LEVIE ON THE LAW OF WAR

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Editors

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FOREWORD

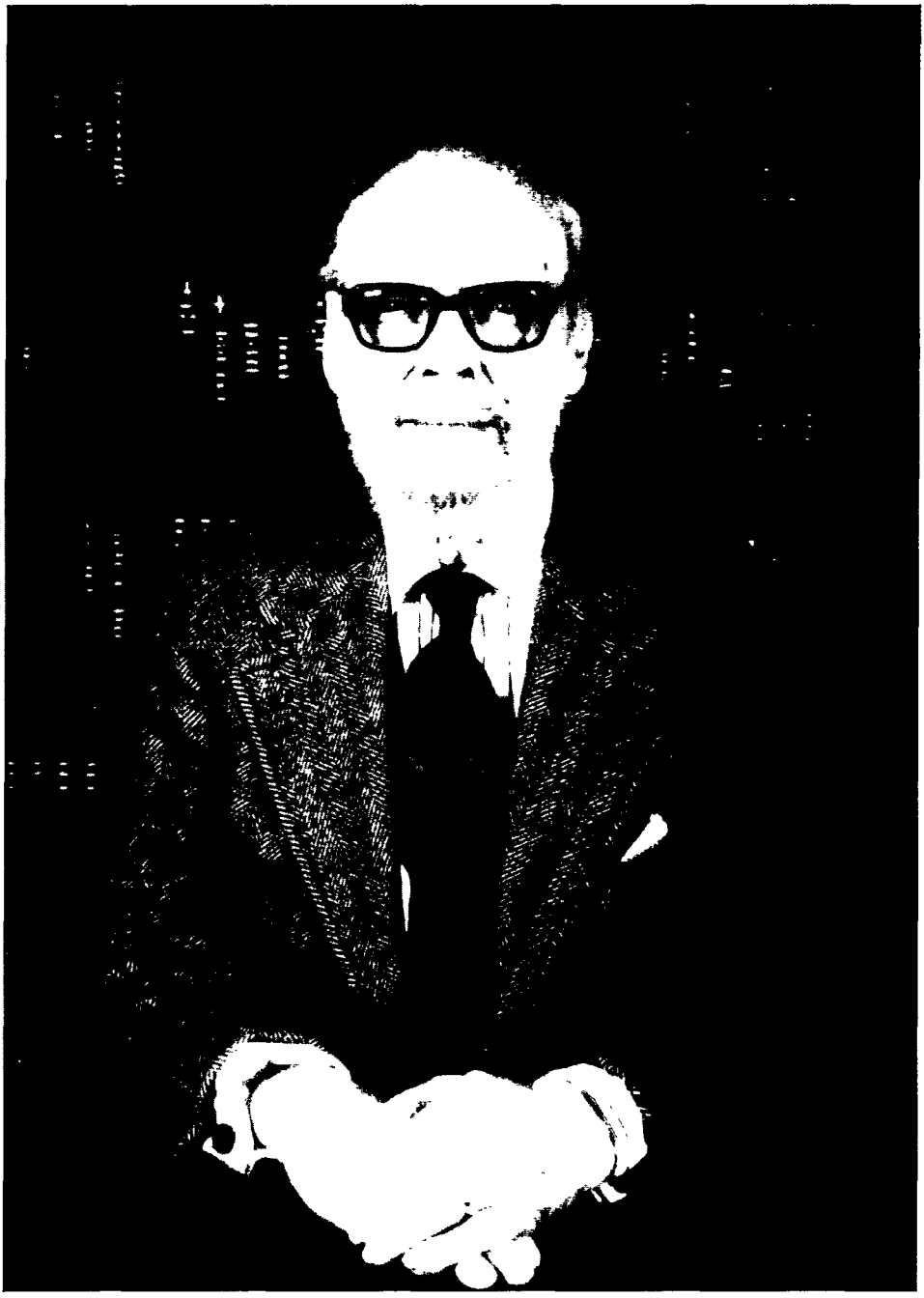
The International Law Studies "Blue Book" series was initiated by the Naval War College in 1901 to publish essays, treatises and articles that contribute to the broader understanding of international law. In *Levie on the Law of War*, the series republishes selected essays of Howard S. Levie.

Professor Levie has contributed to the articulation and development of the law of war for over half a century; initially as a judge advocate in the United States Army, next as a Professor at Saint Louis University School of Law, and then as a widely published and highly respected Professor *Emeritus*. In 1971 Professor Levie began a long relationship with the Naval War College, when he occupied the Charles H. Stockton Chair of International Law. In authoring two volumes of the "Blue Book" series, *Prisoners of War in International Armed Conflict* and *Documents on Prisoners of War*, he revitalized the series and restored it to the forefront of scholarly works involving international law. Thus, it is fitting that we again turn to Professor Levie for this, the seventieth volume of the series.

The editors' selection of articles from Professor Levie's voluminous works illustrate the breadth and depth of his scholarship, and evidence the profound impact he has had on the law applicable to armed conflict. We are pleased to be able to remind those who have long read Professor Levie, and acquaint those who are new to his writings, of the continued vitality of his work. While the opinions expressed in these writings are those of Professor Levie, and are not necessarily those of the United States Navy nor the Naval War College, one cannot quarrel with Professor Levie's commitment, as one of my predecessors, Vice Admiral James B. Stockdale noted in the Foreword to *Prisoners of War*, "to those principles of humanitarianism necessary to regulate an imperfect world."

On behalf of the Secretary of the Navy, the Chief of Naval Operations and the Commandant of the Marine Corps, I extend to the editors our thanks in bringing together these outstanding examples of Professor Levie's work. To Professor Levie, I extend my gratitude for his many contributions to the Naval War College. His legacy at the College will be an enduring one.

JAMES R. STARK
Rear Admiral, U.S. Navy
President, Naval War College



Professor Howard S. Levie

ACKNOWLEDGMENTS

We extend our appreciation to the following publishers who, in order to honor Professor Levie, kindly granted permission to reprint materials originally appearing in their books and journals. Please note that any errors or omissions which have occurred in the reprint of these articles are the responsibility of the editors, not of the original publishers.

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INTRODUCTION

It is a rare privilege in life to ascend to the top of one's chosen profession. Yet to do so, and then, upon reaching mandatory retirement age, successfully embark on a path that takes you to the pinnacle of still another is an extraordinary accomplishment. Professor Howard Levie is just such an individual. Rising to the rank of Colonel in the United States Army, he compiled an impressive military record while serving in an array of high-level legal positions, including Chief of International Law for the United States Army, and Staff Judge Advocate of the Southern European Task Force, European Command, and Sixth Army. Colonel Levie also had the rare opportunity to shape history, most notably through his participation in the Korean War Armistice talks.

Following retirement from the Army, now "Professor" Levie went on to establish himself in academia as one of the masters of international law, particularly the law of armed conflict. A second retirement as Professor *Emeritus* from Saint Louis University only served to accelerate that process. He is as prolific today at 90 as he ever was; more importantly, his work continues to impact the direction the law of armed conflict takes—and is likely to take in the future. Indeed, as will become apparent, his own views continue to evolve even as this selection of his works is published.

The defining characteristic of Professor Levie's work is this very duality; he is neither simply an academic in uniform, nor merely a soldier in academic robes. Too often, academics, including some who have served in the military, are divorced from the reality of the combat operations that law shapes. Their work is thought provoking, but of little real utility to the warfighter or policy maker. The view from the ivory tower is simply too distant. By the same token, as some military officers enter the halls of academia, their output tends to the anecdotal, rather than incisive. While there is merit in the "sea story" as the subject of scholarly contemplation, it cannot replace the critical thinking that characterizes true scholarship. These individuals aptly describe the fog of war, but do little to clear it away.

Professor Levie, by contrast, is as much the academic as soldier—and vice versa. Thus, he brings a synergism to his writings that sets them apart from so much else in the field. They are as relevant and useful at the Pentagon or Naval War College as they are at Oxford or Yale. Therein lies their uniqueness . . . and beauty. Perhaps it is fitting, then, that his selected works be edited by both a military officer *and* an academic.

Professor Levie's writings appear in a variety of journals, not all of which are readily available. We thought, therefore, that it would be worthwhile to bring together in one volume those which we considered most valuable and thought

provoking. We also thought it would be fitting recognition on the occasion of his 90th birthday in December 1997.

Of course, any editor who must select 20 or so writings from a body of work that includes 10 books (several of which are multi-volume works) and over 75 articles, and continues to grow, understandably approaches that task with some trepidation. In making our selection, we set two criteria for inclusion. First, we wanted to include articles which remained especially relevant, to produce a book which would be useful to today's, and tomorrow's, scholars and practitioners. To that end, we asked Professor Levie to prepare addenda to five chapters reflecting changes in the law since they were originally published. Second, we hoped to emphasize those topics in the law of war to which Professor Levie devoted his greatest attention, and upon which his international reputation is primarily based. Thus, there is a heavy emphasis on prisoners of war, the first subject to which he turned, and that which has been the focus of much of his work since. There are also a number of articles discussing the legal issues surrounding war crimes, an interest of Professor Levie's in which he has recently invested significant effort. Given his long ties to the Naval War College, it should come as little surprise that we have also elected to include several articles dealing with naval warfare. The articles are presented chronologically, both because several pieces cut across subject-matter boundaries, and to emphasize the impressive temporal scope and developmental vector of his jurisprudence. As an aside, we also endeavored to remain true stylistically to the original articles, with the exception of converting foot notes to end notes. Thus, we only altered the original article when a clear editing error had been made.

The opening piece, *The Nature and Scope of the Armistice Agreement* (1956), aptly meets these criteria for inclusion. Written while Professor Levie was on active duty, it reviews the history and development of the armistice as an instrument governing non-hostile relations between belligerents, concluding that formal peace treaties are being supplanted by armistices as the prevailing method of ending wars. Not unexpectedly, *Nature and Scope* was resorted to time and again by practitioners to help ascertain the status of relations between Iraq and Coalition States following cessation of hostilities in Operation Desert Storm. Indeed, it was referenced as late as 1997 by judge advocates considering the status of aircrew members that might fall into Iraqi hands while enforcing the no-fly zones of Operations Southern and Northern Watch. The scholarly treatment provided the topic in *Nature and Scope* is complemented neatly by *Across the Table at Pan Mun Jom* (1965), an account of Professor Levie's own experiences as a negotiator in the Korean armistice talks.

In *Prisoners of War and the Protecting Power* (1961), Professor Levie turns to a topic for which he has become best known, prisoners of war. Writing in the American Journal of International Law nearly four decades ago while still a

military officer, he discusses the historical evolution and functioning of the institution of the Protecting Power, arguing that it deserves to play a central role in safeguarding prisoners from excesses by Detaining Powers. It is a theme to which he will return time and again. For instance, in *Some Major Inadequacies in the Existing Law Relating to the Protection of Individuals During Armed Conflict* (1971),he singles out the non-existence of a means for ensuring the presence of a Protecting Power in each State party to an armed conflict as one of four major *lacunae* in the law. Soon thereafter, in *International Law Aspects of Repatriation of Prisoners of War During Hostilities: A Reply* (1973), an extended comment on an article by Professor Richard Falk on repatriation, Professor Levie rejects the idea of releasing repatriated prisoners of war to "*ad hoc* and self-styled humanitarian organizations," as occurred on occasion during the Vietnam conflict. Instead, he argues, repatriation is best accomplished by Protecting Powers, or, in their absence, the International Committee of the Red Cross. He returns to the topic once more in the last work included in the book, *Enforcing the Third Geneva Convention on the Humanitarian Treatment of Prisoners of War* (1997). It is there that he labels it a "tragedy" that the sole use of Protecting Powers since the 1949 Convention occurred during the Falklands War.

As the titles just cited suggest, though the need for Protecting Powers is a pervasive call in Professor Levie's work, he delved into virtually every facet of the prisoner of war theme. For instance, in *The Employment of Prisoners of War* (1963), he outlines the Geneva Prisoners of War Convention limitations on the use of prisoner labor. In this piece, Professor Levie's "soldier" persona surfaces in his understanding of the need for balance in treatment of the subject, for while prisoner labor is certainly subject to abuse by a Detaining Power, productively occupying prisoners can actually enhance their morale.

Of the articles reproduced here, *Maltreatment of Prisoners of War in Vietnam* (1968) offers the most wide ranging treatment of prisoner of war prescriptions. In it, Professor Levie takes on the contentious issue of the applicability of the Prisoners of War Convention to the Vietnam War. Was it an international armed conflict thereby requiring compliance by all Parties to the Convention, or was it a non-international armed conflict, in which case only the minimal protections of Common Article Three to the Geneva Conventions of 1949 would apply? What customary law applies to the treatment of those captured? What responsibilities does a belligerent have *vis-à-vis* maltreatment of prisoners by an ally? Professor Levie then surveys allegations of mistreatment by the United States, South Vietnam, North Vietnam, and the Vietcong. The piece retains its relevance, for the applicability of the Convention and the quality of treatment required to be accorded to prisoners were both issues that surfaced during the Gulf War, not only with regard to the treatment of Coalition prisoners held by the Iraqis, but also as to the treatment of Iraqi prisoners of war.

Professor Levie has also devoted much of his effort to writing about war crimes and the appropriate enforcement regime for them. *Criminality in the Law of War* (1986) sets the stage by distinguishing between the treatment accorded prisoners for pre-capture and post-capture offenses. Also setting the stage is *The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders* (1991). Superior orders—the claim that the accused committed a war crime because he was so ordered by a superior officer (or Government) and that refusal would have resulted in harsh punishment—is a purported defense that has been presented for as long as war crimes have been prosecuted. Upon review of its historical assertions and the largely unsuccessful efforts to codify a denial of the defense, Professor Levie concludes that "any defense counsel . . . would be professionally derelict if he failed to assert . . . that the rule denying availability of the defense of superior orders has been rejected as a rule of international law." It is a conclusion that draws into question the official US position, as stated in law of armed conflict manuals such as the Commander's Handbook on the Law of Naval Operations, that no such defense exists.

Several of Professor Levie's more recent articles on the subject follow. In *Violations of Human Rights in Time of War as War Crimes* (1995), he emphasizes that the law of war includes much of what is in peacetime labeled "human rights," and that violations of human rights norms during armed conflict may subject the offender to punishment as a war criminal, as has been done in the case of the former Yugoslavia. Writing the same year, in *Prosecuting War Crimes Before an International Tribunal*, Professor Levie offers a primer on how to conduct a war crimes prosecution. How does one accumulate evidence or determine whom to charge? Which rules of evidence apply? *The Statute of the International Tribunal for the Former Yugoslavia: A Comparison with the Past and a Look at the Future* (1995) serves as the mechanism by which Professor Levie looks at how one war crimes tribunal has been set up to handle such matters. The article is a comprehensive description of the International Tribunal and its procedures; topics range from organizational structure and jurisdiction to rules of procedure and penalties. Having described an actual war crimes tribunal, in *War Crimes in the Persian Gulf* (1996) he conducts a retrospective analysis of war crimes committed by the Iraqis during the Gulf War, and outlines how a tribunal might have handled them had the political decision been taken to establish one. Finally, *Was the Assassination of Abraham Lincoln a War Crime?* (1995) is a fascinating look back in history at the question: "Is the murder of an individual committed in wartime by one or more individuals of the same nationality as the victim a war crime?" Given the contentiousness of events ranging from incidents of involvement in overseas assassination attempts cited by the Church Committee to speculation concerning US intentions regarding Saddam Hussein, the article remains timely despite its use of a case study over 100 years old.

While Professor Levie may be best known as one of the world's most eminent prisoners of war and war crimes scholars, his contributions have ranged far more widely. Given his enduring affiliation with the United States Naval War College, it should come as little surprise that he has spent much time considering the law of naval warfare. We have selected three noteworthy pieces on the subject. *Methods and Means of Combat at Sea* (1988) is an excellent survey of the subject generally, serving as a primer on everything from the applicability of Protocol I Additional of 1977 and protection of the environment to exclusion zones and submarine warfare. He deals with the latter subject much more thoroughly in *Submarine Warfare: With Emphasis on the 1936 Protocol* (1993). It is an exhaustive study of the development of the laws of submarine warfare from the American Revolution through both world wars to the present. Finally, in *The Status of Belligerent Personnel 'Splashed' and Rescued by a Neutral in the Persian Gulf Area* (1991) he addresses the status of Iranian or Iraqi personnel who fell into the hands of US forces engaged in escort operations during the Iran-Iraq war. Finding that there was, despite occasional hostile incidents involving US forces, no state of armed conflict between the United States and either Iran or Iraq, Professor Levie concludes that they would not be entitled to prisoner of war status under the Prisoners of War Convention, but that they would be entitled to basic humanitarian protections such as adequate food and water and being free from torture.

We have included several articles dealing with specific weaponry which lies at the heart of current debates in the law of armed conflict community. *Weapons of Warfare* (1975) is an analysis of three types of "weapons" that created great controversy during the Vietnam War—lachrymatories, napalm, and herbicides. Finding the use of all three most likely legal during that conflict, Professor Levie goes on to urge, on practical and humanitarian grounds, against their use in future wars. In light of the Chemical, Conventional Weapons, and Environmental Modification Conventions, and Protocol I Additional to the Geneva Conventions, this piece, written over two decades ago, is particularly prescient.

Two articles on the subject explore both extremes along the continuum of weaponry. *Nuclear, Chemical, and Biological Weapons* (1991) surveys the law applicable to each titled category, with special emphasis on naval warfare. Professor Levie concludes that while there is no *per se* prohibition on the use of nuclear weapons, the use of either biological or chemical weapons is legally proscribed. Ultimately, he notes that "one might almost regret our inability to turn back the clock to the nineteenth century, when nuclear, chemical, and biological weapons . . . were not even a gleam in a scientist's eyes." An addendum to the piece illustrates the extent to which his aspirations are slowly being realized in the Chemical and Biological Weapons Conventions, which outlaw the use

of either genre of weapons, and the 1996 holding of the International Court of Justice in the *Nuclear Weapons Case,* which finds the use of nuclear weapons generally contrary to international law, except in self-defense "in which the very survival of a State would be at stake." (The Court did not rule on the legality of use even in the latter circumstances.)

At the other end of the continuum of weapons lie conventional weapons. *Prohibitions and Restrictions on the Use of Conventional Weapons* (1994) examines the Conventional Weapons Convention and its three annexed Protocols governing non-detectable fragments, land mines, and incendiaries, respectively. Despite initial US opposition to Protocol III (the US ratified I & II), Professor Levie argues that "it is an extremely humanitarian agreement which contains nothing irreparable of either a political or a military nature that warrants the refusal of the United States and other major military powers to accept it."

Broader in its coverage of methods and means of warfare is *The Law of War Since 1949* (1995), a sweeping survey of the major post-war instruments governing armed conflict—the Seabed Treaty, Bacteriological Convention, Environmental Modification Convention, Protocol I Additional, Conventional Weapons Convention, and Chemical Weapons Convention. It is a provocative piece in which he restates his support of Protocol III (concerning incendiaries) to the Conventional Weapons Convention, and then bemoans the fact that a convention to prohibit the existence of nuclear weapons is unlikely (even had the International Court found their use fully contrary to international law) due to the reality that a number of actual, or potential, possessors would fail to become Parties, "or would become Parties with the preconceived idea of violating their agreement and thereafter being in a position to hold the non-nuclear world hostage."

Professor Levie's willingness to at times swim against the tide of official US positions is perhaps most evident in *The 1977 Protocol I and the United States* (1993). In this article he serially reviews those provisions of the Protocol which the US finds objectionable, setting forth why they are in fact not contrary to US interests, or in the case of those which are, explaining how concerns could be addressed with a very few understandings or reservations at the time of ratification. Given his credibility as an objective and insightful scholar, and his impressive credentials as an accomplished military officer, the article has proven expectedly influential, particularly in military circles.

As should be apparent, Professor Levie has not shied away from forcefully expressing his opinion. That has certainly been the case with regard to Protocol I Additional and the weapons treaties. However, it is not a recently emergent propensity on his part. For instance, in *Major Inadequacies* (1971), cited *supra* regarding Protecting Powers, he argues for a method by which an automatic determination that the law of armed conflict applies to a situation can be made,

cites the need for "a complete and total prohibition of the use in armed conflict of any and all categories of chemical and biological weapons," and laments the non-existence of a code governing aerial warfare. It was in the same year that he wrote *Civilian Sanctuaries: An Impractical Proposal.* In the article, Professor Levie takes issue with a proposal contained in two reports of the UN Secretary General (prepared at the request of the General Assembly) that civilian sanctuaries be established during armed conflict to ease the difficulty belligerents experience in discriminating civilians and civilian objects from legitimate military objectives. To Professor Levie, the proposal did not comport with reality; States would not be willing to set apart large areas in which any activity contributing to the war effort would be forbidden, nor willing to deprive themselves of the labor necessary for defense industries. In a worst case scenario, the areas could actually become a source of blackmail leverage for a nuclear nation facing total defeat. In its stead, Professor Levie argues for compliance (not new norms), codification of the law of air warfare, and creation of a system of sanctions against States (in addition to individuals) which violate the principle of military necessity.

