces opposing those of the belligerent Power into whose hands they have fallen, it could be argued that they fall

<sup>340</sup> Article 29, first paragraph, 1907 *Hague Regulations*; *U.S. Manual* para. 76; *British Manual* para. 326; *Swiss Manual* para. 38. See generally, Article 46 of the 1977 Protocol I.

<sup>341</sup> Davis, *Prisoner of War* 531; Riskey, *The Law of War* 129.

<sup>342</sup> It remains true for the Chief of State if he is, by statute or constitution, the commander in chief of the armed forces; and for a minister if he is, in addition to his political office, a member of the regular armed forces or is accompanying the armed forces in the field in one of the categories included in Article 4A. *British Manual* para. 127.

<sup>343</sup> *British Manual* para. 129; *U.S. Manual* (1940 ed.) para. 77; *U.S. Manual* para. 83. A note in the *British Manual* states that during the Russo-Japanese War (1904–05) a British naval attaché and two American military attachés accompanying the Russian forces were captured by the Japanese at Mukden. They were sent to Tokyo and turned over to their respective Ministers. Concerning this episode see Ariga, *Guerre russo-japonaise* 122.

<sup>344</sup> This is stated as one of the requirements in each of the sections of the manuals cited in the previous note.

within the ambit of Article 4A (4)<sup>345</sup> and that they are therefore entitled to prisoner-of-war status.<sup>346</sup>

## 11. Conclusions

The above discussion involving the determination of entitlement to prisoner-of-war status under the 1949 Convention should not be considered exhaustive either as to the categories of persons entitled to that status,<sup>347</sup> or as to the problems which may conceivably arise in this area of the law of armed conflict,<sup>348</sup> particularly as the characteristics of armed conflict, and of the combatants participating therein, are in an extraordinary period of change. Despite the minimal attention paid to the subject of prisoners of war in general and entitlement to prisoner-of-war status in particular in the 1973 Draft Additional Protocol, the decisions in this area made by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts and included in the 1977 Protocol I demonstrate that the subject continues to be in a state of flux and is one in which major changes may be anticipated, changes which may come about by negotiation, but which will more probably evolve out of the practice of nations.

## F. SOME GENERAL PROBLEMS

### 1. Agreements between Belligerents

While it is far from easy to obtain agreements between opposing belligerents during the course of international armed conflict, particularly with respect to matters involving the conduct of that conflict,

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<sup>345</sup> The enumeration contained in that article is merely illustrative as is indicated by the fact that it starts with the words "such as."

<sup>346</sup> The practice followed by the Vietcong and the North Vietnamese does not furnish a particularly strong precedent with respect to the status of "military advisers" inasmuch as neither of them gave prisoner-of-war status to any captured Americans, whether serving as military advisers to the Republic of Vietnam armed forces or, subsequently, as members of combat units. However, inasmuch as all such individuals were treated (or maltreated) equally, it may be argued that it does furnish a precedent of sorts supporting the premise contained in the text. The problem of the status of military advisers, either before or after capture, has received surprisingly little attention from commentators.

<sup>347</sup> See note 345 *supra*. *U.S. Manual* para. 70; *British Manual* para. 127 n.1. Moreover, as the two manual provisions point out, there is nothing to preclude a Detaining Power from granting prisoner-of-war status or treatment to individuals, or categories of individuals, who cannot conceivably fall within the provisions of Article 4. For an example of this, see note 206 *supra*. One category of individuals specifically removed from eligibility for prisoner-of-war status by Article 47 of the 1977 Protocol I is that of "mercenaries."

<sup>348</sup> For example, as one author points out, in the Republic of Vietnam the status of "civil defendant" was to be preferred over that of prisoner of war, despite the fact that the latter had originally been intended to be the most desirable status for an individual in the custody of the enemy, Haight, *Shadow War* 46.

it is possible, and numerous agreements between such belligerents have been reached in past conflicts.<sup>349</sup> Many articles of the Convention contain specific references to agreements between the belligerents;<sup>350</sup> and there are matters covered in other articles that could also conceivably be the subject of such agreements.<sup>351</sup> In fact, the first paragraph of Article 6, which is concerned with special agreements between the belligerents, specifies that the belligerents are not restricted to the subjects enumerated in that Article,<sup>352</sup> that they may conclude agreements on any subjects that they deem appropriate.<sup>353</sup>