Finally, *The Falklands Crisis and the Laws of War* (1985) has been included in the collection as a capstone piece—a case study of sorts—that examines many of the principles discussed throughout the book, but in the context of a single conflict. In it, Professor Levie considers maritime exclusion zones, protection of fishing vessels and hospital ships, incendiary weapons, the role of protecting powers, treatment of civilians, prisoners of war, and mercenaries. The result is a classic Levie *tour de force.*

What was perhaps most gratifying in preparing Levie on the Law of War was the extent to which those involved found themselves distracted from the somewhat tedious editing process by the substantive brilliance of the articles. We almost unconsciously found ourselves *reading* when we should have been *editing.* Indeed, a recurring experience for all was rediscovering how relevant and perspicacious pieces that were in some cases decades old remained. It is our hope that others will share in that experience.

When all is said and done, this book would not have been possible without the invaluable assistance of many friends at the Naval War College. Professor Jack Grunawalt, Director of the College's Oceans Law and Policy Department, provided encouragement throughout the project, enthusiastically agreeing to write the opening chapter about Professor Levie's distinguished careers. While funding was intermittently problematic, Captains Ralph Thomas and Dan Brennock of the Center for Naval Warfare Studies ensured it never was for *the editors,* thereby giving us the much appreciated luxury of concentrating on the task at hand. Ms. Carole Boiani and Ms. Allison Sylvia of the College's Publications and Printing Division supervised the preparation of the manuscript,

an oft onerous task that involved scanning less than optimally preserved articles, and then correcting the countless errors that result from this "miracle technology." They did so with professionalism, speed, and most importantly, a seemingly inexhaustible supply of good spirits. We are indebted to our colleagues in the Oceans Law and Policy Department—Professor Grunawalt, Captain Thomas, Colonel Lou Reyna, Commander Jeff Stieb, and Lieutenant Colonel James Duncan—who willingly read page proofs to identify "typos" that had eluded our own proofreading efforts. Colonel Duncan was especially helpful as overall director of the International Law Studies series (Blue Books) in handling the mechanics of transforming a completed manuscript into a finished book. Of course, we would be horribly remiss if we failed to thank our families for their understanding support throughout.

Of course, we owe our deepest debt of gratitude to Professor Levie. He allowed us full editorial control of the project, never once providing anything but the gentlest of suggestions. In fact, upon reviewing the notional table of contents, he only recommended one addition, *Across the Table at Pan Mun Jom,* emphasizing that the decision on whether to include it was ours, not his. We did, as we should have in the first place, and the book benefited thereby. Indeed, our sole complaint is that as we were putting the collection together, Professor Levie continued to write high quality pieces that deserved to be included, thereby creating a dilemma of where to draw the line in a *corpus* of jurisprudence that grew as we worked. In fact, *Enforcing the Third Geneva Convention* was included at the final hour, forcing us to work with drafts because it was not actually published until our page proofs were in their last revision. Simply put, Professor Levie was an absolute joy to work with.

We wish Professor Levie well as he continues to guide the rest of us to better understanding of the law of war. It was our great honor to serve as editors for this labor of love.

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Professor Howard Levie and the Law of War

Professor Richard J. Grunawalt

Once in a great while, someone comes along who makes a significant and lasting contribution to his or her chosen profession, a contribution that comes to define the paradigm of that calling. With respect to the development and articulation of the law of war, Professor Howard Levie is just such an individual. Soldier and scholar, patriot and humanitarian, Professor Levie has compiled a most remarkable record of achievement in furthering the understanding of, and compliance with, the law of war over the past six decades.

Born in Wolverine, Michigan on 19 December 1907, Professor Levie moved to Baltimore, Maryland in 1912. Five years later, his family moved to New York City, where Howard graduated from Dewitt Clinton High School in 1924. Matriculating at Cornell University that year, Professor Levie was selected to participate in the "Junior Year in France" program (sponsored by the University of Delaware) and, in Paris, attended both the *Cours de Civilisation* at the Sorbonne and the *École Libre des Sciences Politiques* during academic year 1926-27. (Howard was later to recount that among his instructors at the latter was Professor Pierre Laval, who became Premier of the Vichy Government during World War II and who was tried, convicted and executed by the French following the war for collaborating with the Nazis. Howard describes Professor Laval as, "an excellent teacher.") Returning to Ithaca, New York in 1927, Professor Levie entered Cornell Law School under a program that allowed him to combine his senior year as an undergraduate with his first year of law school. He was elected to Phi Beta Kappa that year and received a Bachelor of Arts degree the following Spring. In June 1930, he was awarded a Juris Doctor degree from Cornell Law School.

The young attorney was admitted to the practice of law in New York State in June 1931 following a brief (six months) mandatory clerkship. He was engaged in the private practice of law in New York City from 1931 until he entered the United States Army through the Volunteer Officer Candidate program in September 1942. It was during that period that he met and married the lovely Blanche Krim in 1934. Shortly after Howard joined the Army, Blanche did the same, enlisting in the Women's Army Corps.

Howard underwent basic training at Fort Eustis, Virginia, where, aged 35, he was 15 to 18 years older than most of his fellow soldiers. In December 1942, Private Levie reported to the Anti-Aircraft Artillery Officer Candidate School at Camp Davis, North Carolina. Commissioned a Second Lieutenant in March 1943, he was assigned to Battery K of the 701st Coast Artillery Regiment at Camp Miles Standish, Taunton, Massachusetts, but soon relocated to Newport,

Rhode Island where Battery K was tasked to provide anti-aircraft protection to the Navy torpedo factory on Goat Island. Although his war-time sojourn in Newport was short-lived, this assignment marked the beginning of what was to become in later years a close and enduring affinity to this lovely city by the sea.

Having completed a course of instruction for "Triple A" battery officers at Fort Totten, New York, and one in photo-interpretation at Camp Richie, Maryland, Howard was directed to Camp Stoneman, Pittsburgh, California, for further transport to a "permanent station outside the continental limits of the United States, tropical climate." And "tropical climate" it turned out to be. Arriving in New Guinea in March 1944, Professor Levie was assigned to Staff Headquarters, Intermediate Section (responsible for all New Guinea). Promoted to First Lieutenant in November, he was subsequently reassigned to Headquarters, Army Forces, Western Pacific (AFWESTPAC) in Manila in July 1945. On 2 September 1945, the Japanese surrendered in a ceremony aboard USS MISSOURI in Tokyo Bay.

Following cessation of hostilities, AFWESTPAC became heavily involved in supervising the repatriation of British and American prisoners of war from China, Korea and Japan. It was this experience that helped prompt Howard's interest in the law applicable to prisoners of war; an interest that led to a life-time study of that discipline, to include the writing of two books and innumerable law review articles (many of which are reprinted in this collection). It was also this assignment that initiated Howard's long involvement in war crimes issues. Present at the arraignment of Japanese General Tomoyuki Yamashita before a U.S. Military Commission in Manila on 8 October 1945, Professor Levie became in later years, an internationally recognized authority on war crimes. Indeed, his book *Terrorism in War: The Law of War Crimes* (1993) is widely regarded as one of the best of the genre.

In November 1945, Professor Levie was awarded the Bronze Star Medal for his service in the Southwest Pacific area and, more importantly (at least from Blanche's point of view), returned to the United States (terminating a 22-month separation). Blanche having recently been discharged from active duty, joined Howard in Washington, DC where he was assigned to the War Department General Staff as Executive Officer, Supply Control Branch, Requirements Division, Army Service Forces. A collateral duty as Recorder of the Board for a joint Army-Navy review of Alaskan defenses took Howard throughout the length and breadth of Alaska in June of 1946.

In September 1946, Howard accepted a Regular Army commission in the Judge Advocate General's Corps with a date of commissioning backdated to 19 December 1932 and in the rank of Captain backdated to 19 December 1942. The following January he was promoted to Major.

Major Levie began his service in the Judge Advocate General's Corps in March 1947 in the Legislative Branch of the Claims Division of the Office of the Judge Advocate General. In February 1949, he entered the Master of Law program at George Washington University School of Law. However, that effort was interrupted by his selection to attend the Army Command and General Staff College at Fort Leavenworth, Kansas. Following graduation in June 1950, Major Levie received orders to the Far East Command. The North Korean invasion of South Korea on the 25th of June 1950, and the re-designation of the Far East Command as the United Nations and Far East Command, was to have a substantial impact on Professor Levie's career. Promoted to Lieutenant Colonel in September 1950 while assigned to the Judge Advocate Division at General Headquarters in Tokyo, Howard became involved with the legal review for General MacArthur of several Japanese war crimes trials in which death sentences had been adjudged. It was in this period that he also became involved in the issue of the status of North Koreans captured by United Nations Command Forces. In March 1951, he was detailed to Korea to serve as Law Member of a General Court-Martial convened by General Mathew Ridgway, which tried several U.S. Army members for offenses involving the killing of North Korean soldiers and, in one case, North Korean civilians.

In July 1951, Lieutenant Colonel Levie was reassigned to the staff of the United Nations Command Armistice Delegation. That delegation initially included Vice Admiral Turner Joy, U.S. Navy (Senior Delegate); Major General Henry Hodes, U.S. Army; Rear Admiral Arleigh Burke, U.S. Navy; Major General Lawrence Craigie, U.S. Air Force and Major General Paik Sun Yup, ROK Army. As detailed in Chapter IV of this volume, Howard played a major role in the drafting of the Korean Armistice Agreement. He completed his Korean assignment in June 1952 and returned to Japan. Thereafter, Howard served as Liaison Officer between the Judge Advocate Division at Command Headquarters (which had relocated to Yokohama) and other command elements that remained in Tokyo. He also participated in several important courts-martial cases, including that of Dorothy Krueger Smith, who was convicted of murdering her Army Colonel husband; the case reached the Supreme Court of the United States where it was overturned on jurisdictional grounds.

Lieutenant Colonel Levie's next assignment was as Staff Judge Advocate at the Command and General Staff College at Fort Leavenworth, Kansas. While there, he and Blanche renewed many old acquaintances and Howard pursued further his interests in the law of war. That tour of duty commenced in March 1953, but was cut short in September of the following year to permit Howard to assume the reins of the newly-established International Affairs Division of the Office of the Judge Advocate General in Washington as its first Chief. Shortly thereafter, he was promoted to the rank of Colonel. It was during this tour that

Howard first met with such future international law luminaries as Richard Baxter (then in the Office of General Counsel, Department of Defense, and in later years a Judge of the International Court of Justice), Lou Henkin (then a foreign affairs officer at the State Department and subsequently a Professor of Law at Columbia Law School and President of the American Society of International Law) and Monroe Leigh (then in the office of the General Counsel, Department of Defense, and later Counselor of the Department of State). Now firmly immersed in the practice of public international law, Howard was instrumental in building the International Affairs Division, with its International Law and War Crimes branches, into a front line authority on the law of war. It was also during this assignment that he first visited the Naval War College in Newport, Rhode Island, beginning a lifetime association with this institution. Another memorable event was his participation in the presentation of the four 1949 Geneva Conventions for the Protection of Victims of War to the United States Senate for its advice and consent to their ratification.

In July 1955, Colonel Levie had occasion to make a lengthy visit to Europe to assess various status of forces agreement (SOFA) issues with several NATO nations. While in Europe, he also attended the Academy of International Law at the Hague for which he received a *Certificat d'Assiduité.* In November 1955, Howard was again in Europe, this time to participate in NATO meetings regarding prisoner of war matters.

Colonel Levie's Washington assignment also allowed him to renew his determination to obtain a Master of Law degree from George Washington Law School (with a specialization in international law). While studying under Professor Tom Mallison during that process, Howard authored a paper entitled "The Nature and Scope of the Armistice Agreement." Subsequently published in the American Journal of International Law (and included in this present work as Chapter I), that paper launched Professor Levie's life-long career as an articulate spokesman for, and commentator on, the law of war. Despite his frequent trips abroad and heavy work schedule as Chief, International Affairs Division, Howard earned his LL.M. degree in 1957. He also had occasion during this period to lecture on SOFA matters at a variety of fora, including the Washington Foreign Law Society, the Federal Bar Association, the National War College and the Judge Advocate General's School in Charlottesville, Virginia.

In April 1958, Colonel Levie was transferred to the Southern European Task Force headquarters in Verona, Italy, as Staff Judge Advocate. During that tour of duty, he often was additionally tasked to support the U.S. Sending State Office for Italy in a variety of NATO SOFA matters. He also began a long and fruitful association with the International Society of Military Law and the Law of War, attending its first Congress in Brussels in May 1959.

The next stop on Howard's distinguished military career was as Military Legal Advisor at the U.S. European Command (USEUCOM) Headquarters, then located in Paris, France. Arriving in Paris in December 1959, he was soon intensively involved in operational law matters for USEUOM, a number of which necessitated multiple visits to both NATO and non-NATO nations. Throughout this period, Howard further honed his law of war credentials.

In June 1961, the Levies returned to the United States where Howard was assigned to Sixth Army Headquarters at the Presidio of San Francisco, California, as Staff Judge Advocate. He was to hold that position until January 1963, when, having reached the age of 55, he was required by law to retire from active service. On 31 January 1963, Howard retired in the rank of Colonel, United States Army. Awarded the Legion of Merit by an appreciative Army and a grateful nation, he returned to civilian life after 21 years of active military service.

Professor Levie's retirement from the Army signaled not the end, but the renewal of his journey toward international renown as a law of war scholar. In September 1963, he joined the faculty of Saint Louis University Law School as an Associate Professor of Law (he was to become a full Professor with tenure just two years later). Although his first teaching assignment at the Law School was Commercial Transactions, he soon assumed responsibility for instruction of International Law. From September 1963, until his retirement from Saint Louis University in June 1976 at age 69 (pursuant to mandatory rules then in force at that institution), Howard wrote over 20 scholarly articles pertaining to the law of war (seven of which are reprinted in this present volume). While much of Howard's writings during his tenure at Saint Louis concerned prisoner of war and war crimes matters, he also had occasion to address a broad spectrum of law of war issues. It was also during this period that Howard and Blanche returned to Newport to spend a sabbatical year (academic year 1971-72) at the Naval War College where he was the Charles H. Stockton Professor of International Law.

As the Stockton Chairholder, Professor Levie filled a Chair which had been held by some of the preeminent international legal scholars in the world. His predecessors included the legendary John Bassett Moore, one of the first judges on the Permanent Court of International Justice; Professor Manley O. Hudson, then of Harvard Law School, and later a judge on the International Court of Justice; Professor Hans Kelsen of the University of California at Berkeley; Professor Leo Gross of the Fletcher School of Law and Diplomacy; and Professor Oliver J. Lissitzyn of Columbia Law School.

Professor Levie's retirement from Saint Louis University in 1977, and attainment of Professor Emeritus of Law status, once again marked both an end and a beginning. Indeed, 21 years of active military service and 14 years of law school teaching were but the prologue to this illustrious career. As we shall see,

Howard's most prolific and influential writing has occurred since 1977; some 20 years later, Professor Levie continues to contribute to the development and articulation of the law of war.

In 1977, the Levies established their permanent home in Newport. Howard resumed his teaching of international law within the Naval War College as lecturer in the International Law and Oceans Affairs program of the Naval Staff College (a role he continued, *pro bono*, for 20 years, teaching 40 consecutive classes, until voluntarily withdrawing from the program in July 1997 at age 89 - much to the regret of the College); as the Lowry Professor in 1982-83; and as an Adjunct Professor of International Law from 1991 to the present. He continues to lecture in the Naval War College elective course on the Law of Combat Operations. For over a decade he provided instruction in the Geneva Conventions to military attorneys of all the services at the Naval Justice School. During 1984-1988, he was also lecturer in International Law at Salve Regina College. In addition, Howard has been an honored participant in various conferences and symposia on the law of naval warfare within the Naval War College. His enormous contribution to the Naval War College was formally recognized in October 1994 when Rear Admiral Joseph Strasser, President of the College, announced the establishment of the Professor Howard S. Levie Military Chair of Operational Law in the Joint Military Operations Department. Through this singular honor, Howard joined an elite listing of distinguished Americans for whom such Chairs have been established at the College, including Admirals Chester Nimitz, William Halsey, Arleigh Burke and Raymond Spruce, and Generals Tasker Howard Bliss and Colin Powell. As many readers of this volume can personally attest, Howard has also been a major contributor throughout these past two decades to the work of a wide variety of international and domestic organizations and societies concerned with the law of war.

Levie on the Law of War is a compilation of 25 articles written by Howard over the course of his distinguished career. Selected by the editors to reflect the broad range of topics which he has addressed with great incisiveness, they represent some of the most influential of his works. However, it must be remembered that he is also the author or editor of an impressive array of books. His first was written during his tenure as the Stockton Professor of International Law at the Naval War College. Perhaps the finest treatise ever written on the law governing prisoners of war, *Prisoners of War in International Armed Conflict*, was published as volume 59 of the Naval War College International Law Studies (the "Blue Book") series. The book won international acclaim for its scholarship, including the 1982 Triennial Ciardi Prize of the International Society of Military Law and the Law of War. That monumental effort was supported by an exhaustive compilation of source materials (which he edited) entitled *Documents on Prisoners*

of War. Published as volume 60 of the "Blue Book" series, *Documents* remains an essential resource for law of war scholars.

The year 1979 also witnessed publication of the first of a multi-volume set edited by Howard recording the proceedings of the 1974–77 Geneva Diplomatic Conference which drafted the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). Entitled *Protection of War Victims,* the fourth and final volume of which was published in 1981, this work was described by Ambassador George Aldrich, head of the U.S. Delegation to the Conference, as "an invaluable tool in interpreting and applying the new law developed by means of the Geneva Protocol."

The second book authored by Howard was published in 1983. Entitled *The Status of Gibraltar,* this work examines the historical background and status of the dispute between Great Britain and Spain over that strategically situated British Crown Colony, making extensive use of documents not previously analyzed in depth. As with all of his writings, *Gibraltar* reflects close attention to thoroughly researched sources and a balanced and honest appraisal of the issues.

Just three years later (1986), Professor Levie's third book was published. A two-volume work entitled *The Code of International Armed Conflict,* it constitutes a comprehensive presentation of the entire law of war, both conventional and customary. Presented in the form of a code of that body of law, the book sets forth each rule, identifies its source(s) and presents cogent commentary on its meaning and application. A superb research tool, *The Code of International Armed Conflict* remains an essential part of any law of war collection.

Howard next turned his attention to the critically important and intellectually challenging arena of non-international armed conflict. In 1987, he edited *The Law of Non-International Armed Conflict,* which complements his earlier work *Protection of War Victims,* and which utilizes the same effective format. Providing the negotiating history of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to Non-International Armed Conflicts (Protocol II), this volume provides the reader with a clear understanding of, and appreciation for the complexities of law and policy inherent in the regulation of non-international conflict.

1988 witnessed the publication of Howard's seventh book. Entitled *The Law of War and Neutrality: A Selective English-Language Bibliography,* this work is remarkable for both its thoroughness and its organizational clarity. Once again, his attention to detail, coupled with his mastery of the subject, enabled Howard to produce a volume that no law of war research scholar should be without.

Professor Levie's long association with the Naval War College and his study of the law of naval warfare kindled his interest in the legal aspects of mine warfare at sea, a subject that had not previously been comprehensively addressed in the

literature. His book *Mine Warfare at Sea*, published in 1992, superbly fills that gap. Written in non-technical language, this very readable work provides an overall study of the military, legal, operational and technical history of mine warfare at sea. Rich with illustrations drawn from four hundred years of practice, *Mine Warfare* recounts how naval mines have been employed in warfare, how nations have attempted to regulate their use, and how such mines will likely be employed in the future. Complete with an exhaustive bibliography and extensive index, this book is also a "must have" volume on the law of war research scholar's shelf.

Howard's incomparable book on violations of the law of war was published in 1993. Entitled *Terrorism in War: The Law of War Crimes*, it draws upon Howard's extensive experience in war crimes trials and his unequaled expertise in all matters pertaining to breaches of the Geneva Conventions and to other violations of the law of war. In the view of many scholars and practitioners in this field, *Terrorism in War* is the quintessential treatment of this subject in the literature, providing the reader, whether scholar or layman, with a comprehensive analysis of law of war crimes issues—past, present and future. Presented chronologically, the book examines the early history of war crimes and war crimes trials through the Gulf Crisis of 1990-91. It then focuses on procedural matters including jurisdiction, asylum and extradition, and trial procedures, before turning to the analysis of conventional war crimes, crimes against peace and crimes against humanity. The book concludes with an examination of the accused, their victims and their defenses. Of particular utility for research scholars is the inclusion in the appendices of key provisions of all relevant documents, from the Lieber Code of 1863 through the 1977 Additional Protocol I. It is in this magnificent work that one sees most convincingly the enormous contribution of Howard's scholarship to the articulation and enforcement of the law of war.

In 1995, Howard took on yet another major tasking, the editing of volumes 7 through 12 of *Terrorism, Documents of International and Local Control.* For those serious readers not familiar with this superb series, I commend it to you. Volume 12, the last to be edited by Howard, is a veritable well-spring of information pertaining to contemporary practice and problems relating to terrorism, from the sentencing judgment of the International Tribunal for the Former Yugoslavia in the Erdemovic case to the report of the Secretary of Defense concerning the bombing of Khobar Towers. Here again we see Howard's thoroughness and objectivity at work.

Not one to rest on his many laurels, Howard Levie continues in his unrelenting quest to advance the cause of respect for the rule of law in armed conflict. Indeed, as this volume goes to press, Howard is nearing completion of yet another important treatise on the law of war. That book, entitled *Capitalist*

and Communist Prisoners of War in Korea, draws on his extensive personal experience in the Korean War and its aftermath as a member of the Staff of the United Nations and Far East Command and legal advisor to the United Nations Command Armistice Delegation, and on his peerless expertise in the law applicable to prisoners of war. This eagerly awaited work will add to the enormous contribution of this incomparable scholar.

I would certainly be remiss if I failed to mention what is perhaps the most significant achievement of Howard's long and illustrious career—his genius and great good fortune in marrying Blanche. From that date to this, Blanche has been an integral part of Howard's life work. Indeed, those of us who have had the privilege and pleasure of knowing the Levies over the years have come to appreciate that Howard is but one-half of an extraordinary team. Sixty three years following their exchange of marriage vows, Blanche remains the vivacious spirit of this incomparable duo.

In the end, recounting selected highlights of Howard Levie's illustrious career as a lawyer, soldier and scholar does not do justice to either the man or his work. To those of us privileged to work with and learn from him, Howard is far more. He is the embodiment of knowledge and commitment in all matters pertaining to the law of war. Always open and objective, he nonetheless retains the enviable perspective of the long view. Indeed, this sense of perspective pervades his writing. All too acquainted with the brutal realities of war, Howard is a man of compassion—of resolute commitment to the development and enforcement of rules of normative behavior that mitigate, as much as possible, the suffering which war inevitably entails. Those acquainted with the Levies will surely appreciate the enormous influence of Blanche's humanity on Howard's profound compassion for the victims of war. Yet, he remains a realist, fully appreciative of the equation of military necessity and of the dictates of national security during conflict. He understands the plight of the victims of war and the hardship of the individual soldier engaged in its execution. The writings compiled in this volume reflect Howard's abiding sense of balance, of fairness, of reality.

I will conclude these remarks with an anecdote that, to me, is the essence of Howard Levie. Upon completion of a typically erudite lecture on the 1949 Geneva Conventions and the 1977 Protocols to a class of some thirty-five international naval officers attending the Naval War College, Howard was approached by an Eastern European officer who appeared to be somewhat distressed by what he had heard. That officer commented that he fully endorsed all that Howard had said, but was concerned that in the heat of battle he might not remember all that he had learned. The officer asked Howard what he should do in such a circumstance. Howard replied, "Commander, just do what you know is the right thing to do and you will not go wrong." That is also the

underlying message in all of Howard's writings on the law of war: whether national political leader or individual soldier—do what is right and hold accountable those that do not.

I

The Nature and Scope of the Armistice Agreement

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I. Introduction

For many centuries the armistice agreement has been the method most frequently employed to bring about a cessation of hostilities in international conflict, particularly where the opposing belligerents have reached what might be termed a stalemate. This practice has not only continued but has probably increased, during the present century.

The first World War ended in an extended series of so-called armistice agreements.[1] During the twenty-one years which elapsed before the outbreak of the second World War there were really only two such agreements of any historical importance: that entered into in Shanghai on May 5, 1932, which brought about a cessation of hostilities in the Sino-Japanese conflict of that period;[2] and that entered into at Buenos Aires on June 12, 1935, which ended hostilities between Bolivia and Paraguay over the Gran Chaco.[3]

The second World War also ended in an extended series of so-called armistice agreements;[4] and in the comparatively short period of time since then, there have already been no less than ten major general armistice agreements concluded by belligerents.[5] This increased importance in modern practice of the general armistice as an instrument leading to the restoration of peace has resulted in it having been likened to the preliminaries of peace[6] (which it has, in fact, practically superseded), and even to a definitive treaty of peace.[7] Under the circumstances, it appears appropriate to review the history and development of the general armistice as a major international convention concerned with the non-hostile relations of belligerents, as well as to determine its present status under international law.[8]

II. General Discussion

What is the nature of a general armistice agreement, the war convention which has properly been termed "the most important and most frequently reached agreement between belligerents"?[9] A general armistice is an agreement

between belligerents which results in a complete cessation of all hostilities for a specified period of time, usually of some considerable duration, or for an indeterminate period. It applies to all of the forces of the opposing belligerents, wherever they may be located. It may have a political and economic, as well as a military, character.[10]

This definition, while adequate to describe the nature of a general armistice, necessarily omits many peripheral but nevertheless important facets of the term defined, facets which it is essential should be borne in mind in any searching analysis of the problem. What is the legal basis of the general armistice? How does it come into being? Does it create a new juridical status between the belligerents? These are but a few of the more important of the many questions relating to this problem.

As has already been noted, the armistice is a war convention. By definition a convention is an agreement; it is a contract; it is consensual. That this is all true of an armistice is fully established by reference to numerous international conventions,[11] military manuals,[12] and authors of texts of international law.[13] Belligerents are free to enter into an armistice or to decline to do so. They are free to include in an armistice any provisions which they may desire, unfettered by either legal restrictions or precedents, guided only by the necessities of war.[14] As one author has aptly stated:

> The contractual field for an armistice is completely open. Here again "contracts take the place of law as between those who enter into them."[15]

It follows that there is no fixed rule or custom which prescribes what provisions should or should not be included in an armistice agreement.[16] On the other hand, there are certain provisions which, as will be seen, are very generally included by the parties, not because of any legal compulsion, but rather because experience has proven that such provisions are of a nature to facilitate the purpose of the armistice and to insure against violations thereof.[17] And whether the parties specifically provide therefor or not, an armistice does result in a complete cessation of active hostilities; that is, it results in a cease-fire.[18] Without a cease-fire there would, by definition, be no armistice.

Being a contract, it must be negotiated. Because a general armistice results in a cessation of all hostilities, and because it may contain political and economic as well as military provisions, it has political significance. It may, therefore, be made only on behalf of the sovereignty of the state.[19] This sovereignty may be expressed by either of two methods: first, the armistice may contain a specific provision that it is to become effective only after ratification;[20] or second, the representatives of the state designated to negotiate the armistice, and they may be military or civilian or both, may be provided with full powers.[21] Modern

practice appears to prefer the latter method. There were no ratifications of the so-called Armistice Agreements reached during either World War I or World War II.[22] All of the armistice agreements reached under the aegis of the United Nations have been negotiated by representatives with full powers. None has required ratification.[23]

While it cannot be disputed that a state has complete freedom in determining who will represent it in negotiating an armistice, there have been conflicting expressions of opinion as to the advisability of the selection of military personnel for this purpose. Gentili did not believe that the task of negotiating an armistice should be delegated to the military. He said: "Therefore the leaders in war should handle matters which belong to war and not other matters."[24] On the other hand, one modern writer states that "it is clear that, once the decision is made, the actual negotiations should be conducted by the military organs."[25]

It cannot be said that there is any established modern practice in this regard. The Renville Truce Agreement (Netherlands-Indonesia) and the India-Pakistan Cease-fire Order and Truce Agreement were both negotiated by diplomatic representatives. The four Israeli-Arab Armistice Agreements were negotiated by the military on behalf of each of the Arab countries and by mixed civilian-military delegations on behalf of Israel. The Korean Armistice Agreement was negotiated and signed exclusively by the military on both sides. And the three Agreements on the Cessation of Hostilities in Indochina were negotiated by both military and diplomatic representatives.[26] As a matter of fact, with modern methods of communication, the question is no longer of very great importance inasmuch as the decision of the negotiator, whether he be military or civilian, will actually be made in each instance pursuant to instructions received directly from his home capital.[27] Perhaps the best solution would be a "mixed team" consisting of members drawn both from the military and from the diplomatic corps, the practice followed by Israel in its negotiations with the Arab states, and by both sides in the Indo-Chinese negotiations.

A matter of major legal interest is that of the juridical status which exists during the period while an armistice is in effect. Is it war, or peace, or some third status? While there has, on occasion, been some rather loose language used with regard to this question, it may be stated as a positive rule that an armistice does *not* terminate the state of war existing between the belligerents, either *de jure* or *de facto*, and that the state of war continues to exist and to control the actions of neutrals as well as belligerents.[28]

As long ago as the days when Greece and Rome were at the zenith of their power, it became accepted law that, although the *indutiae* (armistice or truce) resulted in a cessation of hostilities, it did not, as did the *foedus* (treaty of peace), result in a termination of the war.[29] The early writers on international law concurred in this conclusion.[30] The great majority of contemporary writers

likewise do so.[31] Both the American and the British military manuals have uniformly taken the position that an armistice is merely a cessation of active hostilities and is not to be described as either a temporary or a partial peace.[32]

The rule stated above has received affirmative judicial approval on a number of occasions. Thus, the United States Supreme Court, confronted with the question of whether the 1918 Armistice had brought about a state of peace, ruled that "complete peace, in a legal sense, had not come to pass by the effect of the Armistice and the cessation of hostilities."[33] Similarly, on November 3, 1944, the French Court of Cassation stated that "an armistice convention concluded between two belligerents constitutes only a provisional suspension of hostilities, and cannot itself put an end to the state of war."[34]

A few years ago an incident occurred in the Security Council of the United Nations which has been misconstrued as indicating a rule contrary to that discussed immediately above. Subsequent to the execution of the Israeli-Egyptian General Armistice Agreement, Egypt continued to maintain its "blockade" of the Suez Canal insofar as Israel was concerned. Israel complained to the Security Council asserting that the four armistice agreements had, in effect, terminated the state of war between all of the belligerent parties. Egypt, on the other hand, contended that the state of war continued despite the armistice agreements and that the blockade was legal. The Security Council on September 1, 1951, passed a resolution calling upon Egypt to lift its blockage.[35] This action of the Security Council has been construed as indicating that a general armistice is a kind of *de facto* termination of war.[36] It is considered more likely that the Security Council's action was based upon a desire to bring to an end a situation fraught with potential danger to peace than that it was attempting to change a long established rule of international law. By now it has surely become fairly obvious that the Israeli-Arab General Armistice Agreements did not create even a *de facto* termination of the war between those states.[37]

One of the most frequent problems to arise with regard to the interpretation of a general armistice has been the determination of those acts which are permitted and those which are prohibited. There have been two very definite schools of thought on this problem. One school, long designated as the one with the weight of authority behind it, takes the position that during a general armistice a belligerent cannot legally do anything which the enemy would have wanted to and could have prevented him from doing but for the armistice.[38] The other school, long designated as the one with the weight of reasoning as well as the weight of practice behind it, takes the position that during a general armistice the belligerents must refrain from doing only those acts which are expressly prohibited by it.[39] This dispute is apparently as old as history,[40] and is now of historical significance only.[41] Modern discussions of the subject point out the problem of enforcement and the invitation to charge and countercharge

inherent in what might be termed the classical approach.[42] In recent years the belligerents have been prone to spell out with particularity all those specific acts which are to be renounced during a general armistice.[43] Whether or not this is more conducive to an atmosphere which will lead to a restoration of peace is probably debatable, with strong arguments to be made on either side. Nevertheless, the modern rule appears to be that belligerents may be presumed to have the right to do anything which is not specifically forbidden by the terms of the armistice agreement; and, conversely, that the doing of an act not specifically prohibited, even though the other side could have prevented it but for the agreement on the cessation of hostilities, cannot validly be made the basis for a complaint of violation or for the denunciation of the armistice.

III. Provisions of Armistice Agreements

Mention has already been made of the fact that the modern general armistice may, and frequently does, contain military, political, and economic provisions.[44] An analysis of the various provisions of a number of general armistice agreements, using as models not only the post-World War II agreements of this category, but also a number of older ones, will disclose the direction which the armistice is taking in the dynamics of international law, and will permit the drawing of certain conclusions.[45]

Incorporated within the hundreds of armistice agreements which have been concluded over the course of centuries it is possible to discover provisions covering almost every conceivable topic. Many such provisions are probably no longer relevant under conditions of modern warfare; and many were apt only because of the situation pertaining to a particular conflict. With the foregoing, which are interesting for historical reasons but which have no particular present legal significance, it is not necessary to concern oneself. The present-day student of this problem will be concerned exclusively with the provisions which belligerents have, either consistently over the centuries, or at least in recent times, believed it appropriate to incorporate in armistice agreements concluded by them.

In general, what matters should one expect to find included in a typical armistice agreement? Probably the most thorough and up-to-date answer to that question is contained in *The Law of Land Warfare*, the new Manual of the United States Army.[46] Summarized, the provisions suggested therein relate to:

(1) Effective date and time;
(2) Duration;
(3) Line of demarcation and neutral zone;
(4) Relations with inhabitants;
(5) Prohibited acts;

(6) Prisoners of war;
(7) Consultative machinery;
(8) Miscellaneous politico-military matters.

Any discussion of the contents of an armistice agreement must logically begin with a discussion of the suspension of hostilities. That subject disposed of, one may turn to those of the above-enumerated items which are of some particular current interest.

A. Suspension of Hostilities

As has already been remarked, an armistice *per se*, with or without a specific provision, results in a cessation of hostilities.[47] Nevertheless, only on very rare occasions have the parties failed to include such a provision.

The Truce of Ratisbonne, signed on August 15, 1684, on behalf of Leopold, Emperor of the Holy Roman Empire, and Louis XIV, King of France, did not specifically suspend hostilities. It contained a provision establishing a truce for twenty years from the date of ratification.[48] For whatever significance it may have, it should be noted that we find the same parties entering into the Truce of Vigevano on October 7, 1696, only twelve years later, and this time with a specific provision for a suspension of hostilities.[49]

In April, 1814, Napoleon abdicated as Emperor and an armistice was entered into between the Allies and the French. While the brother of Louis XVIII had come to France as the representative of the King, there was considerable question as to the extent of control which he would be able to exercise over Napoleon's Grand Army. Accordingly, the armistice provided for a suspension of hostilities but only if "the commanding officers of the French armies and fortified places shall have signified to the allied troops opposed to them that they have recognized the authority of the Lieutenant General of the Kingdom of France."[50] Although a somewhat similarly confused political situation existed in Italy in 1943, it was apparently considered unnecessary to include such a provision in the Armistice Agreement of September 3, 1943, between the United Nations forces and the government of Marshal Badoglio which had succeeded Mussolini.[51]

The Armistice Protocol signed by the Russians and the Japanese at Portsmouth on September 1, 1905, contained a clause prohibiting bombardment of enemy territory by naval forces, but no other provision with regard to the suspension of hostilities.[52] It directed the two governments to order their military commanders to put the Protocol into effect. On September 13 an agreement was reached by the army commanders in Manchuria which specifically provided for the suspension of hostilities effective on September 16.[53] On September 18, a "Naval Protocol of Armistice" was signed by the navy commanders which, while it established a boundary line between the two fleets,

again did not specifically suspend hostilities.[54] And the two army commanders in Korea were unable to reach an agreement prior to the exchange of ratifications of the peace treaty on September 25.[55]

On a number of occasions the United Nations has adopted, apparently without any reason therefor, terminology new to international law in its actions relating to armistice agreements. The Renville Truce Agreement uses the novel term "stand-fast and cease-fire."[56] The India-Pakistan Agreement provides for a "cease-fire."[57] The Israeli-Arab General Armistice Agreements adopt the procedure of omitting a specific provision for a suspension of hostilities—perhaps on the theory that this was unnecessary in view of the "truce" which had previously been imposed on the belligerents by the United Nations—and merely established "a general armistice between the armed forces of the two Parties."[58] The Korean Armistice Agreement reverted to standard procedure, providing for "a complete cessation of all hostilities" in Korea.[59]

B. Effective Date and Time

It has been stated that

> in armistices time is of the first consideration. The time of commencement and the moment of termination should be fixed beyond all possibility of misconception.[60]

In the event that the armistice fails to specify an effective date and time, it is assumed that it is intended to become effective immediately upon signing.[61] Because of difficulties in assuring the receipt of proper notification by all commands, or for other reasons, it has, on occasion, been deemed advisable to have the armistice become effective on a later date.[62] For the same reason, the suspension of hostilities has on occasion been made effective at different times in different areas.[63] In view of the nature of the elaborate communications systems with which the modern army is usually equipped, neither of these situations should any longer occur.

The United States has been involved in at least one controversy with regard to the effective date of an armistice. The Protocol of Washington (United States–Spain), which was signed on August 12, 1898, provided that

> upon the conclusion and signing of this protocol hostilities between the two countries shall be suspended, and notice to that effect shall be given as soon as possible by each Government to the commanders of the military and naval forces.[64]

The effective date of the suspension of hostilities was obviously not stated with sufficient precision. Spain later contended that the protocol had been effective from the date of signature. The United States took the position that this would render meaningless the latter part of the provision and that the suspension of hostilities had become effective only upon receipt of notification by the military and naval commanders in the field. More care in the drafting of the provision would have obviated this dispute, which involved the capitulation of Manila.

The importance of clearly indicating the effective date and time of an armistice agreement appears to be a lesson well learned, for we find that the subject is fully covered in all of the post-World War II armistice agreements.[65] Continued adherence to this practice will be at least a small step in minimizing the difficulties between belligerents which inevitably arise during any armistice.

C. Duration

Two types of provision with regard to duration are found in armistice agreements. Some specify a definite period. Thus, the Armistice of Nikolsburg and that of Shimonoseki provided for durations of four weeks and twenty-one days, respectively.[66] The Armistice of Malmoe, concluded by the King of Prussia and the King of Denmark on August 26, 1848, provided for an armistice of seven months with automatic prolongation unless one month's advance notice was given by either party.[67] And the agreement reached by the French and the Austrians in Vienna on July 13, 1809, provided for an armistice of one month, but with fifteen days advance notice of resumption of hostilities.[68] Others provide for an indefinite duration or contain no provision whatsoever on this subject. Where this is the situation, the armistice remains effective until due notice of denunciation has been given by one of the belligerent parties.

It has been said that "it is customary to stipulate with exactness the period of time during which hostilities are suspended."[69] Although, prior to the twentieth century, armistice agreements, more frequently than not, specified an exact duration, modern practice seems to be otherwise. No duration is specified in any of the major armistice agreements concluded since World War II. Thus, for example, the Renville Truce Agreement provides that it shall be considered binding unless, in effect, one party terminates it because of violations by the other party.[70] The Israeli-Lebanese General Armistice Agreement provides that it "shall remain in effect until a peaceful settlement between the Parties is achieved."[71] The Korean Armistice Agreement provides that it shall remain in effect until superseded by "an appropriate agreement for a peaceful settlement at a political level between both sides."[72] Of course it may be argued that these two latter agreements are determinate, inasmuch as they remain in effect until an event certain. Perhaps so, but it can scarcely be said that there has been any

stipulation with exactness as to the duration of the armistice under these circumstances. The Israeli-Lebanese General Armistice Agreement is seven years old and no "peaceful settlement" is in sight. And while the Korean Armistice Agreement is only three years old, the "peaceful settlement" mentioned therein looks equally remote.