There are two major limitations contained in the Convention with respect to the making of special agreements. First, the lead paragraph of Article 6 prohibits any such agreements that "adversely affect the situation of prisoners of war"; and, perhaps of even more importance, it prohibits any such agreements that "restrict the rights which it [the Convention] confers upon them." Hence, special agreements between belligerents may improve the lot of the prisoner of war, but may not in any manner remove or limit any of the rights, privileges, or safeguards assured to them by the Convention.<sup>354</sup> And second, the fifth paragraph of Article 10 prohibits any special agreement derogating from the preceding provisions of that Article (which are concerned with the selection of a substitute for a Protecting Power) when the freedom of one Power is restricted "by reason of military events, more

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<sup>349</sup> See, e.g., the agreements listed in note 39 *supra*. We are, of course, here concerned exclusively with agreements concerning prisoners of war reached by the Detaining Power and the Power of Origin.

<sup>350</sup> The first paragraph of Article 6 lists 17 articles of the Convention that contain some type of provision for agreements between belligerents.

<sup>351</sup> For example, agreements concerning prisoner-of-war food, amplifying the first paragraph of Article 26 even though it contains no mention of the possibility of such agreements, are not inconceivable. See p. 126 *infra*. Again, it would frequently be helpful for the belligerents to enter into an agreement concerning comparable ranks, even though the first paragraph of Article 43 is not among those referring to the possibility of agreements between belligerents. See p. 168 *infra*.

<sup>352</sup> During World War II the United States and Germany reached an agreement that called for a head-for-head exchange of prisoners of war who had been sentenced to death for the murder of fellow prisoners of war (Lewis & Mewha 76-77), certainly a subject not referred to in the Convention.

<sup>353</sup> It might be asked why sovereign States, as the belligerents in international armed conflict would presumably be, must be granted permission to enter into agreements during the course of hostilities. One answer advanced, and with considerable merit, is that the Convention creates multilateral obligations running between all of the Parties thereto, and the first paragraph of Article 6 permits bilateral amplifications to which agreement of all of the Parties to the Convention would otherwise be required. See Wilhelm, *Le caractère* 579-81.

<sup>354</sup> In Pictet, *Commentary on the First Convention* 75, this provision of the first paragraph of Article 6 is termed "a landmark in the process of renunciation by States of their sovereign rights in favour of the individual and of a superior juridical order."

particularly where the whole, or a substantial part, of the territory of said Power is occupied." This provision arose out of the experiences of World War II when the Scapini Mission replaced the Protecting Power in the supervision of the treatment of French prisoners of war held by the Germans.<sup>355</sup> It is unfortunate, however, that the decision was made to limit this particular prohibition to the provisions of Article 10, concerned solely with substitutes for a Protecting Power, as the same problem can arise in many other areas.<sup>356</sup>

The second paragraph of Article 6 provides that when the belligerents reach a special agreement for the benefit of prisoners of war, the latter shall have the benefits of the provisions of that agreement until (1) it expires by its own terms; or (2) it is superseded by a subsequent and, presumably, more favorable agreement; or (3) the Detaining Power has taken measures more favorable than those contained in the agreement.<sup>357</sup> This provision parallels the first paragraph of Article 5 of the Convention, which provides that the Convention itself protects prisoners of war from the time that they fall into the power of the enemy until their final release and repatriation. Special agreements, once negotiated, have the same duration with the three exceptions noted.

## 2. Disputes between Belligerents

Inevitably, disputes arise between the opposing belligerents during the course of practically all international armed conflicts, with charges and countercharges passing back and forth, some of which will be fully justified;<sup>358</sup> some of which will be unwarranted, but will have been made in good faith on the basis of apparently reliable information received and believed to be true;<sup>359</sup> and some of which will be made when known to be completely without foundation, and, perhaps, on the basis of evidence known to be manufactured.<sup>360</sup> Not infrequently, such

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<sup>355</sup> See notes 52 *supra*, and IV-70 *infra*. See also, Pictet, *Recueil* 87-88; Bastid, *Droit des gens* 335; Wilhelm, *Le caractère* 576. Substantially the same problem arose with respect to the T'Serclaes Mission in occupied Belgium. See note IV-70 *infra*.

<sup>356</sup> See, e.g., 1 ICRC *Report*; and Pictet, *Commentary on the First Convention* 71.

<sup>357</sup> Article 41 requires the Detaining Power to post in every prisoner-of-war camp a copy of the Convention and "the contents of any special agreements" in the language of the prisoners of war therein incarcerated. See p. 166 *infra*.

<sup>358</sup> See note VI-115 *infra*.

<sup>359</sup> See note VI-116 *infra*.