It has been stated above that where an armistice is of indeterminate duration, it remains effective until "due notice" of denunciation has been given. Sometimes an armistice specifies the period of advance notice of denunciation which is required. Thus, the second Thessaly Armistice entered into by the Greeks and the Turks on June 3, 1897, provided for 24 hours' notice of resumption of hostilities.[73] More often, it does not. Article 47 of the Declaration of Brussels admonished that "proper warning be given to the enemy, in accordance with the conditions of the armistice";[74] and Article 36 of both of the Hague Regulations (1899 and 1907) said approximately the same thing.[75] The practical value of these provisions is dubious.[76] It is precisely when there is no relevant condition in the armistice agreement that resort must be had to general international law. In this instance, conventional international law being lacking, resort must be had to custom—and custom says that "good faith requires that notice be given of the intention to resume hostilities."[77]

A number of authors have commented on Sherman's ire when the armistice which he had concluded with Johnston on April 18, 1865, was disapproved by President Johnson and Secretary Stanton, and upon his honor and fairness in giving 48 hours' notice of resumption of hostilities to General Johnston.[78] Of his ire there can be no doubt.[79] Without attempting to detract from General Sherman's honor and sense of fairness, it is necessary to point out that the armistice itself provided for 48 hours' notice of resumption of hostilities.[80] Actually, Sherman even referred to this provision of the armistice agreement in giving the notice which it required.[81]

D. Demarcation Line and Neutral Zone

A demarcation line between the two belligerent forces, frequently accompanied by a neutral zone, has long been a technique employed for the purpose of preventing incidents which, even though inadvertent, might lead to a resumption of hostilities.[82] The statement that a "neutral zone is actually the only means there is of preventing violations of the armistice"[83] is probably too strong and tends to overevaluate the neutral zone. A neutral zone is unquestionably a very great aid in preventing incidents. However, it is definitely not a cure-all.

The last century provides a number of historical examples of the use of the demarcation line and the neutral zone in armistice agreements. In the Armistice

of Cintra (France–Allies) provision was made for the River Siandre to be the line of demarcation between the two armies with Torres Vidras as "no man's land."[84] The French-Austrian Armistice of Vienna of 1809 plotted a line of demarcation from point to point, but did not provide for a neutral zone.[85] The Armistice of Nikolsburg required the Austrians to remain 2½ miles from a line of demarcation which had been previously established, thus creating a neutral zone entirely at the expense of the Austrians.[86] And in the Greco-Turkish War of 1897 both the Armistice of Epirus and that of Thessaly provided for lines of demarcation.[87]

The post-World War II armistice agreements have, in the main, followed the long established tradition. The Renville Truce Agreement provided for both a line of demarcation and a demilitarized zone. Like so many other novelties in this document, the line of demarcation was designated "the status quo line"—a term unique to this agreement![88] The Israeli-Lebanese General Armistice Agreement created a demarcation line and provided that only defensive forces would be permitted "in the region" of the line.[89] This rather unusual arrangement was probably due to the fact that the demarcation line was the international boundary line between Lebanon and Palestine.

The Korean Armistice Agreement contains a rather elaborate series of provisions establishing and regulating both a "Military Demarcation Line" and a "Demilitarized Zone."[90] The same may be said of the agreements entered into at Geneva on July 20, 1954, between representatives of the Commanders-in-Chief of the French Union Forces in Indochina and of the People's Army of Viet-Nam.[91]

It will be noted that the foregoing enumeration does not include the India-Pakistan Resolution for a Cease-Fire Order and Truce Agreement. In that agreement it was not necessary to create a demarcation line or a neutral zone, inasmuch as Pakistan agreed to withdraw her forces from the territory of the State of Jammu and Kashmir.[92]

E. Relations with Inhabitants

A number of different problems arise during an armistice with regard to the relations between the belligerents and the local inhabitants. These problems include the movement of civilians from the territory controlled by one belligerent to that controlled by the other, commercial intercourse between the two territories, etc. However, as will be seen, these problems are all interrelated.

Article 50 of the Declaration of Brussels merely stated that it was within the power of the two belligerents "to define in the clauses of the armistice the relations which shall exist between the populations."[93] Article 39 of both of the Hague Regulations purported to extend the contractual freedom of the parties

by specifically including therein "what communications may be held in the theatre of war with the inhabitants and between the inhabitants of one belligerent State and those of the other."[94] Neither of the foregoing provisions included Lieber's corollary to the effect that "if nothing is stipulated the intercourse remains suspended, as during actual hostilities."[95] Both the Rules of Land Warfare and The Law of Land Warfare elaborate somewhat on Lieber, pointing out the necessity for a specific provision in the armistice, and then stating:

> Otherwise these relations remain unchanged, each belligerent continuing to exercise the same rights as before, including the right to prevent or control all intercourse between the inhabitants within his lines and persons within the enemy lines.[96]

It is probably also appropriate to point out here that Article 134 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, directs the belligerents, upon the close of hostilities, "to ensure the return of all internees to their last place of residence, or to facilitate their repatriation."[97]

From the foregoing it is clear that the official point of view is that the parties may include provisions concerning civilians in the armistice agreement, but that, failing such provisions, the condition of civilians remains unchanged from that existing during hostilities. The writers of texts on the subject are not quite so unanimous. The majority concur with the doctrines set forth above.[98] At least one author believes that "liberty of movement [for the civilian population] is presumed if the armistice is general and is concluded for a sufficiently long period of time."[99] No justification has been found for that statement. Another states that it may be desirable to provide in the armistice for the relaxation of the prohibitions imposed on civilians—but he does not even hint that there is any presumption in the absence of specific provision.[100]

What has been the actual practice in this regard? Probably the most unusual suggestion was that made to the Estates General in 1608 by the French and British Ambassadors when they were attempting to use their good offices to terminate the hostilities in which the United Provinces were then engaged with Spain. They proposed armistice provisions which would not only have permitted commerce and communications between the territories controlled by the two belligerents, but also included what could only be characterized as a most-favored-nation clause![101] This proposal, perhaps understandably, was not included in the Truce of Antwerp, which was eventually reached by the parties in 1609.[102]

The Armistice of Ulm, which was concluded on March 14, 1647, between Louis XIV and his allies on one side and the Elector Maximilian and his allies on the other side, authorized a complete resumption of commerce between the citizens of the two sides except for certain specified items such as saltpeter,

powder, arms, etc.[103] The Truce of Ratisbonne also reestablished commerce between the two belligerents.[104] Then, two and a half-centuries later, we find a somewhat similar provision in the Renville Truce Agreement, where Article 6 specifies that "trade and intercourse between all areas should be permitted as far as possible."[105]

While the Korean Armistice Agreement contains no provision with regard to commercial intercourse, it does contain elaborate provisions for the movement of civilians who were in territory controlled by one belligerent and who were normally resident in territory controlled by the other.[106] The Vietnamese Agreement went even a step further, permitting *any* civilian to cross over to the territory controlled by the other belligerent if he desired to go there to live, the only restriction being that the move had to be made during the period allocated for troop withdrawals.[107] The latter Agreement also provides for the "liberation and repatriation" of all civilian internees held by either side.[108] This bears some resemblance to the provision of the Geneva Civilian Convention to which reference has already been made.[109]

F. Prisoners of War

The problem of prisoners of war has received extremely varied treatment in armistice agreements over the centuries and still remains one which can be most difficult of solution.

The Armistice of Ulm provided for the release of all prisoners of war by both sides without the payment of ransom, this last proviso probably having been the most important feature of that agreement as far as the belligerents themselves were concerned.[110] Surprisingly enough, we find that the parties still considered it essential to specify a waiver of ransom in the armistice agreement concluded in 1814 after Napoleon's first downfall. However, the importance of the latter armistice from our point of view is twofold: It provided that all prisoners of war should be "immediately sent back to their respective countries"; and it provided for the appointment of commissioners by each side "in order to carry this general liberation into effect."[111] In the Armistice of Malmoe it was agreed that all prisoners of war would be "set free"; and a supplementary agreement stated where they would be taken for "delivery to their officers."[112]

Article 20 of both of the Hague Regulations provided for the repatriation of prisoners of war only after "the conclusion of peace."[113] As we have seen, this phrase is not applicable to an armistice. The 1929 Geneva Prisoner of War Convention changed this considerably, providing that an armistice must, in principle, contain stipulations regarding the repatriation of prisoners of war.[114] It further provided that, if for some reason, the parties had been unable to include such a provision in their armistice, they would conclude a separate agreement

on the subject as soon as possible and repatriate the prisoners of war with the least possible delay. The 1949 Geneva Prisoner of War Convention went still a step further, providing that prisoners of war should be "released and repatriated without delay after the cessation of active hostilities," and providing further that, failing such a provision in the armistice, each Detaining Power must establish and execute without delay a unilateral plan of repatriation.[115] In view of the foregoing, and because of the experience in Korea, The Law of Land Warfare, unlike Lieber's Instructions and the Rules of Land Warfare, states that "if it is desired that prisoners of war and civilian internees should be released or exchanged, specific provisions in this regard should be made."[116]

Prior to the Diplomatic Conference which drafted the Conventions in Geneva in 1949 most writers on the subject took the position that the final answer to the question of the return of prisoners of war was for the treaty of peace, not for the armistice.[117] They reasoned that to act otherwise would be to give an unwarranted advantage to the side which had lost the greater number of soldiers to the enemy and a corresponding disadvantage to the side which had been successful in capturing the larger number of prisoners of war. It was suggested that it would be appropriate to reach a separate agreement, after the armistice had been signed, under which prisoners would be exchanged in equal numbers and corresponding grades, thus avoiding any change in the relative positions of the belligerents.[118] This is the procedure normally followed in cartels for the exchange of prisoners of war.[119] While there is much to be said for this position, it is not fully supported by history and, in the light of the quoted provisions of the 1949 Geneva Convention, it is not in conformity with the requirements of an international convention which has been so widely accepted as already to be considered as constituting universal international law.[120] This is not to say that the basic reason for the theory expressed above is not a valid one. When prisoners of war are held by the two belligerent sides in such disproportionate numbers as was the case in Korea, there is no question but that total release and repatriation considerably changes the balance between the two sides, even where there is a provision, as there is in the Korean Armistice Agreement, against the employment in subsequent acts of war of prisoners of war released and repatriated pursuant to an armistice agreement.[121]

The Renville Truce Agreement (which, it will be recalled, was signed on January 17, 1948, prior to the drafting of the 1949 Geneva Convention and prior even to the Stockholm Conference where the working draft of the subsequent prisoner of war convention was prepared) contains the following significant provision:

> To accept the principle of the release of prisoners by each party and to commence discussions with a view of the most rapid and convenient

implementation thereof, the release in principle to be without regard to the number of prisoners held by either party.[122]

The Israeli-Lebanese General Armistice Agreement provided for an immediate exchange of all prisoners of war.[123] The provisions of the Korean Armistice Agreement with regard to prisoners of war are too well known to require repetition here.[124] Article 21 of the Agreement for the Cessation of Hostilities in Viet-Nam provided generally for the "liberation and repatriation of all prisoners of war."[125] In elaborating on that provision the agreement states that prisoners of war will be "surrendered" to the other side—which would seem to indicate acceptance of the principle of "forcible repatriation." However, the agreement further provides that the side to which they have been surrendered will assist them in proceeding to the zone of their choice—which would seem to indicate a right of self-determination by the individual. It is extremely doubtful that any of these unfortunates were among the horde of refugees who moved from the Communist to the non-Communist zone.[126]

The omission of the India-Pakistan Cease-Fire Order and Truce Agreement from the above discussion was not inadvertent. For some reason the United Nations Commission resolution which became the Agreement made no mention of this subject; and apparently neither of the parties ever suggested that it be included.

G. Consultative Machinery

Provisions in an armistice agreement for the establishment of commissions with various functions have a long history. Under the circumstances, it is somewhat strange to find that the subject had not been mentioned in the literature on the subject prior to the inclusion of a provision with regard thereto in The Law of Land Warfare. That provision reads as follows:

> *Consultative machinery.* It is generally desirable to provide for the establishment of a commission, composed of representatives of the opposing forces, to supervise the implementation of the armistice agreement. Additional commissions, composed of representatives of the belligerents or of neutral powers or both, may be constituted to deal with such matters as the repatriation of prisoners of war.[127]

The armistice proposed by the ambassadors of France and Great Britain in 1608 has already been mentioned in another connection.[128] That document also contained a provision to the effect that in the event the parties were unable to agree concerning the continued occupation of certain villages and hamlets, some "notable persons" would be selected to decide the question. This provision

was among those which the parties omitted from the Truce of Antwerp. However, the Truce of Ratisbonne established a commission to delimit frontiers

> so that in the future there may be no dispute to the prejudice of the truce herein agree upon. The said Commissioners shall work together to the end that if either party fails to make the promised restitutions, or to comply with any provision of this agreement, it will be entirely his own act.[129]

Similarly, the 1809 Vienna agreement provided for commissioners to be named by both sides for the purpose of supervising the execution of the agreement.[130] And the Finnish-Russian Armistice of 1940 called for special representatives of the two sides to decide problems arising in the implementation of the agreement.[131]

All of the post-World War II armistice agreements establish commissions of one type or another for the purpose of either implementing or supervising the implementation of various provisions of the agreements. Thus, the Renville Truce Agreement made use of the Committee of Good Offices created by the United Nations and the Committee's military assistants for the investigation of incidents, supervision of the withdrawal of troops, etc.[132] The India-Pakistan Agreement availed itself of the services of the United Nations Commission.[133] The Israeli-Lebanese Agreement created a Mixed Armistice Commission and also provided for the use of the personnel of the United Nations Truce Supervision Organization.[134] The Korean Armistice Agreement created a variety of organs, including a Military Armistice Commission, a Neutral Nations Supervisory Commission, a Committee for the Repatriation of Prisoners of War, Joint Red Cross Teams, a Committee for Assisting the Return of Displaced Civilians, and a Neutral Nations Repatriation Commission.[135] Similarly, the Viet-Nam Agreement created a Joint Commission and an International Commission.[136]

It is believed that on the basis of the foregoing consistent experience of recent years it may be assumed that the device of commissions made up of members of the belligerent forces and commissions made up of representatives of neutral nations, to which is assigned the mission of implementing and of supervising the implementation of the provisions of an armistice agreement, has become an accepted feature of such agreements.

H. Political

It has already been pointed out that one of the characteristics of an armistice is that it may contain political and economic, as well as military, clauses.[137] The Law of Land Warfare enumerates a number of categories of such clauses which may be contained in an armistice, including disposition of aircraft and shipping;

co-operation in the punishment of war crimes; restitution of captured or looted property; shipping, communications facilities and public utilities; civil administration; displaced persons; and the dissolution of organizations which may subvert public order.[138] It is obvious that a number of these subjects would only be appropriate in an armistice such as most of those which were concluded during or at the end of the two world wars where the victors were dictating terms to the vanquished. Some, such as those relating to displaced persons, movement of civilians, commercial intercourse, etc., have already been discussed. Generally speaking, it may be stated that the scope of this type of provision is limited only by the ability of the belligerents to reach agreement with regard thereto. Numerous examples of such provisions may be found in the armistice agreements of the past decade which we have been examining herein.[139]

I. Violations

The question of denunciations has already been discussed in connection with armistice agreements of indefinite duration.[140] Now it is appropriate to examine the problem of violations of an armistice agreement and denunciations in connection therewith.

In his Instructions, Lieber stated that "if either party violates any express condition, the armistice may be declared null and void by the other."[141] Article 51 of the Declaration of Brussels also included a statement to the effect that a violation of an armistice gave the other party the right to terminate it ("le denoncer").[142] It will be noted that under either of these rules a belligerent had the right to denounce an armistice for a violation of even a minor condition. An attempt was made to remedy this situation by Article 40 of both of the Hague Regulations which authorized a denunciation for a "serious violation," with the additional proviso that in cases of "urgency" the violation might warrant the recommencing of hostilities immediately.[143] Clearly, the failure to define the term "serious violation" and the indefiniteness of the term "urgency" left a great deal to the discretion of the aggrieved party.[144] After analyzing the applicable international conventions and the writers on the subject, one eminent author arrives at this conclusion:

> . . . Three rules may be formulated from this—(1) violations which are not serious do not even give a right to denounce an armistice; (2) serious violations empower the other party to denounce the armistice, but not, as a rule, to recommence hostilities at once without giving notice; (3) only in case of urgency is a party justified in recommencing hostilities without notice.[145]

Parties negotiating armistice agreements have apparently been loathe to include any reference therein with regard to the possibility of denunciation for violation, perhaps because they have preferred to rely on the rather vague rule of international law.[146] It is suggested that in these days of extremely detailed agreements it might be well to consider the advisability of specifying in the agreement which of its provisions are considered by the parties to be of such importance that a violation would be considered either "serious" or "urgent."

One of the important problems with regard to violations is that of the violation of a provision of an armistice by an individual acting independently. Grotius stated that "private acts do not break a truce unless in addition there is a public act, that is, through command or approval.[147] This is the basic tenor of Article 52 of the Declaration of Brussels and Article 41 of both of the Hague Regulations, all of which, in substance, provide that a violation by a private act only entitles the aggrieved side to demand that the individual offender be punished and, in an appropriate case, to demand compensation for damages.[148]

The Rules of Land Warfare defined the term "private individuals" as excluding members of the armed forces.[149] The Law of Land Warfare reverses that position, stating that in the sense of Article 41 of the 1907 Hague Regulations a private individual is *any* person, including a member of the armed forces, who acts on his own responsibility.[150] It is believed that the Hague Regulation intended, like Grotius, to distinguish between official and unofficial acts, and that the definition appearing in the later manual is fully consonant with that distinction. The Law of Land Warfare states further that violations by individuals do not justify denunciation unless they are proved to have been committed with the knowledge and consent of their government or commander—and that consent may be inferred from a persistent failure to punish the offenders.[151]

As far back as the Armistice of Ulm in 1647 we find a provision to the effect that officers of either side who violated any provision of the armistice agreement would be severely punished.[152] Paragraph 13e of the Korean Armistice Agreement requires the commanders of the two sides to "insure that personnel of their respective commands who violate any of the provisions of this Armistice Agreement are adequately punished"; and Article 22 of the Viet-Nam Agreement is identical, except for minor differences which probably resulted during the course of translating from English to French and then back into English.[153] It can logically be assumed that if the parties provide for the punishment of individual violators, they do not contemplate that such violations constitute a basis for denunciation.

The emergence of the guerrilla or partisan as a potent force in modern warfare has emphasized this problem. Irregular forces are frequently difficult to control; but it is not unusual to find them specifically included, with the regular forces,

within the restrictions contained in the armistice.[154] While this procedure is obviously appropriate, their frequent disregard of the orders of the commander of the organized military forces, who is responsible for insuring compliance with the provisions of the armistice, can become an acute problem insofar as violations of the armistice are concerned.[155]

J. Naval

Authorities writing on the war conventions have, with rare exception, devoted little more than a sentence or two to the subject of the effect of a general armistice on naval warfare.[156] They are, however, practically unanimous with regard to the few rules which they do enunciate.

Naturally, a general armistice would impliedly include a prohibition against a naval bombardment or a naval battle, inasmuch as every general armistice includes a complete suspension of active hostilities. However, the problem is more difficult when the question involved is the maintenance of a naval blockade with its concomitant factors such as the right of visit and search, control over neutral vessels, seizure of contraband, taking of prizes, etc.

One of the more recent works on this subject states:

> . . . During a general armistice, belligerents probably also have the right to capture vessels belonging to the enemy and to stop and visit neutral ships as well as to prevent them from breaking a blockade and from carrying contraband, unless otherwise agreed upon. The question is not, however, settled and the taking of prize in particular may be considered as a hostile act.[157]

As a practical matter, it is difficult to see how a belligerent who continues the maintenance of a blockade during an armistice can avoid committing hostile acts. However, most writers are far more positive than the above quotation would indicate concerning the right of a belligerent to continue during a general armistice a naval blockade which had been previously established and concerning which the armistice agreement makes no provision.[158] There is some indication that modern thinking in this direction is premised on the equally modern doctrine which permits a naval blockade even in time of peace—the so-called "pacific blockade."[159] The limitation with regard to prizes noted above is undoubtedly based upon the statement made by one writer to the effect that such an act "is irreconcilable with a state of suspension of hostilities."[160] It is apparent that the failure, in an appropriate case, to include within an armistice a clear provision with regard to naval blockade, and naval warfare generally, can be the cause of serious difficulties and, perhaps, even of the resumption of hostilities.[161] Let us review some of the armistice agreements in which an

attempt has been made to cover the subject and weigh the sufficiency or insufficiency of the provisions drafted for that purpose.