<sup>360</sup> The charge made by the Soviet Union, the People's Republic of China and North Korea (not all of whom were admitted belligerents) in 1952 that the United States was using bacteriological weapons in Korea (see note 372 *infra*) is typical of this last category. A demand by the United States for an impartial investigation was, of course, unanswered. The Soviet Union has, by subsequent actions, implicitly admitted the lack of validity of that charge. Levie, *Working Paper* 17. Similarly, the Nazi charge that the British had sunk the *Athenia* in

disputes will involve the treatment, or alleged maltreatment, of prisoners of war. The Convention provides two methods of resolving such disputes.

Article 11 provides that, in the interests of the prisoners of war, Protecting Powers "shall lend their good offices" with a view to settling disputes between belligerents, particularly those involving "the application or interpretation of the provisions of the present Convention."<sup>361</sup> The second paragraph of Article 11 supplements this by providing that, in such a case, the Protecting Power may, at the request of a belligerent *or on its own initiative*,<sup>362</sup> propose to the opposing belligerents a meeting of their representatives, particularly those responsible for prisoners of war, the meeting to take place "possibly on neutral territory suitably chosen."<sup>363</sup> It continues with the provision that the belligerents to whom a proposal for a meeting of their representatives is made "shall be bound to give effect to the proposals made to them for this purpose";<sup>364</sup> and it concludes with an authorization for the Protecting Powers, if they deem it necessary, to propose an individual from a neutral nation, or selected by the ICRC, "who shall be invited to take part in such a meeting." Presumably, such individual would act as a catalyst, a combined conciliator-mediator, whose presence and activities would make it possible for the representatives of the opposing belligerents to negotiate and to reach agreements, despite the handicaps that confront any representatives of opposing belligerents

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September 1939 to create a German atrocity story was made originally on the basis of a complete lack of information, and was later adhered to despite official German reports establishing that a German submarine had been responsible. Von der Porten, *The German Navy in World War II* 36.

<sup>361</sup> Article 87 of the 1929 Convention referred only to "the application of the provisions of the present Convention." The addition of the words "or interpretation" was unsuccessfully opposed by the Soviet Union. 2B *Final Record* 353-54.

<sup>362</sup> The cognate provision of the last paragraph of Article 87 of the 1929 Convention said that the Protecting Powers "may, for instance, propose to the belligerents." In Pictet, *Commentary* 125, the position is taken that, unlike the last paragraph of Article 11 of the 1949 Convention, this provision of the 1929 Convention implied that Protecting Powers could not act on their own initiative, "the initiative being taken by the Party to the conflict whose interests they represent." No basis can be found for this interpretation of the language of the 1929 Convention. However, the last paragraph of Article 11 of the 1949 Convention clearly leaves no room for dispute in this regard.

<sup>363</sup> Neither from the identical wording of the last paragraph of Article 87 of the 1929 Convention, nor from the *travaux préparatoires* of the 1949 Diplomatic Conference, can any clue be obtained as to the interpretation to be given to the words "suitably chosen." Draper, *Recueil* 145.

<sup>364</sup> Despite Colonel Draper's contention (*ibid.*) that by this provision the 1949 Diplomatic Conference was "establishing a duty where none previously existed," the second paragraph of Article 87 of the 1929 Convention actually provided: "The belligerents shall be required to give effect to proposals made to them with this object."

attempting to perform these functions during the actual course of hostilities.

During World War I a great many such meetings took place on neutral territory, and a great many bilateral and multilateral agreements were reached by the opposing belligerents.<sup>365</sup> During World War II not one such meeting took place,<sup>366</sup> primarily because Switzerland, which was the Protecting Power of the great majority of belligerents, did not propose any meetings—probably because it evaluated the probability of successful negotiations at such a meeting as being exceedingly low.<sup>367</sup> Apparently, the participants at the 1949 Diplomatic Conference were not optimistic for the future because, while they attempted to clarify and strengthen the provisions of Article 11, they also adopted a Resolution recommending that “in the case of a dispute relating to the interpretation or application of the present Conventions,” the opposing Parties should attempt to reach agreement on referring the dispute to the International Court of Justice.<sup>368</sup> Nothing is more unlikely than that such an agreement could ever be reached; or, if it were, that the Court would be able to reach a decision before the ultimate cessation of hostilities!