The Truce of Antwerp (Spain-United Provinces) stated that "all acts of hostility of all nature on sea and on land shall cease."[162] Such a clause would prohibit a pitched battle at sea or a naval bombardment of an enemy shore—but would it prohibit a blockade? The Armistice of Paris which followed Napoleon's abdication in 1814 was more specific.[163] It provided that the blockade of France would be lifted and that all prizes taken after various dates (which allowed for the time necessary for the news to reach different areas) would be restored. No difficulties should arise under such an armistice; nor under the somewhat similar provisions of the Armistice of Malmoe, which even went so far as to require the return of prizes legitimately taken and to provide for indemnification if prizes and their cargoes could not be returned in kind.[164]

The Armistice of Versailles of 1871 (France-Germany) created a naval line of demarcation and provided for the restoration of all captures made after the conclusion of the armistice and before its notification.[165] Again, this would seem to meet the requirements of precision and completeness essential to prevent disputes.

The Armistice of Shimonoseki (Japan-China) adopted the opposite approach, specifically authorizing the seizure of any military sea movements.[166] While this is, of course, entirely within the power of the parties, some act pursuant thereto may cause such a public reaction as to practically compel a government to resume hostilities—and, also, a government which is looking for an excuse to do so can avail itself of an incident thereunder as a basis for the resumption of hostilities.

Neither the two original armistice agreements entered into on May 19, 1897 (Epirus), and May 20, 1897 (Thessaly), in the Greco-Turkish War of that period, nor the amended agreements reached on June 3, contained any provisions relating to the naval situation.[167] On June 4 a supplementary agreement was concluded which lifted the Greek blockade, but prohibited Turkey from reinforcing her armies in Greece or bringing in any munitions, limiting her to revictualing her troops twice a week through designated Greek ports. These, and certain other naval provisions of the supplementary agreement were so indefinite as to be calculated to encourage disputes—which they did.

It has already been noted that the Protocol of Portsmouth (Russia-Japan) prohibited bombardment of enemy territory by naval forces and that the subsequent "Naval Protocol of Armistice" established a boundary line between the two fleets.[168] The Protocol of Portsmouth also provided that "maritime captures will not be suspended by the armistice." It is to be assumed that the Japanese were following the precedent which they had established in the Armistice of Shimonoseki.

The early post-World War II armistice agreements tended to follow the irregular pattern indicated above. The Renville Truce Agreement contains no reference to naval warfare or the sea—a strange situation for an armistice relating to an island area.[169] The Israeli-Lebanese General Armistice Agreement provided that "a general armistice between the armed forces of the two parties—land, sea and air—is hereby established" and that "no element of the land, sea or air military or para-military forces of either Party . . . shall commit any warlike or hostile acts."[170] We have already seen how identical provisions have caused grave disputes between Israel and Egypt with regard to their effect on Egypt's naval blockade.[171]

In the Korean Armistice Agreement the required precision and completeness on this subject were almost reached. Paragraph 12 of that Agreement called for a complete cessation of *all* hostilities, including naval hostilities; and paragraph 15 provides:

> This Armistice Agreement shall apply to all opposing naval forces, which naval forces shall respect the waters contiguous to the Demilitarized Zone and to the land area of Korea under the military control of the opposing side, and shall not engage in blockade of any kind of Korea.[172]

This is probably one of the most complete naval provisions ever included in an armistice agreement. However, the general descriptive statement concerning this armistice is qualified in view of the fact that in negotiating it an attempt to reach an agreement on the extent of the territorial waters was unsuccessful because the United Nations Command proposed the traditional three-mile limit, the Communists insisted on the twelve-mile limit, and the Republic of Korea had established the arbitrary "Rhee Line" which extends anywhere from 60 to 200 miles from shore. According to unofficial accounts the United Nations Command has voluntarily imposed a twelve-mile limit on its personnel in order to avoid incidents. However, this has not been entirely successful.

Finally, the Agreement on the Cessation of Hostilities in Viet-Nam is almost, though not quite, as complete as the Korean Armistice Agreement. Article 24 provides that the agreement applies to all of the armed forces of either party and states that such armed forces "shall commit no act and undertake no operation against the other party and shall not engage in blockade of any kind in Viet-Nam."[173] It also defines the territory of a party as including "territorial waters." France supports the three-mile definition of territorial waters and it is to be assumed that the state of Viet-Nam does likewise. It is equally to be assumed that the Viet-Minh will subscribe to the twelve-mile limit of territorial waters supported by the U.S.S.R. Accordingly, here, too, there is a possibility of dispute.

The foregoing discussion has, it is believed, indicated the necessity of including in an armistice agreement specific and precise provisions with regard to naval warfare, blockades, etc. It should also have indicated that progress in the right direction has been made in recent years and that care on the part of the negotiators of future armistice agreements can quickly and simply eliminate the naval problem as a source of irritation during the often uneasy period of armistice.

IV. Conclusion

The general armistice is a living, dynamic war convention which, despite centuries of use, is still continuing in each decade to expand its scope and to increase the importance of its position among the agreements concerning the non-hostile relations of belligerents. The elaborate armistice agreements of recent years have, in effect, rendered the preliminaries of peace obsolete. It is not inconceivable that the formal treaty of peace will suffer the same fate and that wars will one day end at the armistice table.

Notes

1. All of these agreements may be found in Maurice, The Armistices of 1918, Appendices (London, 1943). They are referred to in the text as "so-called armistice agreements" because each one was actually what one author has called a "capitulatory armistice, in which the victor imposes upon the vanquished conditions which are normally reserved for the treaty of peace." Burgos, Nociones de Derecho de Guerra 144 (Madrid, 1955).

2. U. S. Foreign Relations, Japan: 1931-1941 (Washington, 1943), Vol. I, p. 217.

3. U. S. Foreign Relations, The American Republics: 1935 (Washington, 1953), Vol. IV, p. 73. This was termed a "Peace Protocol" and, in many respects, went beyond the normal scope of even a modern armistice. Neither of these two armistice agreements had any particular significance in the development of the general armistice as an important war convention.

4. See comment in note 1 above. These agreements may be found in 39 A.J.I.L. Supp. (1945) 88 (Rumania); 93 (Bulgaria); and 97 (Hungary); 40 *ibid.* 1 (1946) (two with Italy). A number of other such agreements were entered into during the course of the war (Finland–U.S.S.R., 34 *ibid* 127 (1940); France-Germany, 34 *ibid* 173 (1940); France-Italy, 34 *ibid.* 178 (1940), etc.). The surrenders of Germany on May 7, 1945 (Exec. Agr. Ser., No. 502), and of Japan on Sept. 2, 1945 (Exec. Agr. Ser., No. 493) do not fall within this category. See Zemanek, "Unconditional Surrender and International Law," in 26 The Annual, Journal of the A.A.A. 29 (1956).

5. The Renville Truce Agreement (Netherlands–Indonesia), U.N. Doc. S/649, Jan. 17, 1948; Resolution for a Cease-fire Order and Truce Agreement (India–Pakistan), U.N. Doc. S/995, Sept. 13, 1948; the four Israeli–Arab General Armistice Agreements: U.N. Doc. S/1264/Rev. 1, Feb. 23, 1949 (Egypt); U.N. Doc. S/1296/Rev. 1, March 23, 1949 (Lebanon); U.N. Doc. S/1302/Rev. 1, April 3, 1949 (Jordan); and U.N. Doc. S/1353/Rev. 1, July 20, 1949 (Syria); the Korean Armistice Agreement, U.N. Doc. S/3079, Aug. 7, 1953; and the three Agreements on the Cessation of Hostilities in Indochina: IC/42/Rev. 2, July 20, 1954 (Viet-Nam); IC/51/Rev. 1, July 20, 1954 (Laos): and IC/52, July 21, 1954 (Cambodia). The Korean Armistice Agreement may also be found in 47 A.J.I.L. Supp. 186 (1953), and the three Indochinese agreements in Report on Indochina, U. S. Senate Committee on Foreign Relations, 83d Cong., 2d Sess., 1954, Committee Print, pp. 16–41.

6. Rosenne, Israel's Armistice Agreements with the Arab States 27 (Tel Aviv, 1951); Zemanek, *loc. cit.* 30.

7. Phleger, Proceedings of Annual Meeting of the American Society of International Law, 1955, p. 98; Sibert, "L'armistice dans le droit des gens," in 40 Revue générale de droit international public 714 (1933).

8. While any review of the historical development of the general armistice will necessitate some discussion, however limited, of the general armistice agreement over the centuries, emphasis will be placed on those of the last decade.

9. Monaco, "Les conventions entre belligérents," in 75 Recueil des Cours de l'Académie de Droit International de La Haye 323 (1949, II).

10. We are not here concerned with the local, or partial, armistice, the agreement between belligerents which has only a military character and which results only in a temporary armistice of limited scope. All references in the text to an "armistice" refer to a general armistice agreement.

11. Art. 50, Declaration of Brussels of 1874, Recueil général des lois et coutumes de la guerre (Brussels, 1943), p. 595; Art. 36, Regulations respecting the Laws and Customs of War on Land, annexed to Hague Convention No. II, July 29, 1899 (32 Stat. 1811, 2 Malloy, Treaties 2042); Art. 36, Regulations respecting the Laws and Customs of War on Land, annexed to Hague Convention No. IV, Oct. 18, 1907 (36 Stat. 2277; Malloy, *op. cit.* 2269).

12. Par. 253, Rules of Land Warfare, U. S. Army, Basic Field Manual 27–10 (Washington, 1940); par. 479, The Law of Land Warfare, U.S. Army, Basic Field Manual 27-10 (The Law of Land Warfare superseded the Rules of Land Warfare in July 1956); pars. 256, 258, and 270, British Army Manual of Military Law, 1929, Amendments No. 12 (1936), Ch. XIV, The Laws and Usages of War on Land; pars. 256, 258, and 270, British Army Manual of Military Law, 1951, Draft Section XIV, The Laws of War on Land (when published, The Laws of War on Land will supersede The Laws and Usages of War on Land).

13. Basdevant, Cours de droit international public 176 (Paris, 1946); Calvo, Le droit international, Vol. IV, #2436 (5th ed., Paris, 1896); Clunet, "Suspension d'armes, armistice, préliminaires de paix," in 46 Journal du droit international privé 173 (1919); Fauchille, Traité de droit international public, Vol. II, p. 326 (8th ed. by Bonfils, Paris, 1921); Phillipson, Termination of War and Treaties of Peace 74 (New York, 1916); Robert, Des effets de l'armistice général 28 (Paris, 1906); Sibert, *loc. cit.* 662.

14. Calvo, *op. cit.* But see Art. 75 of the 1929 Geneva Convention relative to the Treatment of Prisoners of War (47 Stat. 2021; Treaty Series, No. 846; 4 Malloy, Treaties 5224).

15. Clunet, *loc. cit.* 174.

16. Fauchille, *op. cit.* 326; Robert, *op. cit.*; Sibert, *loc. cit.* 685.

17. The more important provisions of the "usual" armistice agreement, if such there be, are discussed in detail in Part III hereof.

18. Art. 136, Lieber, Instructions for the Government of Armies of the United States in the Field (General Orders No. 100, April 24, 1863); Politis, "La guerre grécoturque," in 5 Revue de droit international public 116, 135 (1898); Spaight, War Rights on Land 238 (London, 1911).

19. Bernard, L'armistice dans les guerres internationales 53 (Geneva, 1947); Calvo, *op. cit.* #2437; Castrén, The Present Law of War and Neutrality 129 (Helsinki 1954); Halleck, International Law Vol. II, p. 312 (3d ed. by Baker, London, 1893); Kluber, Droit des gens moderne de l'Europe # 277 (2d Ott ed. in French, Paris, 1874); Sibert, *loc. cit.* 669; Vattel, The Law of Nations, iii, XVI, 237 (Text of 1758, Classics of International Law, Washington 1916). Vattel states that "the conclusion of a general armistice is a matter of such importance that the sovereign is always presumed to have reserved it to himself." This undoubtedly refers to ratification, rather than negotiation. One of the few armistice agreements actually signed by sovereigns personally in modern times was that of Villafranca, which was signed by the Emperors Napoleon III of France and Francis Joseph of Austria on July 11, 1859.

20. Lawrence, The Principles of International Law 565 (6th ed., New York, 1915), but see the 7th ed., 1927, p. 556; 2 Oppenheim, International Law 550 (7th ed. by Lauterpacht, London, 1952). While par. 259 of the Rules of Land Warfare stated categorically that a general armistice is *always* subject to ratification, par. 483 of The Law of Land Warfare states that "if an armistice contains political terms, it must be made under authorization from the governments concerned *or* subject to approval by them."

21. Clunet, *loc. cit.* 173; Fauchille, *op. cit.* 326; Wheaton, International Law 222 (7th ed. by Keith, London, 1944). Each of the four Israeli-Arab General Armistice Agreements (note 5 above) states in the preamble that the Parties have "appointed representatives empowered to negotiate and conclude an Armistice Agreement."

22. Notes 1 and 4 above. However, the Protocol of Buenos Aires (note 3 above) suspending the Gran Chaco hostilities did require ratification. This was one of its numerous variations from the usual armistice of modern times.

23. The four Israeli-Arab General Armistice Agreements specifically provided that they were not subject to ratification. The others were completely silent on the subject.

24. *De Jure Belli*, ii, X, 292 (Text of 1612, Classics of International Law, Oxford, 1933). This was apparently the feeling of at least a part of the British press during the Korean negotiations. See Frankenstein, L'Organisation des Nations Unies devant de Conflit Coréen 323 (Paris, 1952).

25. Monaco, *loc. cit.* 326. In discussing the preparations for the Armistice of Rethonde which brought World War I hostilities to an end on November 11, 1918, Maurice (*op. cit.* 34) makes the following amusing comment: "This latest American note did much to clear the air, but it did not entirely satisfy Marshal Foch, and there followed some interesting correspondence between him and his Government on the respective responsibility of statesmen and soldiers in making terms of armistice."

26. Note 5 above. It is probable that the Arab states did not use diplomatic representatives because of their refusal to take any action which might, even remotely, imply recognition of the existence *de jure* of the state of Israel.

27. Of course, this was not the case prior to the invention of wireless telegraphy. In August, 1808, Lt. General Sir Arthur Wellesley (later Lord Wellington) was successful in several engagements with the French in Portugal. The French Commander then approached Sir Arthur and his superiors with a request for an armistice. Agreement on an armistice extremely favorable to the French was reached at Cintra on Aug. 22, 1808. Later, a "Definitive Convention for the Evacuation of Portugal by the French Army" was agreed upon. "Violent public clamour" ensued when the news reached England, where on the facts known, no justification could be perceived for having entered into a truly consensual agreement with what appeared to have been a defeated foe. As a result, Sir Arthur and his two superiors were subsequently compelled to face a Board of Enquiry. Stockdale, The Proceedings on the Enquiry into the Armistice and Convention of Cintra (London, 1809).

28. Oppenheim (*op. cit.* 546) states that during a general armistice "the condition of war remains between the belligerents themselves, and between the belligerents and neutrals, on all points beyond the mere cessation of hostilities." And in his International Law Codified (Trans. of 5th Ital. ed. by Borchard, New York, 1918), note, #1775, Fiore goes even further, cautioning that "both in the relations of public international law and in those of international law, during an armistice, however long protracted, the law of war, not the law of peace, must be applied."

29. 2 Phillipson, The International Law and Customs of Ancient Greece and Rome 287, 289-290 (London, 1911).

30. Gentili, *op. cit.* ii, XII, 302-303; Grotius, *De Jure Belli ac Pacis* iii, XXI, I-II (Text of 1646, Classics of International Law, Oxford, 1925); Pufendorf, Of the Law of Nature and Nations viii, VII, 3 (Text of 1688, Classics of International Law, Oxford, 1934).

31. Benton, International Law and Diplomacy of the Spanish-American War 226 (Baltimore, 1908); Calvo, *op. cit.* #2339; Clunet, *loc. cit.* 72; Fenwick, International Law 580 (3d ed., New York, 1952); McNair, Legal Effects of War 5 (Cambridge, 1948); Sibert, *loc. cit.* 658; Spaight, *op. cit.* 245; Zemanek, *loc. cit.* 31.

32. Lieber, *op. cit.* Art. 142; par. 253, Rules of Land Warfare; par. 479, The Law of Land Warfare; par. 266, Laws and Usages of War on Land; par. 266, Laws of War on Land (note 12 above).

33. Kahn *v.* Anderson, Warden, 255 U.S. 1, 9 (1921).

34. In re Suarez, Annual Digest of Public International Law Cases, 1943-1945 (ed. by Lauterpacht, London, 1949), p. 412. Suarez, a French newspaperman, was charged with "communicating with the enemy" during the German occupation of France. He contended that after the Armistice of Compiègne (June 22, 1940) relations with German nationals no longer fell within the meaning of that term. The Court of Cassation disagreed with this contention and Suarez died before a French firing squad. In the editorial comments on this case Lauterpacht says: "This judgment is in full conformity with the classical theory of international law regarding the juridical nature of an armistice. . . . An armistice is only a provisional suspension by treaty of hostilities, a temporary pause in military operations between belligerents, leaving, moreover, the state of war, with all its juridical consequences, still in existence."

35. Security Council, Sixth Year, Official Records, 558th Meeting, pars. 1-7. The resolution made no mention of the Treaty of Constantinople of 1888.

36. Stone, Legal Controls of International Conflict 641, 644 (New York, 1954).

37. On April 13, 1956, while Mr. Dag Hammarskjöld, Secretary General of the United Nations, was in the Middle East pursuant to a Security Council Resolution of April 4, 1956, attempting to secure compliance with the General Armistice Agreements, Mr. David Ben-Gurion, Prime Minister of Israel, requested him to "ascertain whether their [Egypt's] readiness to undertake the full implementation of the General Armistice Agreement signifies that they no longer consider Egypt to be at war with Israel." New York Times, April 17, 1956. For a further discussion of the problem of the naval blockade during an armistice, see section III J below.

38. Bluntschli, Le droit international codifié #691 (Trans. from German into French, Paris, 1870); Calvo, *op. cit.* #2339; Fiore, *op. cit.* #1774; Hall, A Treatise on International Law 583 (7th ed. by Higgins, Oxford, 1917); Vattel, *op. cit.* iii, XVI, 246; 2 Westlake, International Law 92 (2d ed., Cambridge, 1913); Wheaton, *op. cit.* 224; Winthrop, Military Law and Precedents 787 (2d ed. rev., Washington, 1920).

39. Castrén, *op. cit.* 130; Fauchille, *op. cit.* 330; Fenwick, *op. cit.* 580; Grotius, *op. cit.* iii, XXI, VII; 2 Hyde, International Law Chiefly as Interpreted and Applied by the United States 283 (Boston, 1922);

Lawrence, *op. cit.* 558; Phillipson, *op. cit.* 63 (note 13 above); Spaight, *op. cit.* 235; par. 256, Rules of Land Warfare; par. 287e, The Law of Land Warfare; par. 282, Laws and Usages of War on Land; par. 282, Laws of War on Land (note 12 above). It is interesting to note that Spaight (*op. cit.*) criticized a statement in Lawrence (apparently in the latter's 5th edition) to the effect that "it is universally agreed that during an armistice a belligerent may do in the actual theatre of war only such things as the enemy could not have prevented him from doing at the moment when actual hostilities ceased"; and that, perhaps as a salutary effect of Spaight's criticism, the next edition of Lawrence's work (the 6th), published in 1915, four years after Spaight's book appeared, stated (at p. 566): "There is a controversy whether during an armistice a belligerent may do, in the actual theatre of war, only such things as the enemy could not have prevented him from doing at the moment when active hostilities ceased, or whether he may do whatever is not forbidden expressly, except, of course, attack the enemy or advance further into his territory. The weight of authority is in favor of the former alternative; but the weight of reasoning seems on the side of the latter, which has the decisive support of recent practices." The latest (1927) edition of Lawrence is consistent with its immediate predecessor (p. 558).

40. Several hundred years before the birth of Christ the famous Philip of Macedon took advantage of a "truce" (we would call it a suspension of arms), which he had requested for the purpose of burying his dead, and withdrew to a more advantageous position. Gentili (*op. cit.* ii, XIII, 313) says "Philip did wrong"; Grotius (*op. cit.* iii, XXI, VII) maintains that "it is not inconsistent with a truce to withdraw with the army inland as we read in Livy that Philip did"; Vattel (*op. cit.* iii, XVI, 250) also sees no bad faith in such an act, though warning that it gives the enemy the right to renew the attack despite the suspension of hostilities; Winthrop (*op. cit.* 787) concurs in Gentili's position; while Maurice (*op. cit.* 32) points out that in October, 1918, the British and French felt it necessary to call President Wilson's attention to the fact that the mere evacuation of occupied territory by the Germans (which had been suggested as a provision of the armistice which was then under discussion) would not suffice, inasmuch as the enemy would then have the opportunity, among other things, of "retiring without loss on to new positions which he would have time to choose and fortify"—clear acceptance of the validity of Phillip's act.