The second method of resolving disputes between belligerents is the “enquiry” provided for in Article 132. Its value is difficult to estimate because there was no comparable provision in the 1929 Convention.<sup>369</sup> However, it appears to present built-in problems. The first paragraph of Article 132 provides that at the request of a belligerent an inquiry concerning any alleged violation of the Convention “shall be instituted.” This has been construed by some as being “obligatory”;<sup>370</sup> while others assert that the institution of an inquiry is consensual.<sup>371</sup> Inasmuch as this paragraph of Article 132 also provides that the inquiry is to be instituted “in a manner to be decided between the interested Parties,” it is difficult to see how an inquiry can be instituted, or conducted, in the absence of agreement between the Parties.<sup>372</sup> Moreover, this conclusion is borne out by the next para-

<sup>365</sup> See, e.g., the agreements listed in note 39 *supra*.

<sup>366</sup> Janner, *Puissance protectrice* 51; Pictet, *Commentary* 125. The agreements referred to in note VII-67 *infra*, were reached by diplomatic correspondence, not by face-to-face negotiation. (It could not be ascertained how the agreement referred to in note 352 *supra* was reached.)

<sup>367</sup> Janner, *Puissance protectrice* 51.

<sup>368</sup> Resolution I, 1 *Final Record* 361.

<sup>369</sup> Article 30 of the 1929 Sick-and-Wounded Convention may be considered to be the progenitor of this article of the 1949 Prisoner-of-War Convention. It apparently was never used. Draper, *Recueil* 149; Pictet, *Commentary* 632.

<sup>370</sup> *Ibid.*

<sup>371</sup> 1971 GE Documentation, II, at 36.

<sup>372</sup> During the hostilities in Korea the Communists charged that the United States was using bacteriological weapons. 2 ICRC *Conflit de Corée*, Nos. 396-99, at 84-86. The United States proposed that an investigation of this charge be made

graph of Article 132, which attempts to establish a procedure to be followed should the opposing belligerents be unable to agree on the manner in which the inquiry is to be conducted. Under those circumstances the belligerents "should agree on the choice of an umpire who will decide upon the procedure to be followed." Once again, agreement between the belligerents is required; this time, agreement on a third party who is to set the procedure for the inquiry upon which the belligerents were themselves unable to agree. It seems rather unlikely that it will be any easier for the belligerents to reach agreement on the selection of an umpire with the far-reaching power to establish the inquiry procedure than it will be for them to reach agreement on the procedure themselves; and if they do not, the inquiry does not take place.<sup>373</sup> However, if a procedure for the inquiry is established, either by the belligerents pursuant to the first paragraph of Article 132, or by the umpire selected pursuant to the second paragraph of Article 132, the inquiry is conducted in accordance with that procedure; and if the inquiry establishes a violation of the Convention, the third and last paragraph of Article 132 requires the belligerent found to be in violation of the Convention to repress the violation as quickly as possible.<sup>374</sup> Of course, if the inquiry determines that there has been no violation, no problem arises.

As has been indicated, the value of the provisions of Article 132 concerning inquiries is dubious. Realizing this, a proposal has been made for the creation of a "United Nations Commission of Inquiry into Breaches of the Humanitarian Conventions."<sup>375</sup> The functions of this Commission would encompass "investigating all complaints of violations during armed conflicts" of the 1899 and 1907 Hague Conventions, the 1925 Geneva Protocol, and the 1949 Geneva Conventions. For the reasons already set forth, the allocation of quasi-judicial functions of this nature to any body owing its existence to a political organization such as the United Nations is a procedure to be regarded with considerable apprehension.<sup>376</sup> There have, perhaps, been some

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by the ICRC. *Ibid.*, No. 406, at 89. The ICRC offered to conduct such an investigation, "subject to the agreement of both Parties." *Ibid.*, Nos. 407-11, at 89-93. The Chinese and the North Koreans did not answer the ICRC and the idea of an investigation was abandoned. *Ibid.*, No. 437, at 109.

<sup>373</sup> Lauterpacht-Oppenheim 395; Pictet, *Commentary* 632. For an example of the difficulty of securing an agreement between the adversaries for an inquiry (in the Middle East), see ICRC *Annual Report*, 1974, at 18-19.

<sup>374</sup> See Draper, *Recueil* 149-50. The last paragraph of Article 132 provides that "the Parties to the conflict shall put an end" to any violation established by the inquiry. (Emphasis added.) Presumably, one belligerent requested the inquiry because it believed that its adversary was violating the Convention. When this belief is established as a fact, it would appear that the belligerent so found to be in violation of the Convention would be the only one with the burden of repression.

<sup>375</sup> U.N., *Human Rights*, A/8370, para. 164.

<sup>376</sup> See pp. 18-19 *supra*.