41. The last reported incidents involving this problem occurred during the latter half of the 19th century. They clearly indicate that, as a matter of practice, belligerents have frequently taken actions during an armistice which were not specifically forbidden and which the enemy could have prevented at the moment when actual hostilities ceased. One of these incidents occurred during the Seven Weeks' War between Prussia and Austria. After the Armistice of Nikolsburg had been signed (July 26, 1866), Prince Frederick Charles, the Prussian commander, massed his troops in such a manner as to facilitate an attack on Pressburg, should the negotiations for peace fail, an action which the Austrians could, at least, have rendered difficult. This action brought no protest from the Austrians—and the Treaty of Prague (August 23, 1866) brought the war to an end. Similarly, after the Armistice of Adrianople had been signed (Jan. 31, 1878), bringing to a halt hostilities between the Russians and the Turks, the Russian commander, General Totleben, ordered his troops to erect a number of high observation posts from which a full view of the Turkish entrenchments could be obtained, an act which the Russians certainly could not have accomplished prior to the cessation of hostilities. The Turkish commander demanded that they be removed and threatened to open fire on them if this was not done. General Totleben refused to comply with this demand and complained to the Turkish Government which overruled its military commander and never questioned the right of the Russians to do as they had done. And again, during the Boer War, after the signing of the Armistice of Tugela Heights (Feb. 25, 1900), British artillery was moved to new positions and the British took other actions which the Boers had been in a position to prevent at the time the armistice was signed. All this was apparently done with no protest on the part of the Boers.

42. Bordwell, The Law of War between Belligerents 295 (Chicago, 1908); Phillipson, *op. cit.* 63-64 (note 13 above); Spaight, *op. cit.* 235.

43. For an example of this practice, see sub-pars. 13c and 13d of the Korean Armistice Agreement. The three Agreements on the Cessation of Hostilities in Indochina have many restrictive provisions identical with, or closely parallel to, those contained in the Korean Armistice Agreement. They also have additional provisions in this regard, such as those relating to "foreign troops," "military bases," and "military alliances."

44. See discussion above.

45. A number of the armistice agreements to which reference will be made were studied in somewhat esoteric documents which were approximately contemporaneous with the particular armistice itself. These documents, many of which are probably unique, are located in the Library of the International Court of Justice at The Hague. Where this is so it will be indicated by a footnote stating "I.C.J. Library."

46. Pars. 487-488, The Law of Land Warfare (note 12 above).

47. See discussion above.

48. Traité de Trève entre Le Serenissime et Très-Puissant Prince Leopold, Empereur des Romains et L'Empire, d'une Part ET Le Serenissime et Très-Puissant Prince Louis XIV Roy Très-Chrestien de France et de Navarre d'autre Part, I.C.J. Library.

49. Traité de Suspension d'Armes en Italie Conclu à Vigevano le Septième Octobre 1696 (Paris, 1697), I.C.J. Library.

50. I.C.J. Library.

51. T.I.A.S., No. 1604; 40 A.J.I.L. Supp. 1 (1946); Dept. of State Bulletin, Nov. 11, 1945, p. 748.

52. Takahashi, International Law Applied to the Russo-Japanese War 219 (New York, 1908).

53. *Ibid.* 220.

54. *Ibid.* 224.

55. *Ibid.* 225.

56. Par. 1, Renville Truce Agreement (note 5 above).

57. Part IA, Resolution for a Cease-Fire Order and Truce Agreement (note 5 above).

58. See, for example, Art. III(1), Israeli-Lebanese General Armistice Agreement. In view of the basic similarity between the four Israeli-Arab General Armistice Agreements all subsequent references to this group of agreements will be restricted to the Israeli-Lebanese General Armistice Agreement, which was drafted by eliminating unnecessary provisions from the prior Israeli-Egyptian agreement and which served as the model for the agreements later negotiated between Israel and its other Arab neighbors, Jordan and Syria.

59. Par. 12, Korean Armistice Agreement (note 5 above). So, likewise, do the three Agreements on the Cessation of Hostilities in Indochina, which, in many instances, adopted verbatim the phraseology of the Korean Armistice Agreement. In view of the basic similarity between the three Agreements on the Cessation of Hostilities in Indochina, all subsequent references to this group of agreements will be restricted to the Agreement on the Cessation of Hostilities in Viet-Nam.

60. Spaight, *op. cit.* 234.

61. Oppenheim, *op. cit.* 554.

62. The Armistice of Nikolsburg (Austria-Prussia) was signed on July 6, 1866, to be effective one week later, on Aug. 2 (Phillipson, *op. cit.* 65). The Truce of Brussels (Spain-United Provinces) was signed on March 13, 1607, and did not take effect until May 5, 1607 (Discours, Paris, 1609, I.C.J. Library).

63. The Armistice of Versailles, signed by France and Germany on Jan. 28, 1871, provided for a cessation of hostilities on the date of the signing in the Paris area and three days later in the more remote areas of France (Clercq, Recueil des traités de la France (Paris, 1864–1872), Vol. X, pp. 410-414). Art. 11 of the Agreement on the Cessation of Hostilities in Viet-Nam (note 5 above), provides for a cessation of hostilities simultaneously throughout all of Viet-Nam and then, paradoxically, specifies different effective dates in different areas of the country because of the difficulty of transmitting orders down to the lowest combat echelons. Because of the comparatively primitive conditions existing in Indochina, a number of the provisions of these three agreements are throwbacks in history.

64. Benton, *op. cit.* 228. Another instance of difficulties arising because of insufficient attention being paid to armistice provisions regarding time occurred during the Second Balkan War (1913). An armistice agreement was entered into while peace negotiations were being conducted. It became necessary to extend the duration of the armistice and, by error, an armistice which expired at noon was renewed only as of 1:00 P.M. The threat of a resumption of hostilities for one hour was only overcome by direct appeal to the peace conference!

65. Par. 1, Renville Truce Agreement; Art. VIII(1), Israeli-Lebanese General Armistice Agreement (notes 5 and 58 above); pars. 12 and 63, Korean Armistice Agreement; Arts. 11 and 47, Agreement on the Cessation of Hostilities in Viet-Nam (notes 5 and 59 above). Because the India-Pakistan Resolution for a Cease-Fire Order and Truce Agreement was actually only a resolution of the United Nations Commission, it was necessary for the parties to reach a supplementary agreement as to the effective date and time of the cessation of hostilities. This they did (par. 14, U.N. Doc. S/1196, Jan. 10, 1949).

66. Note 62 above, and Ariga, La Guerre sino-japonaise 251 (Paris, 1896).

67. Actenstücke zur Schleswig-Holstein 'schen Frage. Waffenstillstand von Malmoe vorn 26 August 1848 (Frankfurt am Main, 1848), I.C.J. Library.

68. I.C.J. Library.

69. Politis, *loc. cit.* 130.

70. Par. 10, Renville Truce Agreement.

71. Art. VIII (2), Israeli-Lebanese General Armistice Agreement.

72. Par. 62, Korean Armistice Agreement.

73. Politis, *loc. cit.*

74. Note 11 above.

75. *Ibid.*

76. They appear to do no more than to reiterate the principles of *Pacta sunt servanda.*

77. Spaight, *op. cit.* 234; Wheaton, *op. cit.* 225. Both par. 265*b* of the Rules of Land Warfare and par. 487*b* of The Law of Land Warfare (note 12 above) state that if the duration of an armistice is indefinite, "a belligerent may resume operations at any time after notice."

78. See, for example, Spaight, *op. cit.*

79. War of the Rebellion, Vol. XLVII, pp. 302, 334, 345.

80. *Ibid.* 243 (Sherman to Grant and to Halleck).

81. *Ibid.* 293 (Sherman to Johnston).

82. Politis, *loc. cit.* 136; Spaight, *op. cit.* 244. See also par. 265*c*, Rules of Land Warfare; par. 487*c*, The Law of Land Warfare; par. 289, Laws and Usages of War on Land; and par. 289, Laws of War on Land (note 12 above).

83. Robert, *op. cit.* 36.

84. Note 27 above.

85. Note 68 above.

86. Note 62 above.

87. Politis, *loc. cit.* 130. Phillipson, *op. cit.* 69, says that these two armistice agreements omitted demarcation lines. However, that of Epirus provided for the Turks to occupy the right bank of the Arachtos River and for the Greeks to retire to the left bank; and that of Thessaly specified that a line of demarcation was thereafter to be plotted. This was done and a neutral zone 5 km. wide was established (Politis, *loc. cit.* 136).

88. Pars. 1 and 2, Renville Truce Agreement (note 5 above).

89. Arts. 4 and 5, Israeli-Lebanese General Armistice Agreement (notes 5 and 58 above).

90. Pars. 1-4, Korean Armistice Agreement.

91. Art. 1, Agreement on the Cessation of Hostilities in Viet-Nam.

92. Part IIA 1, India-Pakistan Resolution for a Cease-Fire Order and Truce Agreement.

93. Note 11 above.

94. *Ibid.* For a dispute as to the correctness of the above official translation of this article, see Spaight, *op. cit.* 232, note.

95. Lieber, *op. cit.* Art. 141.

96. Par. 265*d*, Rules of Land Warfare; par. 487*d*, The Law of Land Warfare, *loc. cit.*

97. T.I.A.S., No. 3365; 50 A.J.I.L. 724 (1956).

98. Robert, *op. cit.* 28; Sibert, *loc. cit.* 700; Spaight, *op. cit.* 245. Sibert states that "civilians remain under the protection—extremely imperfect—of the laws of war." It is to be hoped that the Civilian Convention (note 97 above) will prove to have mitigated this criticism.

99. Bluntschli, *op. cit.* #693.

100. Hyde, *op. cit.* 285.

101. ARTICLES de la TREFUE proposée par les Ambaffadeurs des Roys de France, & de la grand Britagne, en l'affemblée des Eftats Generaulx (Paris, 1608), I.C.J. Library.

102. DISCOURS de ce qui s'est passé au Royaume D'Hongrie, sur le traitté de la paix, auec le Roy d'Espagne, & les serenissimes Princes Archiducs, & les Estats généraux des prouinces vries dudict pays (Paris, 1609), I.C.J. Library.

103. Traité entre Le Roy Louis XIV, La Reyne de Suede, etc., d'une Part ET L'Electeur Maximilian, etc., d'autre Part (Paris, 1689), I.C.J. Library.

104. Note 48 above.

105. Note 5 above. Strangely enough, this subject of commercial intercourse probably received more attention in former days than it does now.

106. Par. 59, Korean Armistice Agreement.

107. Art. 14(d), Agreement on the Cessation of Hostilities in Viet-Nam, *loc. cit.* For some statistics on the huge number of persons who took advantage of this provision, see Report on Indochina 8-9 (note 5 above).

108. *Ibid.* Art. 21.

109. Note 97 above.

110. Note 103 above.

111. Note 50 above.

112. Note 67 above.

113. Note 11 above.

114. Note 14 above.

115. Art. 118, 1949 Geneva Convention relative to the Treatment of Prisoners of War, T.I.A.S., No. 3364; 47 A.J.I.L. Supp. 119 (1953).

116. Par. 487*f*, The Law of Land Warfare. The details of the dispute with regard to the release and repatriation of prisoners of war which bogged down the Korean armistice negotiations for well over a year after agreement had been reached on all other matters is beyond the scope of this paper. It is suggested that, while the definitive discussion of that problem remains to be written, basic materials with regard thereto may be found in Charmatz & Wit, "Repatriation of Prisoners of War and the 1949 Geneva Convention," in 62 Yale Law Journal 391 (1953); Gutteridge, "The Repatriation of Prisoners of War," in 2 International and Comparative Law Quarterly 207 (1953); Mayda, "The Korean Repatriation Problem and International Law," in 47 A.J.I.L. 414 (1953); Lundin, "Repatriation of Prisoners of War: The Legal and Political Aspects," in 39 American Bar Association Journal 559 (1953); British White Paper, The Legal Aspects of the Repatriation of Prisoners of War, Cmd. 8793 (March, 1953); Department of State, Memorandum of Legal Considerations Underlying the Position of the United Nations Command Regarding the Issue of Forced Repatriation of Prisoners of War (1953); Baxter, "Asylum to Prisoners of War," in 30 British Year Book of International Law 489 (1953); and Stone, *op. cit.* 661-665, 680-683. See also Garcia-Mora, International Law and Asylum as a Human Right, Ch. VII (Washington, 1956).

117. Bernand, *op. cit.* 92; Politis, *loc. cit.* 142; Robert, *op. cit.* 97.

118. Robert, *ibid.* 99.

119. Pars. 157-159, Rules of Land Warfare.

120. The Final Act of the 1949 Geneva Conference had 59 signatories. Up to July 1, 1956, there had been notification of 42 ratifications and 10 adherences. The U. S. ratification became effective on February 2, 1956. See 50 A.J.I.L. 724 (1956).

121. Par. 52, Korean Armistice Agreement (note 5 above).

122. Par. 7*f*, Renville Truce Agreement.

123. Art. VI, Israeli-Lebanese General Armistice Agreement (notes 5 and 58 above).

124. Pars. 51-58 and Annex, Korean Armistice Agreement.

125. Notes 5 and 59 above.

126. Note 107 above.

127. Par. 487*g*, the Law of Land Warfare (note 12 above).

128. Note 101 above.

129. Note 48 above.

130. Note 68 above.

131. 34 A.J.I.L. Supp. 127, 131 (1940); Dept. of State Bulletin, April 27, 1940, p. 453.

132. Arts. 4, 8, and 9, and par. 3 of the Annex, Renville Truce Agreement.

133. Part ID, Resolution for a Cease-Fire Order and Truce Agreement.

134. Art. VII, Israeli-Lebanese General Armistice Agreement (notes 5 and 58 above).

135. Pars. 19-35, 36-50, 56, 57, and Annex, Korean Armistice Agreement (note 5 above).

136. Pars. 30-33 and 34-36, Agreement on the Cessation of Hostilities in Viet-Nam (notes 5 and 59 above).

137. See discussion above.

138. Par. 488, The Law of Land Warfare (note 12 above).

139. Prohibition of sabotage, restrictions on propaganda radio broadcasts: par. 7, Renville Truce Agreement; local administration, guarantee of human and political rights, consultation on means of self-determination: Parts IIA3, IIB3, and III, India-Pakistan Resolution for a Cease-Fire Order and Truce Agreement; civil administration and relief in demilitarized zone, displaced persons, recommendation for the convening of a political conference: pars. 10, 59, and 60, Korean Armistice Agreement (note 5 above); civil administration and relief in demilitarized zone, political and administrative measures in regrouping zones, prohibition of foreign military bases, prohibition of military alliances: para. 8, 14, and 19, Agreement on the Cessation of Hostilities in Viet-Nam (notes 5 and 59 above). The Israeli-Arab General Armistice Agreements contain no such provisions, probably for the reason mentioned in note 26 above.

140. See p. 8 above.

141. Lieber, *op. cit.* Art. 136. For some reason, Art. 145 provides further that a "clear" breach of an armistice by one party releases the other.

142. Note 11 above.

143. *Ibid.*

144. Wheaton, *op. cit.* 229.

145. Oppenheim, *op. cit.* 556.

146. An exception to this statement is par. 10 of the Renville Truce Agreement, which provides: "This agreement shall be considered binding unless one party notifies the Committee of Good Offices and the other party that it considers the truce regulations are not being observed by the other party and that this agreement should therefore be terminated."

147. Grotius, *op. cit.* iii, XXI, XIII.
148. Note 11 above.
149. Par. 269, Rules of Land Warfare (note 12 above).
150. Par. 494*b*, The Law of Land Warfare (note 12 above).
151. *Ibid.* par. 494*c*. In general accord on this problem, see pars. 299 and 300, Laws and Usages of War on Land; and pars. 299 and 300, Laws of War on Land.
152. Note 103 above.
153. Note 5 above.
154. The India-Pakistan Resolution for a Cease-Fire Order and Truce Agreement is stated to be applicable to "all forces, organized and unorganized." The Israeli-Lebanese General Armistice Agreement refers to "military or para-military forces of either Party, including non-regular forces." The Korean Armistice Agreement uses the more general term "all armed forces under their control, including all units and personnel of the ground, naval, and air forces." So does the Agreement on the Cessation of Hostilities in Viet-Nam.
155. Rosenne, *op. cit.* 45.
156. The exception is Rolin, Le droit moderne de la guerre (Brussels, 1920), in which an entire chapter (Vol. II, Ch. XVII, ##801-810) is devoted to "The application of the rules of armistice in maritime warfare."
157. Castrén, *op. cit.* 130.
158. Oppenheim, *op. cit.* 547; Politis, *loc. cit.* 134; Robert, *op. cit.* 52; Wheaton, *op. cit.* 229. Rolin (*op. cit.* #805) quotes Art. 72 of the Manuel des lois de la guerre maritime, drafted by the Institut de Droit International, as stating that "in the absence of a specific provision in the agreement, blockades in being at the time of an armistice need not be lifted." Rolin asserts, however, that no new blockades may be established, as the establishment of a blockade is an act of war.
159. Oppenheim, *op. cit.* 144; Politis, *loc. cit.*
160. Pillet, Les lois actuelle de la guerre 368 (Paris, 1901).
161. For a discussion of the problem arising from the indefiniteness of the provision of the Israeli-Egyptian General Armistice Agreement in this regard, see above.
162. Note 102 above.
163. Note 50 above.
164. Note 67 above.
165. Clercq, *op. cit.*
166. Note 66 above.
167. Politis, *loc. cit.* 116.
168. See discussion and notes 52 and 54 above.
169. Note 5 above.
170. Notes 5 and 58 above.
171. See discussion above.
172. Note 5 above.
173. Notes 5 and 59 above.

II

Prisoners of War and the Protecting Power

55 American Journal of International Law 374 (1961)

One of the more significant, but inadequately recognized, developments in the field of the law of war which has occurred during the past half-century is that with respect to the institution of the Protecting Power. Surprisingly little has been written, especially in English, either on the general subject of the Protecting Power or on the specific subject of the Protecting Power and its relationship to the prisoner-of-war problem.[1] This article will endeavor, to a necessarily limited extent, to fill that void, with the emphasis being placed on the gradual, but steady, expansion of the authority, responsibility, and functions of the Protecting Power in safeguarding the welfare of prisoners of war.

The term *Protecting Power* is comparatively simple of definition. It is a state which has accepted the responsibility of protecting the interests of another state in the territory of a third, with which, for some reason, such as war, the second state does not maintain diplomatic relations.[2] Because the protection is most frequently rendered to nationals of the protected state found in the third state, the former is often referred to as the *Power of Origin* and the latter as the *Power of Residence*. For obvious reasons, in the case of prisoners of war the state by which they are held is known as the *Detaining Power* rather than as the *Power of Residence*. And while the term *Power of Origin* may be a misnomer in the case of certain prisoners of war, as, for example, those who were captured while serving in the armed forces of a state other than their own, it will be used herein for lack of a more appropriate term.

I. Historical

The earliest indication of what we now term the Protecting Power probably appeared in the Capitulations of the Ottoman Empire of the sixteenth century.[3] Curiously enough, in those early days protection of non-nationals came about, not as a result of agreements reached with the Power of Residence by the Power of Origin, but as a result of agreements reached with the Power of Residence by the prospective Protecting Power itself, the latter having probably been primarily concerned with the resulting increase in its own prestige and influence in the territory in which it was acting and in the home territories of the protected

persons. At that period the Protecting Power was, and in the three succeeding centuries it remained, completely a creature of custom and usage, with no conventional basis, definition, or functions. As a result, the extent of the activity of Protecting Powers varied in different countries and even, with respect to different Protecting Powers, within the same country. The passage of time resulted in the passing of the initiative for the designation of a Protecting Power in a particular case from the Protecting Power to the Power of Origin, where it more properly belonged. It also resulted in the concept of the Protecting Power as an international institution becoming more and more firmly intrenched in international law and practice. In its present form, however, the Protecting Power dates back less than one century—and its codified form is of even more recent vintage.

Most writers attribute the modern genesis of the Protecting Power to developments which occurred during the Franco-Prussian War (1870-1871). In that conflict, probably for the first time, all of the belligerents were represented by Protecting Powers in the territory of the enemy. England was charged with the protection of the French in Germany; and the United States, Switzerland, and Russia acted as Protecting Powers in France for the various German States.[4] It may be said that the expansion of the functions of the Protecting Power during this conflict was, in large measure, due to two practices which originated during its course: that of expelling enemy consuls; and that of imposing stringent restrictions on enemy aliens.[5] Unquestionably, each of these practices could and did contribute to the need for the enlargement of the functions of the Protecting Power.

The precedents established during the Franco-Prussian War were adhered to in most subsequent international conflicts, many of which had, however, their own peculiar aspects. Thus, in the Sino-Japanese War (1894–1895) each side requested the United States to act as its Protecting Power and so we find the same state acting as the Protecting Power for each belligerent within the territory of the other. Similarly, Germany acted as the Protecting Power for both belligerents in the Italo-Turkish War (1911–1912) and in the Sino-Soviet War (1929). Going to the other extreme, in the Greco-Turkish War (1897), Germany acted as the Protecting Power for Turkey in Greece, while three other nations, England, France, and Russia, acted jointly for Greece in Turkey; in the Spanish-American War (1898), England acted as the Protecting Power for the United States, while France and Austria-Hungary acted jointly for Spain (it was during this conflict that, for the first time recorded, a belligerent, the United States, specifically requested neutral inspection of installations within which prisoners of war were being held);[6] and during the Balkan Wars (1912-1913) France and Russia acted jointly as the Protecting Power for Montenegro. This practice of using more than one friendly state as a Protecting Power has since

almost disappeared, although at one time during World War II Spain was acting as the Protecting Power for Japan in the continental United States, while Sweden acted for her in Hawaii, and Switzerland in American Samoa.

The Boer War (1899-1902) may, perhaps, be considered to have been, at least to some extent, an exception to what was fast becoming a firmly established institution of international law. Early in that conflict the British requested the United States to represent their interests with the Boers. Apparently the consent of the Boers was not sought and they not only failed to designate a Protecting Power of their own, but, for all practical purposes, at first refused to recognize the right of the United States consular representatives to act on behalf of the British. Subsequently the Boers did agree to permit the United States consuls in their territory to perform certain specific and limited functions with respect to British prisoners of war, upon the understanding that United States consuls in England would have similar privileges with respect to Boer prisoners of war held there.[7] Thus, to a limited degree, the institution of the Protecting Power was recognized even here.

The Russo-Japanese War (1904–1905) found the Protecting Powers once again exercising the full powers which it had become customary to allot to them. Perhaps as a result of the favorable experiences of the Sino-Japanese War, immediately upon the outbreak of hostilities Japan requested the United States to act on its behalf in Russia; while France was designated by Russia as its Protecting Power in Japan and Korea. And once again, but to an even greater extent than during the Spanish-American War, we find the representatives of the Protecting Powers concerning themselves with the welfare of prisoners of war.[8]

Thus it can readily be seen that when World War I burst upon Europe, the designation of Protecting Powers by belligerents was a firmly established international custom, although the Protecting Power as an institution had yet to be the subject of international legislation. During the course of that conflict four definite items of progress occurred: first, it was during World War I that public opinion in the belligerent countries achieved an understanding of how a friendly neutral could represent, at times vigorously, an enemy belligerent and its nationals;[9] second, the use of the Protecting Power as a means of safeguarding the welfare of prisoners of war, although at first somewhat restricted, was later greatly extended and received rather general acceptance;[10] third, the practice was adopted that when a neutral which had been acting as a Protecting Power itself became embroiled in the conflict, a successor Protecting Power would be designated to fill the vacuum;[11] and finally, the Protecting Power received legal recognition in a number of international agreements entered into by various of the belligerents during the course of the hostilities in which, to a surprising extent, its functions were spelled out with some degree of definiteness.[12]

The precedents established during World War I were destined to bear fruit. A draft prisoner of war convention prepared in 1921 by the International Committee of the Red Cross (hereinafter referred to as the ICRC), while contemplating the use of Protecting Powers for certain limited purposes, would have assigned to the ICRC the responsibility for establishing mobile commissions composed of neutrals charged with assuring that the belligerents were complying with the convention. This proposal was probably due to two factors: first, the failure of the states which had acted as Protecting Powers during World War I adequately to report their activities; and second, the belief that the duties involved in the effective protection of the rights of prisoners of war would exceed the capacity of the diplomatic personnel of Protecting Powers.[13] However, when the Diplomatic Conference convened in Geneva in 1929 and drafted the convention which subsequently received the ratification of the vast majority of states, the ICRC proposal was not adopted and, instead, the basic principle of the Protecting Power received general acceptance, the former Protecting Powers taking the position that all that was needed to assure their activities was that their role "be distinctly set out, and their task clearly defined."[14] The Prisoner of War Convention drafted at that Conference[15] thus became the first international agreement negotiated in time of peace to give official recognition to the institution of the Protecting Power.[16] However, it did not create a new international concept. It did not make the use of the Protecting Power by belligerents obligatory. It did not affect the relationships which had previously existed between the Power of Origin, the Protecting Power, and the Detaining Power. It did give the relationship a formal and agreed status which it had not previously had. It may well be considered that the provisions of the 1929 Convention relating to Protecting Powers constituted the most important advance contained in that convention over the provisions of the regulations relating to prisoners of war contained in the Annex to the Fourth Hague Convention of 1907.[17] The lessons learned during World War I had not been forgotten.

The advent of World War II provided, all too soon, an opportunity for the implementation and testing of this novel international legislation. Most of the belligerents were represented by Protecting Powers and, in general, these found the provisions of the 1929 Convention relating to their activities extremely helpful. True, the designation and functioning of Protecting Powers on behalf of prisoners of war had previously become an almost universally accepted custom in international law. But it is necessary to bear in mind that, despite this, in the U.S.S.R. and Japan, neither of which nations was a party to the 1929 Convention, there was either complete or substantial failure in the functioning of the Protecting Powers.[18] In general, the fact that such a large number of countries were parties to the World War II hostilities had two distinct but related

results. In the first place, not only did the absence of strong neutrals present a problem in the selection of Protecting Powers, but it also meant that there was no large neutral world public opinion to be affected by violations of the convention, and the power of neutral public opinion in forcing compliance with a humanitarian convention cannot be overestimated. And in the second place, because of the small number of neutrals available to act as Protecting Powers, it frequently occurred that the same neutral was designated to act as the Protecting Power for two opposing belligerents.

Once again wartime lessons were not forgotten and on August 12, 1949, just four years after the final termination of World War II, a new Prisoner of War Convention[19] was signed in which, as we shall see, the functions of the Protecting Power are identified and defined with even greater particularity than had been the case in the 1929 Convention.[20] Since that time the hostilities in Korea have occurred. At the outbreak of those hostilities General Douglas MacArthur, as the commander of the United Nations Command, immediately announced that his forces would comply with the humanitarian principles of the 1949 Convention. In answer to a query made by the ICRC, the Foreign Minister of the so-called Democratic People's Republic of Korea sent a message to the Secretary General of the United Nations stating that its forces were "strictly abiding by principles of Geneva Conventions in respect to Prisoners of War."[21] Unfortunately, the provisions of the convention relating to the Protecting Power were evidently not among the principles with which they were "strictly abiding" so that, despite all efforts expended in this regard, those provisions were never implemented.[22]

From the foregoing brief historical survey it is apparent that prior to 1870 only the precursors of the modern Protecting Power existed, and not the latter itself; that during the period from 1870 to 1914 the concept of the Protecting Power began to take form, particularly with respect to its relationship to the problem of the prisoner of war; and that during the period subsequent to 1914 the form has become definite, the institution of the Protecting Power having become the subject of numerous bilateral and multilateral international agreements, culminating in the 1949 Geneva Conventions to which most of the nations of the world are parties.[23] It now becomes appropriate to analyze the form and the character which the Protecting Power received during this evolutionary process.[24]

II. The Modern Concept of the Protecting Power

A. Designation

As will have been noted, Article 86 of the 1929 Convention was, to say the least, somewhat vaguely worded:

> The High Contracting Parties *recognize* that the regular application of the present Convention will find a guaranty in the *possibility* of collaboration of the protecting Powers charged with safeguarding the interests of belligerents . . . (Italics added.)

There is nothing mandatory here. There is no requirement here that a Protecting Power actually be designated or that, if designated, it be permitted to function as such by the Detaining Power. The comparable provision of the 1949 Convention reads quite differently. Article 8 of this latter convention provides:

> The present Convention *shall be applied with the cooperation and under the scrutiny* of the Protecting Powers *whose duty* it is to safeguard the interests of the Parties to the conflict. . . . (Italics added.)

It would appear that the designation of Protecting Powers has now become at least a moral obligation of the belligerent; and that, once designated, a Protecting Power has a duty not only to the Power of Origin,[25] but also to the other parties to the conflict, to perform the functions which have been assigned to it by the 1949 Convention.[26]

What are the qualifications required of a state before it may be designated as a Protecting Power? It must, first of all, be a state within the meaning of that term in international law. It must also, of course, be a *neutral* state—and it is advisable that it be one which can reasonably be expected to remain neutral, although this latter qualification has become more and more difficult to assure. And, finally, it must be a state which maintains diplomatic relations with both the requesting state (the Power of Origin) and the state in which it is being requested to operate (the Detaining Power).

How does a state actually become a Protecting Power? The belligerent state desiring the services of a Protecting Power requests a neutral state which has the qualifications listed above to act on its behalf. If the latter is willing to assume the functions of a Protecting Power, it so notifies the requesting state. It must then obtain from the Detaining Power permission to function as the Protecting Power for the requesting state vis-à-vis and within the territory of the Detaining Power.[27] In other words, the actual designation of the Protecting Power is based upon the request of the Power of Origin and the consent of both the proposed Protecting Power and the Detaining Power.[28]

As we have seen, it has frequently occurred in the past that more than one state has been designated as the Protecting Power for a belligerent, and there is nothing in the 1949 Convention, nor in general international law, to preclude this practice. However, the advantages of the other extreme—one and the same Protecting Power for both belligerents—are many. Even a small nation, when acting as the Protecting Power for both sides, is in a unique position to obtain a general observance of the law of war by each belligerent on the basis of

reciprocity. This was made quite apparent during World War II, when Switzerland acted as the Protecting Power for many of the belligerents on both sides of the conflict. Some of the advantages of this situation are summed up as follows:

> For uniformity and simplicity of administration it is obviously desirable for the protected power to entrust its interests in another country to only one protecting power, and in instances involving the protection of belligerent interests there are advantages to all concerned if both belligerents entrust their interests in the other's territory to the same protecting power. . . . The experience of World War II indicates that a more uniform administration and a higher standard of treatment of enemy interests by both belligerents result from a reciprocal protection of the interests of those belligerents by the same protecting power throughout the territories under the control of each belligerent.[29]

The limited number of states which would be available and competent to act as Protecting Powers in any future world conflagration would, in all probability, almost automatically bring about this result, just as it did during World War II.

The delegates at the Diplomatic Conference which drafted the 1949 Convention foresaw the possibility of numerous situations in which there would be no Protecting Power.[30] They attempted to solve this problem by providing in Article 10 of the convention for the designation of "substitutes" for Protecting Powers.[31] It must, however, be emphasized that the provisions of this article should not be considered as affecting the basic method of selecting either Protecting Power or successor Protecting Powers as long as the Power of Origin continues to exist. A successor Protecting Power, necessitated, perhaps, because the original Protecting Power has become a belligerent, is not a "substitute" for a Protecting Power within the meaning of Article 10, and its designation is governed by the same rules of international law as those which govern the designation of the original Protecting Power.[32] It must also be emphasized that a state or organization designated under the provisions of Article 10 is not a Protecting Power as that term is used generally in international law and as it is used specifically elsewhere in the 1949 Convention, but is merely a state or organization performing some or many of the functions allocated to Protecting Powers by the convention.

B. Personnel

Article 8 of the 1949 Convention provides that

> . . . the Protecting Powers may appoint, apart from their diplomatic and consular staff, delegates from amongst their own nationals or the nationals of other neutral

> Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

It is obvious that the convention has accorded to the Protecting Power two sources of personnel for the execution of its functions: its diplomatic and consular officers stationed within the territory of the Detaining Power;[33] and others of its nationals and other neutral nationals specifically appointed for the purpose. We shall discuss each of these sources in turn.

The normal and natural source of personnel for the execution of the functions of the Protecting Power is, of course, the diplomatic and consular personnel already assigned to and stationed in the territory of the Detaining Power. These officials, working under the ambassador, are experienced, they are known to the local officials, and, perhaps most important, they are already present within the area of operations. It is, of course, true that they already have their usual functions to perform; but many of these functions disappear or are seriously curtailed upon the advent of war (commercial, immigration, tourists, etc.). While any large-scale war of lengthy duration will undoubtedly make it necessary for the Protecting Power to supplement its regular diplomatic and consular staff within the territory of the Detaining Power, there will be numerous instances in which the Protecting Power will be able to perform its functions with only its normal complement of officials, at least for some considerable period of time and until the number of prisoners of war held by the Detaining Power makes a build-up of personnel essential. Of course, the term "diplomatic and consular staff" includes not only those officials of the Protecting Power who were already stationed within the territory of the Detaining Power at the time of the designation of the Protecting Power, but also any of its other diplomatic and consular personnel who may be sent to replace or supplement them.

With the heavy commitments which Switzerland had during World War II, it would obviously have been impossible for it to have made even a pretense of performing its far-flung responsibilities as a Protecting Power without a considerable increase in its staffs in the territories of the many Detaining Powers where it had consented to function. To accomplish this purpose the Swiss Government recruited in Switzerland and sent to its various affected embassies and legations "camp inspectors," who had the function of periodically visiting prisoner-of-war camps and work areas to assure that there was compliance by the Detaining Power with the provisions of the 1929 Convention.[34] This is typical of the second source of personnel the use of which is authorized by Article 8 of the 1949 Convention—the non-career national who is selected by the government of the Protecting Power solely for the purpose of assisting it in performing its functions. He may also be the national of another neutral, but

normally the Protecting Power would resort to this type of selection only when it has exhausted its own manpower potential. Of course, a major source of non-career personnel is to be found among the nationals of the Protecting Power and of other neutral Powers who are residing within the territory of the Detaining Power when the use of additional personnel becomes necessary. The Protecting Power may sometimes find it more convenient, when it has exhausted the list of its own nationals residing in the territory of the Detaining Power, to use neutral nationals falling within this category before resorting to the policy of recruiting its own nationals in its own territory and sending them to the territory of the Detaining Power.

It will have been noted that these non-career, or auxiliary, personnel are subject to the approval of the Detaining Power. This has occasioned considerable discussion, both at and since the Diplomatic Conference. No objection can be perceived to this procedure. The diplomatic and consular personnel of the Protecting Power stationed within the territory of the Detaining Power must have the normal approval of the state to which they are accredited *(agrément, exequatur),* required for all such personnel, and any one of them may, at any time, be declared *persona non grata by* that state, the Detaining Power. The writer finds himself in complete accord with the statement that

> . . . it appeared to be incompatible with international usage that the occasional, auxiliary and temporary staff recruited by the Protecting Power should enjoy a more favorable status than the usual diplomatic or consular staff.[35]

The fear has been expressed that a Detaining Power might arbitrarily refuse to approve any of the auxiliary personnel nominated by the Protecting Power and thereby make it impossible for the latter properly to perform its functions. But a Detaining Power so minded could also, and with equal ease, arbitrarily decline to grant the necessary *agrément* or *exequatur* to replacement or supplementary diplomatic or consular personnel of the Protecting Power. Either of these acts would constitute a violation of the spirit, if not the letter, of the convention. Until the contrary is affirmatively established, it must be assumed that states parties to the convention will carry out their obligations in good faith.

The restriction which we have just been discussing is logical from another standpoint. The individuals concerned will, in the performance of their functions, be required to do considerable traveling within a country at war. Any country at war must institute controls on the right to enter into and to travel within its territory. To tell it that it must accept anyone selected by the Protecting Power, even though it has good reason not to trust the particular individual, is to close one's eyes to the facts of life. And for this same reason, the Detaining Power must retain the right to declare members of the staff of the Protecting

Power *persona non grata,* whether the individual concerned has diplomatic, consular, or auxiliary status.

It has been stated that the representatives of the Protecting Power engaged in performing its functions in the territory of the Detaining Power have a triple responsibility: to their own government; to the government of the Power of Origin; and to the government of the Detaining Power.[36] If this is another way of saying that these individuals must be completely neutral and unbiased, it is correct. It would, however, be less controversial to state, as did William Jennings Bryan, that they are "representatives of a neutral power whose attitude toward the parties to the conflict is one of impartial amity."[37]

C. Functions

Unfortunately, with only a very few exceptions, the drafters of the 1949 Convention apparently found it necessary to avoid any attempt to specify in detail the functions of the Protecting Power. Most frequently these functions are expressed either in the form of duties of the Detaining Power or rights of the prisoners of war. Where a precedent had previously been established, it is set forth in appropriate detail. Where no precedent had previously been established, the problem is normally left to *ad hoc* decision. It was probably anticipated that such problems would be solved by the Protecting Power through the exercise by it of the basic power guaranteed to it, that of surveillance to insure that there is, at all times, full compliance with the provisions of the convention. Should the Protecting Power ascertain that there is a default in the performance of some particular provision, it is apparently assumed that it will find a means of procuring a correction of the situation, even though such means is not specified.[38]

Nevertheless, the convention does contain repeated references to the Protecting Power and a function may usually be implied in a particular instance merely from such a reference. It is difficult, indeed, to categorize these varied references to the Protecting Power. Extremely broad categories are required, and even then not every function will fall within them. Several not wholly successful efforts have been made to list these references on a functional basis.[39] For the purposes of this discussion they will be considered under three general categories: powers and duties; liaison functions; and miscellaneous functions (the functions listed in each category do not purport to be all-inclusive).

(1) *Powers and Duties*:

The basic and overriding power granted to the Protecting Power by the 1949 Convention is, of course, that contained in Article 8, the very first sentence of which states that the convention

> . . . shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict.

This provision has been termed, and rightly so, "the keystone of the conventions."[40]

Strangely enough, the only extended debate on this extremely crucial article which took place at the Diplomatic Conference concerned the selection of the proper word to characterize the activities of the Protecting Power, and that debate occurred primarily as a result of difficulties of translation. The delegates at the Diplomatic Conference were agreed that the Protecting Power could not give orders or directives to the Detaining Power. The idea which it was desired to convey was that the authority of the Protecting Power would entitle it to verify whether the convention was being properly applied and, if necessary, to suggest measures on behalf of prisoners of war.[41] In the draft text the words "under the supervision of the Protecting Power" were used in the English version and the words *"sous le contrôle des Puissances protectrices"* in the French. This was acceptable to the French-speaking delegates but was opposed by those who were English-speaking. It eventually became apparent that the two groups were actually in agreement and that the seeming dispute had arisen because the word *"contrôle"* in French is much weaker than either "control" or "supervision" in English. The English-speaking delegations were given a choice of a number of words to be used as a counterpart for the French word *"contrôle"* and unanimous agreement was ultimately reached on the word "scrutiny."[42]

The importance of Article 8 may, perhaps, be found to lie in the very generality of its phrasing. The fact that the entire convention is to be "applied with the cooperation" of the Protecting Power undoubtedly empowers the latter to make suggestions to the Detaining Power with a view to the improvement of the lot of the prisoner of war even with respect to areas in which no specific reference is made to the Protecting Power. Thus, a Protecting Power might suggest to, and seek to obtain the agreement of, the Detaining Power that certain specified types of offenses committed by prisoners of war be punished by disciplinary rather than judicial measures, even though Article 83 contains no reference to the Protecting Power. Similarly, the fact that the convention is to be applied "under the scrutiny" of the Protecting Power undoubtedly empowers it to investigate and to request reports from the Detaining Power in unspecified areas. Thus, a Protecting Power might seek from the Detaining Power a complete report as to the reasons for delays in the delivery or dispatching of mail or for the prohibition of correspondence, even though Article 76, dealing with these subjects, contains no mention of the Protecting Power; again, it might seek a report from the Detaining Power as to the action taken with respect to a complaint made by a prisoner of war, through the Protecting Power, regarding

the conditions of his captivity, even though Article 78, which authorizes such complaints, does not specifically provide for such a report.