United Nations fact-finding commissions that have determined facts on the basis of facts and not on the basis of politics; if so, such commissions are few and far between.<sup>377</sup> And even though the proposal referred to above would have the commission composed of "persons, independent of any government, and chosen because of their high moral character and their capacity to conduct inquiries in accordance with generally recognized judicial principles," qualifications closely resembling those previously suggested herein,<sup>378</sup> the overriding difference is that the present proposal would have the members of the commission selected by the political processes of the United Nations, a method not conducive to the selection of persons who will actually meet the stated qualifications.

At its final (1977) session the Diplomatic Conference considering the ICRC's 1973 Draft Additional Protocol to the 1949 Conventions adopted and included in the 1977 Protocol I a completely new Article 90 entitled "International Fact-Finding Commission." This Article, which is probably the longest and most detailed in the Protocol, creates a Commission of 15 members "of high moral standing and acknowledged impartiality," to be elected by the Parties every five years, with the Commission itself filling casual vacancies. The members are to serve in their personal capacity. The Commission may inquire into alleged grave breaches or other serious violations of the 1949 Conventions or the 1977 Protocol; may facilitate the restoration of an attitude of respect for the Conventions and the Protocol; and, in other situations, may institute an inquiry at the request of one Party and with the consent of the other Party or Parties concerned. The Commission is to function by Chambers consisting of five members plus one *ad hoc* member to be appointed by each side. (No nationals of the Parties may be included in the Chamber.) The Chamber may hear evidence submitted by the Parties; may itself seek evidence; and may carry out an investigation *in loco*. Its report is not to be made public unless the Parties so request. Unfortunately, the entire Article is subject to a provision (similar to the optional clause of the Statute of the International Court of Justice) requiring the filing of a declaration recognizing the competence of the Commission to act in relation to any other Party accepting the same obligation. It is not unlikely that many of the very Parties who have heretofore demonstrated their unwillingness to comply with the law of war, even that included in international agreements to which they voluntarily became Parties,

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<sup>377</sup> See the constructive criticism of the methods of fact-finding employed by one United Nations investigatory body in the humanitarian field in Carey, *UN Protection of Political and Civil Rights* 84-126. Other subsequent United Nations investigations continue to be subject to the same criticisms.

<sup>378</sup> See pp. 19-22 *supra*.

will decline to file a declaration accepting the jurisdiction of the Commission.

The settlement of disputes between opposing belligerents in international armed conflict is an inherently difficult process that will only be successfully accomplished when both sides consider such a result to be in their own self-interests; but however difficult it may be, and however weak the provisions of the Convention dealing with the subject may be, the mere fact of their existence may, on occasion, serve as the basis for negotiations leading to the settlement of a dispute. Certainly, this possibility more than justified their inclusion in the Convention.<sup>379</sup>

### 3. Prohibition against Renunciation of Rights

As we have seen, the penultimate paragraph of Article 10 prohibits certain agreements between belligerents when, because of military events, they are not able to negotiate on a basis of equality. Obviously, prisoners of war can never negotiate on a basis of equality with the Detaining Power. This truism was repeatedly demonstrated during World War II and it resulted in the adoption of Article 7 of the Convention, a provision that had no counterpart in any previous Convention dealing with the subject of prisoners of war.<sup>380</sup> In absolute terms, it prohibits them from renouncing any or all of the rights secured to them by the Convention or by any special agreement reached by the belligerents for their benefit.<sup>381</sup>

The belief that any new convention should provide that the rights secured to prisoners of war by that convention must remain inviolate and inviolable for the entire duration of the hostilities was evidenced

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<sup>379</sup> Article 121 also provides for an "enquiry," but of a different kind. The first paragraph of Article 121 mandates that the Detaining Power will itself promptly institute an official inquiry into every death or serious injury of a prisoner of war caused by another person, whether guard, prisoner of war, or stranger, as well as into every death the cause of which is unknown; the second paragraph of Article 121 requires the Detaining Power to notify the Protecting Power of the fact that the inquiry is being conducted and, upon its completion, to provide the Protecting Power with a copy of the report, together with copies of the statements of all witnesses; and the last paragraph of Article 121 requires the Detaining Power to prosecute any individual whose guilt is indicated by the inquiry. See p. 289 *infra*, and, particularly, note IV-128 *infra*. During World War II the Germans followed a procedure identical to that prescribed by the first two paragraphs of Article 121, at least with regard to British prisoners of war. *German Regulations*, No. 15, para. 114.

<sup>380</sup> Pictet, *Commentary* 87. See Flory, *Prisoners of War* 142-44.

<sup>381</sup> In *The Ministries Case* (667-68) the Tribunal found that the provisions of Article 6 of the 1907 *Hague Regulations* prohibiting the use of prisoners of war on work connected with the operations of war did not apply when the prisoner of war volunteered. The first paragraphs of Articles 50 and 52 of the 1949 Convention still permit limited volunteering in the work area. See pp. 231-233 *infra*. See also, Pictet, *Commentary* 90.

as early as the 1946 Preliminary Conference.<sup>382</sup> While this idea was, for some unknown reason, not specifically implemented by the 1947 Conference of Government Experts, it did appear as Article 6 of the ICRC draft submitted to the 1948 Stockholm Conference. That draft provided that “[p]risoners of war may in no circumstances be induced by constraint, or by any other means of coercion to abandon” any of the rights contained in the draft convention.<sup>383</sup> The Stockholm Conference deleted the words “be induced by constraint, or by any other means of coercion to abandon” and substituted the one word “re-nounce.”<sup>384</sup> This was a wise decision, as the original draft did not prohibit voluntary abandonment of rights conferred by the rest of the draft convention and thus left it open for the Detaining Power to assert, in every case, that the prisoner of war’s decision was voluntary and that no constraint or coercion had been used to assist him in reaching his decision abandoning the protections of the convention.<sup>385</sup> Subsequently, the ICRC raised the issue that throughout the convention being drafted obligations were imposed upon the Parties (really, upon the Detaining Power) while proposed Article 6 imposed an obligation directly on the prisoner of war himself; and it offered modifications that would have imposed the obligation in regard to renunciation on the Detaining Power rather than on the prisoner of war.<sup>386</sup> At the 1949 Diplomatic Conference several other amendments were also offered,<sup>387</sup> but none gained the necessary support and the draft article approved at Stockholm was ultimately accepted without change.<sup>388</sup> This provision, now Article 7, constitutes an absolute ban on even a voluntary renunciation by a prisoner of war of any of the rights conferred upon him by the other provisions of the Convention or by any special agreement entered into by his Power of Origin and the Detaining Power for his benefit.<sup>389</sup>

Article 7 is, unfortunately, an oversimplification of a complex matter and numerous problems concerning its application have already arisen, while others are apparent. Does it apply to the defector, the ideologist who, while a member of the armed forces of his own country, seeks out the enemy with the object of joining its armed forces to fight against his country? While disputed by some, it is difficult to understand how Article 7 can be meaningful if a Detaining

<sup>382</sup> 1946 Preliminary Conference 70.

<sup>383</sup> *Draft Revised Conventions* 55.

<sup>384</sup> Revised Draft Conventions 54.

<sup>385</sup> 2B *Final Record* 18.

<sup>386</sup> Remarks and Proposals 39; 2B *Final Record* 17; Wilhelm, *Le caractère* 561.

<sup>387</sup> 2B *Final Record* 17–18; Pictet, *Commentary* 89.

<sup>388</sup> 2B *Final Record* 28.

<sup>389</sup> As aptly put by one writer: “Thus, prisoners of war are no longer protected only against the enemy; they are also protected against themselves.” Pictet, *Re-cueil* 85 (trans. mine). However, see note 381 *supra*.

Power may permit a member of the enemy armed forces in its power, no matter how he so came to be, to volunteer for service in the armed forces of the Detaining Power.<sup>390</sup> Nothing would then prevent a Detaining Power from contending that *every* member of the enemy armed forces who came into its power was a defector who had never had but one thought—to leave the armed forces of his Power of Origin and to join the armed forces of the Detaining Power.<sup>391</sup>

The question of the extent of the coverage of Article 7 was directly raised during the armistice negotiations in Korea in connection with the problem of repatriation under Article 118. Is it a violation of Article 7 to permit a prisoner of war to reject repatriation and to seek asylum either in the territory of the Detaining Power, or elsewhere, when hostilities cease? The decision ultimately reached in that controversy, one that had the support of a large majority of the United Nations General Assembly as then composed, was that Article 7 was not violated if it could be established in a satisfactory manner that the prisoner of war was actually making an informed, voluntary, and personal choice.<sup>392</sup> It probably can be assumed that the decision made with respect to this matter in Korea has established a precedent with respect to the application of Article 7 to the repatriation of prisoners of war after the cessation of hostilities.<sup>393</sup>

#### 4. Dissemination of and Instruction on the Convention

A convention on the treatment of prisoners of war is of little value if it is not known to and understood by two major groups: (1) those who are potential prisoners of war or who have actually become prisoners of war; and (2) those who are responsible for handling, guarding, and, in general, supervising the activities of prisoners of war on behalf of the Detaining Power.<sup>394</sup> Instruction in the provisions of the Convention thus serves a dual purpose: (1) it ensures that members of armed forces who fall into the power of the enemy will be aware, at least generally, of their rights as prisoners of war; and (2) it

<sup>390</sup> See pp. 78–80 *supra*.

<sup>391</sup> The North Korean “reeducation” program and the South Vietnamese “Chieu Hoi” program almost went this far. See note 325 *supra*.

<sup>392</sup> See pp. 421–426 *infra*. One acknowledged expert in this field, who was an active delegate at the 1949 Diplomatic Conference, takes the position that to hold otherwise would be “a travesty of the purpose of that Article.” Gutteridge, *Repatriation* 214.

<sup>393</sup> For a wide-ranging discussion of the prohibitions against changing the status of a prisoner of war, either in accordance with his desires, in accordance with an agreement between his Power of Origin and the Detaining Power, or by unilateral act of the Detaining Power, see Wilhelm, *Status, passim*. It does not discuss Article 7 of the Convention in the context of the Korean repatriation problem, probably because publication began in July 1953, while that problem was still *sub judice*.

<sup>394</sup> Concerning this latter category, see p. 165 *infra*.

ensures that the personnel of the Detaining Power who capture prisoners of war or who have the direct responsibility for the prisoners of war in its custody are aware of the rights and protections to which prisoners of war are entitled and the obligations in this regard that rest upon the Detaining Power's personnel.<sup>395</sup>

Article 84 of the 1929 Convention merely required that that Convention, in the native language of the prisoners of war, be posted in the prisoner-of-war camps so that it could be consulted by them.<sup>396</sup> The 1947 Conference of Government Experts considered this to be inadequate and suggested that the enlargement of that Article include a provision requiring the Parties to bring the stipulations of the Convention to the knowledge of the members of their armed forces.<sup>397</sup> In preparing the draft convention to be submitted to the 1948 Stockholm Conference, the ICRC thought it advisable to separate these two ideas.<sup>398</sup> With some amendments and editing, the new provision calling for dissemination of and instruction on the Convention became the first paragraph of Article 127 of the 1949 Convention. That Article contains three undertakings by the Parties: (1) the widespread dissemination of the Convention in their territories; (2) the inclusion of the study of the Convention in programs of instruction of members of their armed forces; and (3), if possible, the inclusion of study of the Convention in programs of instruction of their civilian population.<sup>399</sup>

Provisions such as those contained in Article 127 are, of course, absolutely indispensable inasmuch as a convention the contents of which are completely unknown, or are known only to a limited group in the Ministry of Foreign Affairs and, perhaps, in the Ministry of Defense, is obviously of no value whatsoever.<sup>400</sup> Moreover, with nations, as with individuals, there is frequently a great distance between the promise and the performance; and here, as in many other areas of the Convention, a good rule has been laid down but no provision has been made for ensuring that it is being applied, particularly

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<sup>395</sup> During World War II the chairman of the Mixed Medical Commission functioning in the United States (concerning these Commissions, see pp. 411–412 *infra*) found that there was “a considerable lack of knowledge concerning the provisions of the Geneva Convention on repatriation and of [*sic*] sick and wounded prisoners of war.” Rich, Brief History 502.

<sup>396</sup> This is now found in the first paragraph of Article 41. See pp. 165–166 *infra*.

<sup>397</sup> 1947 GE Report 261.

<sup>398</sup> *Draft Revised Conventions*, Articles 34 (at 76) and 117 (at 133).

<sup>399</sup> The text of the Convention is to be disseminated in time of peace as well as in time of war. (The provisions of the first paragraph of Article 127 were adopted in almost identical form in Article 25 of the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*.)

<sup>400</sup> “In order to ‘implement’ the Geneva Conventions, not only their existence but also their contents must be fully known, especially by those responsible for application.” 1965 Implementation 1.

in peacetime. In 1966, on its own initiative, the ICRC sent a memorandum on the subject to the 114 States then Parties to the 1949 Conventions and to their National Red Cross Societies, requesting information concerning the implementation of the first paragraph of Article 127. The responses received could not, for the most part, be considered as indicating a very widespread and heartfelt compliance with its provisions.<sup>401</sup>

The 1973 Draft Additional Protocol included a provision intended to remedy this situation. Article 72(3) provided that each Party "shall report" to the Depositary of the Conventions (Switzerland) and to the ICRC "at intervals of four years on the measures they have taken" to comply with the obligations of dissemination and instruction assumed under the first paragraph of Article 127 of the Convention and under Article 72(1) of the Protocol.<sup>402</sup> Such a provision might well go far beyond its surface appearance in procuring a more universal compliance with the dissemination and instruction provisions.<sup>403</sup>

One aspect of the provision with respect to civilian instruction is worthy of note. Under the draft article submitted to and approved by the 1948 Stockholm Conference, the Parties would have undertaken "to incorporate the study [of the Convention] in their programme of military and civil instruction."<sup>404</sup> Because of the constitutional limitations of some Federal systems of government, under which civilian education is frequently not a Federal function,<sup>405</sup>

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<sup>401</sup> Twenty-five truly responsive answers were received. 1969 Implementation, II, at 9. A similar ICRC memorandum sent in 1972 inspired 30 responsive answers out of the 133 States then Parties to the 1949 Conventions. 1973 Implementation 5. A few additional answers were received later and were reprinted in two addenda.

<sup>402</sup> Committee I of the 1975 Diplomatic Conference approved Article 72(3) of the Protocol without change by a vote of 22-17-19. See 1975 Report of Committee I, at 29-30. At the 1977 session of the Diplomatic Conference the paragraph was eliminated in its entirety from what became Article 83 of the 1977 Protocol I.

<sup>403</sup> See note 402 *supra*.

<sup>404</sup> Revised Draft Conventions 99. Programs of instruction on the 1949 Conventions, and any Protocol thereto, for members of the armed forces present practical problems only, not legal ones. See the *Guidelines* developed by the *Seminar on the Teaching of Humanitarian Law to the Armed Forces*, 13 I.R.R.C. 42 (1973). See also the U.S. Department of Defense Directive No. 5100.77, 5 November 1974, DOD Program for the Implementation of the Law of War.

<sup>405</sup> Draper, *Recueil* 152. In Pictet, *Commentary on the First Convention* 349, the author asserts that "the propriety of [these constitutional scruples] is open to question," and in Pictet, *Commentary* 615, the statement is made that "[s]ome delegations, therefore, having a scrupulous regard for constitutional niceties which may be thought unfounded. . . ." (Emphasis added.) Without attempting to detract from the expertise of the author of those statements in the area of American constitutional law, it is fairly obvious that he is totally unfamiliar with the American doctrine of "states' rights" (and of the parallel Canadian doctrine with re-

Canada and the United States proposed, and the 1949 Diplomatic Conference accepted, an amendment changing the above-quoted wording to read, in pertinent part, "program of military and, *if possible*, civil instruction."<sup>406</sup> (Emphasis added.)

Finally, the 1973 Draft Additional Protocol introduced a completely new concept into the law of international armed conflict when it included, in its Article 71, a provision obligating the Parties to ensure that their armed forces have "qualified legal advisers," not only to act as legal advisers to military commanders, but also to "ensure that appropriate instruction be given to the armed forces."<sup>407</sup> While a number of armed forces have long included legally trained persons on their rolls, there are many who do not, or, if they do, presently have so few that they could not possibly perform the functions assigned to them by this provision.

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spect to the rights of provinces). If the Article of the Convention had remained as originally drafted, the United States Senate would, in all probability, have insisted that the ratification of the Convention by the United States include a reservation to it. (For the ICRC's persistence in this respect, see note 406 *infra*.)

<sup>406</sup> 2B *Final Record* 70, 112. Nevertheless, under Article 72(1) of the 1973 Draft Additional Protocol the Parties would have undertaken to include the study of the Convention "in their programmes of military and civil instruction." At the 1975 session of the Diplomatic Conference Committee I, perhaps more realistically inclined than the ICRC in this particular area, adopted by consensus an amended version pursuant to which the Parties undertake to include the study of the Convention in their programs of military instruction "and to encourage the study thereof by the civilian population." 1975 Report of Committee I, at 29-30. As so worded, the provision was adopted as Article 83(1) of the 1977 Protocol I.

<sup>407</sup> Committee I of the 1975 Diplomatic Conference adopted this article by consensus after making several amendments that improved it without changing the objective sought to be attained, 1975 Report of Committee I, at 29; See Fleck, *The Employment of Legal Advisers and Teachers of Law in the Armed Forces*, 13 *I.R.R.C.* 173. With only minor changes this provision became Article 82 of the 1977 Protocol I.