Perhaps on only a slightly lower level of importance than Article 8 is Article 126 which empowers the representatives of the Protecting Power to visit all places where prisoners of war may be, themselves selecting the places they will visit and determining the frequency of the visits; to have access to all premises where prisoners are confined; to go to the place of departure, passage, and arrival of prisoners who are being transferred; and to interview prisoners and prisoners' representatives without witnesses.[43] The significant nature of these provisions is so patent as to make any discussion superfluous.

Other powers and duties of the Protecting Power are, indeed, varied. For example, it is directed to lend its good offices to assist in settling disputes with respect to the application and interpretation of the convention (Article 11); it is authorized to inspect the financial records of individual prisoners of war (Article 65); it may, in the interests of the prisoners, permit the Detaining Power to reduce below the specified minimum the number of communications which may be sent out each month by each prisoner (Article 71); it may, in the interests of the prisoners, propose a limit on the number of packages which a prisoner may receive (Article 72); it may itself take over the transport of capture cards, mail, packages, and legal documents, should military operations prevent the Detaining Power from fulfilling its obligations in this respect (Article 75); it has an unrestricted right to receive complaints from individual prisoners and from prisoners' representatives (Article 78); it has the right to inspect the record of disciplinary punishments (Article 96); and it has the duty to find counsel for a prisoner against whom judicial proceedings have been instituted, and the right to attend the trial (Article 105).

(2) *Liaison Functions*:

In its liaison capacity the Protecting Power is actually little more than a conduit. It serves merely as the means of relaying necessary communications between the Detaining Power and the Power of Origin. Protecting Powers are, not infrequently, the sole means readily available for the transmittal of messages between the two belligerents. And, of course, while a great many liaison functions are specifically set forth in the 1949 Convention, this is one area in which the Protecting Power may safely operate, even where the particular liaison mission which it undertakes is not among those enumerated in the convention.

The Detaining Power is required to give to the Protecting Power for relay to the Power of Origin the geographical location of all prisoner-of-war camps so that the prisoners will not, as has happened, accidentally become the target of their own compatriots (Article 23). The reasons for any limitations placed by

the Detaining Power on the amount of funds made available to a prisoner of war from advances of pay must be conveyed to the Protecting Power, presumably for transmittal to the Power of Origin (Article 60). The Detaining Power must advise the Protecting Power, for relay to the Power of Origin, of the rate of daily working pay which it has fixed (Article 62). Transmittals of payments by prisoners of war to their own country are made by notification from the Detaining Power to the Power of Origin through the medium of the Protecting Power (Article 63). Notifications with respect to the status of the accounts of prisoners of war (Article 65) and of prisoners whose captivity has, for some reason, such as escape, death, or other means, terminated (Article 66), are also sent by the Detaining Power to the Power of Origin through the medium of the Protecting Power. Claims of prisoners for injury or disease arising out of assigned work are similarly transmitted (Article 68). Information with respect to the measures taken by the Detaining Power to enable prisoners to communicate with the exterior must be transmitted to the Power of Origin through the Protecting Power (Article 69). And the Protecting Power must be informed, presumably for the information of the Power of Origin, as well as for its own, of all offenses punishable by death under the laws of the Detaining Power (Article 100).

In several instances the convention provides for the exchange of information between the belligerents without specifying how this is to be accomplished. Unquestionably, these are areas in which, as noted above, the Protecting Power would feel qualified to intervene, even though it has no specific mandate. For example, Article 21 provides for an exchange of information between belligerents as to their respective laws and regulations on the subject of parole, and Article 43 provides for an exchange of information with respect to military titles and ranks, but neither of these articles states how the exchange is to be made. The Protecting Powers are available and competent to perform this liaison function; and it may be assumed that either the Detaining Powers would request their services for this purpose or the Protecting Powers would, themselves, offer their services for the transmittal of the required information.

(3) *Miscellaneous Functions*:

There are a number of references to the Protecting Power in the 1949 Convention which cannot rightly be designated as powers or duties but which are likewise not precisely liaison functions. For lack of a more descriptive term, and because, for the most part, they bear little or no relationship to each other, they are here considered as miscellaneous functions.

Thus, Article 12 provides that if a Detaining Power, to whom prisoners of war have been transferred by the original Detaining Power, fails to carry out the

provisions of the convention, the original Detaining Power will, upon being notified to that effect by the Protecting Power, either take measures to correct the situation or request the return of the prisoners concerned. And Article 58 indicates, without specifically so providing, that some time after the outbreak of hostilities the Detaining Power and the Protecting Power will enter into an arrangement relating to the possession of money by prisoners of war.

Again, Article 79 requires the Detaining Power to inform the Protecting Power of its reasons therefor whenever it refuses to approve a duly elected prisoners' representative; and Article 81 requires the Detaining Power to inform the Protecting Power of its reasons for dismissing a prisoners' representative. In neither of these articles is there any indication of the action it is contemplated that the Protecting Power will take when the required information is given to it. While the information might, in the exercise of the Protecting Power's liaison function and as a matter of routine, be passed to the Power of Origin, this action alone would have little significance. Under its right to scrutinize the application of the convention, the Protecting Power would probably, in an appropriate case, take issue with the Detaining Power's action with respect to the non-approval or the dismissal of a prisoners' representative.

Further, Article 121 provides that the Detaining Power shall investigate and make a full report to the Protecting Power of every death or serious injury of a prisoner of war caused or suspected to have been caused by a sentry, another prisoner of war, or any other person, or where the cause of death is unknown; and that if guilt is indicated, the Detaining Power will prosecute the responsible persons. Certainly it is to be expected that the Protecting Power will forward the report of the incident to the Power of Origin; but it is equally certain that the Protecting Power would, on its own initiative, make *démarches* to the Detaining Power, if it felt that the investigation had been inadequate or that a prosecution indicated by the investigation had not taken place.[44]

It is believed that the foregoing short presentation of only a few types of provisions adequately establishes that the Protecting Power has certain functions which cannot exactly be fitted into either the category of powers or duties or the category of liaison functions, and that these miscellaneous functions can probably become whatever the particular Protecting Power desires them to be.

(4) *Limitations*:

Each of the four conventions drafted at the 1949 Diplomatic Conference contains an article similar to Article 8 of the Prisoner of War Convention.[45] However, in the Third and Fourth Conventions (Prisoner of War and Civilian Conventions, respectively) the Protecting Powers are merely admonished to "take account of the imperative necessities of security of the State wherein they

carry out their duties," while in the First and Second (Wounded and Sick of Armed Forces in the Field—the "Red Cross Convention"—and Wounded, Sick and Shipwrecked at Sea, respectively), not only are they so admonished, but they are told in an oblique fashion that their activities *may be* restricted "as an exceptional and temporary measure when this is rendered necessary by imperative military necessities."[46] The importance of the distinction drawn between the two pairs of conventions was fully appreciated at the time of the drafting of the conventions and was the occasion for some spirited debate. While on its face the solution reached by the convention is plainly a victory for those who sought to exclude the possibility of any shackles being placed on the Protecting Power in the performance of its functions with respect to prisoners of war, it remains to be seen whether this result was actually attained.[47]

Assuming that the Detaining Power desires to impose the "exceptional and temporary" restrictions on visits of the Protecting Power which are authorized in Article 126 of the 1949 Convention, or the right to the even more extensive restrictions on the activities of the Protecting Power which is asserted by some states to exist, whether or not specified in the convention, how and by whom is the decision to be made as to whether "imperative military necessities" do, in fact, exist? There is one school of thought which takes the position that it would be illogical to permit the determination to be made by the Detaining Power itself, as it would be judging its own case, and which insists that only the Protecting Power can validly make such a determination.[48] While, from a strictly humanitarian point of view, there is much to be said in favor of this position, it cannot, as a practical matter, be justified. If, for example, the Detaining Power deems it essential to keep representatives of the Protecting Power temporarily out of an area, lest military movements noted therein inadvertently lead to the disclosure of important impending military actions, there would be little logic in compelling it to advise the Protecting Power what and why it was so doing in order to permit the latter to determine whether imperative military necessities actually existed and whether the restriction was really justified. This is unquestionably a matter which will, in the course of events and through reciprocal actions of the belligerents, adjust itself inasmuch as time and experience will very quickly result in an informal mutual appreciation as to where the line is to be drawn.[49]

D. Relationship to the ICRC

The multifold operations of the ICRC are obviously not within the scope of this article. However, inasmuch as the functions of the Protecting Power and those of the ICRC often overlap insofar as prisoners of war are concerned, it appears appropriate to mention, at least briefly, some of the overlapping areas.[50]

The basic safeguard to the activities of the ICRC is contained in Article 9 of the 1949 Convention, which specifies:

> The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of prisoners of war and for their relief.

Despite a substantially similar provision in Article 88 of the 1929 Convention, the ICRC found, during World War II, that it was, at times, necessary to overcome the feeling of some belligerents that it was attempting to duplicate the functions of the Protecting Powers. Apparently it succeeded in convincing them that such was not the case.[51]

It has already been pointed out that Article 10 of the 1949 Convention contains provisions for the designation of "substitutes" for Protecting Powers under certain circumstances. The third paragraph of Article 10 provides that, failing such a "substitute," the Detaining Power shall request or accept

> . . . the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.

It must be emphasized that when the ICRC is thus called upon to serve, it does so as a humanitarian organization and *not* as a Protecting Power which, by definition, it cannot be, inasmuch as it is not a state.[52]

In a number of areas the convention places the ICRC on the same plane as the Protecting Power. As we have seen, Article 126 is of major importance in its grant of authority to the Protecting Power to go wherever prisoners of war are located.[53] That article also specifies that "The delegates of the International Committee of the Red Cross shall enjoy the same prerogatives." A similar parallel is to be found in Article 56 dealing with the locations of, and visits to, labor detachments. And it is not surprising that we find the ICRC referred to along with the Protecting Power in Articles 72 and 75, for these two articles are among those relating to individual and collective relief shipments, a subject of particular interest to the ICRC and one with respect to which it has developed an unchallengeable *expertise* as a result of experience gained in innumerable conflicts. Most Protecting Powers would probably be more than willing to permit the ICRC to pre-empt the handling of this difficult and complicated function.

Articles 79 and 81 authorize the prisoners' representatives to communicate with the ICRC as well as the Protecting Power. Here, however, it is believed

that the purpose of each such authorization to communicate is fundamentally different. The creation of the position of prisoners' representative was first suggested during the Franco-Prussian War (1870–1871) and became a reality during World War I.[54] The function for which it was originally created was to receive and distribute relief packages. However, over the course of time, the functions of the prisoners' representatives have been greatly expanded, and during World War II it was not unusual to find them involved in practically all of the problems of a prisoner-of-war camp. Thus, they were frequently used by the prisoners as the channel for the transmittal of complaints both to the Detaining Power and to the Protecting Power. The drafters of the 1949 Convention were fully aware of this development,[55] and it appears that the steps which they took were intended to insure that the privileges accorded to the prisoners' representative would permit him to communicate with the delegates of the ICRC on problems relating to relief shipments and with the Protecting Power on this subject as well as on the myriad of other problems into which the prisoners' representative is now projected.

It is probably safe to state that, while the allocation of functions by the 1949 Convention between the Protecting Power and the ICRC is not always as clearly stated as it might have been, the fundamental differences between the two and between their methods of operation are such that conflicts between them would be extremely rare.[56]

III. Conclusion

The past century has seen tremendous advances made in the concept of the Protecting Power as an instrument of international law, both in the role which it is called upon to play and in the prestige which it enjoys and which goes far in assisting it to perform the numerous functions which have now been assigned to it. It appears unquestionable that:

> The presence of the Protecting Powers today remains the sole means of putting a brake on the excesses of Detaining Powers, the sole element of moderation and of morality in the treatment of enemy persons, their belongings, and their interests: this was noted and affirmed many times at Geneva.[57]

The results of the 1949 Diplomatic Conference reveal clearly that the nations of the world were generally prepared to accept a solid basis for the activities of the Protecting Power. It was conceded a mission of close observation of the application of the provisions of the Prisoner of War Convention drafted at that Conference, a mission which necessarily incorporates within it a right to call to the attention of the Detaining Power any failure of performance which it finds and to report any such failure of performance to the Power of Origin; a sizeable

expansion was made in its functions and, correlatively, in its power and authority; provision was made for substitutes for Protecting Powers in order to insure that prisoners of war would at all times benefit from the exercise of the functions of the Protecting Power, thus correcting the situation which had arisen all too frequently during World War II; and the use of the institution of the Protecting Power was extended not only to the Red Cross Convention (Wounded and Sick of Armed Forces in the Field), but also to the convention which adapts the Red Cross Convention to maritime warfare (Wounded, Sick and Shipwrecked at Sea), and to the completely new Civilian Convention.[58] These few examples alone demonstrate the great distance which has been traversed since 1907, when the prisoner-of-war provisions of the Regulations Respecting the Laws and Customs of War on Land were drafted at The Hague and contained no reference whatsoever to the Protecting Power.

In many respects the provisions of the 1949 Geneva Conventions relating to the Protecting Power represent compromises. Positions reached solely in order to bring about agreement between opposing viewpoints can rarely be considered perfect and the present case is no exception. However, these provisions unquestionably represent a great step forward in the evolution of international law and would undoubtedly be viewed with amazement by those who drafted the first Red Cross Convention in 1864 or even by those who acted on behalf of the Protecting Powers as recently as in 1914, at the beginning of World War I.[59]

The Protecting Power is now a generally accepted institution of international law. It is the subject of international agreements to which most of the states of the world are parties. There are clear indications that it has been weighed in the balance and not been found wanting, with the result that it has been, and in the future will continue to be, requested to assume numerous new functions on behalf of states at war.

Notes

1. A fairly complete contemporary bibliography of published items would consist of the following: [Franklin, Protection of Foreign Interests (1946); Janner, La Puissance Protectrice en Droit International (1948; originally published in German); Siordet, The Geneva Conventions of 1949: The Question of Scrutiny (1953; originally published in French); and De la Pradelle, "Le Contrôle de l'Application des Conventions Humanitaires en cas de Conflit armé," in 2 Annuaire Français de Droit International 343 (1956). The subject is, of course, dealt with, but in a more limited fashion, in the various general treatises and articles on the 1949 Geneva Conventions such as De la Pradelle, La Conférence Diplomatique et les Nouvelles Conventions de Genève du 12 août 1949 (1951); Yingling and Ginnane, "The Geneva Conventions of 1949," in 46 A.J.I.L. 393 (1952); (Kunz, "The Geneva Conventions of August 12, 1949," in Law and Polities in the World Community 279 (Lipsky, 1953); and Pictet, Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War (hereinafter referred to as Commentary) (1960). Modern texts on international law do little more than paraphrase the provisions of the Geneva Conventions. See, for example, 2 Oppenheim (Lauterpacht), International Law 374–376 and 386 (7th ed., 1952), and Stone, Legal Controls of International Conflict 655, 658, 661, and 666 (1954). Many slightly older texts do not even include the term "Protecting Power" in their indices. See, for example, 2 Oppenheim (McNair), International Law (4th ed., 1926), and

Wheaton (Phillipson), International Law (5th ed., 1916). It is to be hoped that this paucity of material does not indicate a continuation of the neglect of the law of war condemned by Kunz a decade ago. Kunz, "The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision," in 45 A.J.I.L. 37 (1951).

2. A state is frequently called upon to represent certain specified interests of another state in the territory of a third, even though normal, peaceful relations exist between the two latter. Thus, in 1955 the United States was, in varying degrees, representing some 25 states in some 80 other states (United States Foreign Service Manual, Vol. 2, Consular Affairs, pars. 923.31-923.32, July 13, 1955). This peacetime practice unquestionably played an important part in the historical development of the present-day wartime concept of the Protecting Power. The Protecting Power, which is the subject of this article, must not be confused with the protecting state exercising powers over a protectorate.

3. Isolated instances of this practice had occurred earlier. Thus, for example, we find that in the thirteenth century the Venetian Resident in Constantinople was charged with the protection of Armenians and Jews. The appearance of the Protecting Power has been attributed to a combination of three older institutions of international law: extra-territoriality; the employment of foreigners as diplomatic and consular agents; and the use of personal good offices. Franklin, *op. cit.* 7. It is doubtful that the concept of the Protecting Power as it first appeared in the Turkish Capitulations had any more direct progenitor.

4. Franklin, *op. cit.* 29 and 39; Eroglu, La Représentation Internationale en vue de Protéger les Intérêts des Belligérants 10-12 (unpublished thesis (1949) graciously furnished to the writer by the Dean of the Faculty of Law of the Université de Neuchâtel); detailed information concerning the designation of Protecting Powers in most of the conflicts mentioned herein may be found in this excellent study at pp. 10-29.

5. Franklin, *op. cit.* 29.

6. Flory, Prisoners of War 107-108 (1942).

7. Franklin, *op. cit.* 68.

8. Eroglu, *op. cit. 23-24;* Franklin, *op. cit.* 78-79. The latter states that on one occasion when an American Vice Consul was inspecting a prisoner-of-war camp he was permitted to sample the meal which was then being given to the Japanese prisoners of war. In view of all these precedents, it is particularly difficult to comprehend why the 1899 and the 1907 Hague Conferences, both of which were sponsored by the Tsar of Russia, while codifying many customary rules concerning the treatment of prisoners of war, continued the silence of previous international conventions with respect to the institution of the Protecting Power.

9. Siordet, *op. cit.* 7. World War I saw more men taken prisoner than in any previous conflict; and it likewise saw them held in captivity for a longer period of time. Both of these factors had the effect of focusing attention on prisoners of war. It was undoubtedly this situation which led to the more general public acceptance of the idea of a wider use of the Protecting Power in the interests of prisoners of war. Pictet, Commentary 93-94.

10. Strangely enough, Germany, which had frequently acted as a Protecting Power, and the United States, which had not only frequently acted as a Protecting Power, but was probably the protagonist of the extension of the functions of the Protecting Power with respect to prisoners of war during the period prior to its own entry into World War I, were the two most important belligerents to resist the activities of Protecting Powers. At the beginning of the war Germany instituted rigid restrictions on visits by neutrals to its prisoner-of-war camps. By 1916 these restrictions had, due largely to the efforts of the United States, for the most part disappeared. Yet when the United States became a belligerent in 1917, the then Secretary of War took the position that Germany had no right to designate the Swiss to inspect American prisoner-of-war camps unless under treaty law. His position was apparently overruled by President Wilson and members of the Swiss Foreign Service were permitted to make such inspections. Flory, *op cit.* 108-109.

11. Eroglu, *op. cit.* 27-28.

12. For example, Art. VIII of the Final Act of the Conference of Copenhagen of Nov. 2, 1917 (photostatic copy on file in The Army Library, Washington, D.C.), to which Austria-Hungary, Germany, Rumania, and Russia were the belligerent parties, dealt with "Arrangements concerning the Admission of the Delegates of the Protecting Power . . . on the Basis of Reciprocity"; Art. XI of the Agreement between the British and Turkish Governments respecting Prisoners of War and Civilians, executed at Bern on Dec. 28, 1917 (111 Brit. and For. State Papers 557-568), dealt with the subject of visits to prisoner-of-war camps by "representatives of the Protecting Powers"; and the Agreement between the United States of America and Germany Concerning Prisoners of War, Sanitary Personnel, and Civilians, executed at Bern on Nov. 11, 1918 (13 A.J.I.L. Supp. 1 (1919); Foreign Relations of the United States, 1918, Supp. 2, p. 103), contains references to the Protecting Power in no less than 25 separate paragraphs.

13. Rasmussen, Code des Prisonniers de Guerre 56 (1931).

14. Siordet, op. *cit.* 12. Twenty years and one World War later, we again find them urging that the Protecting Power be given the benefit of "well-defined and precise provisions." Final Record of the Diplomatic Conference of Geneva of 1949 (hereinafter referred to as Final Record), Vol. II B, p. 19.

15. The 1929 Geneva Convention Relative to the Treatment of Prisoners of War (hereinafter referred to as the 1929 Convention), 47 Stat. 2021; Treaty Series, No. 846: 27 A.J.I.L. Supp. 59 (1933). It is interesting to note that the companion convention drafted at the same Diplomatic Conference, The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field (better known as the 1929 Geneva Red Cross Convention), 47 Stat. 2074; Treaty Series, No. 847; 27 A.J.I.L. Supp. 43 (1933), a direct descendant of the 1864 and 1906 Geneva Red Cross Conventions, continued to contain no reference to Protecting Powers, a situation which was only remedied 20 years later, after World War II.

16. Art. 86 of the 1929 Convention reads as follows:

"The High Contracting Parties recognize that the regular application of the present Convention will find a guaranty in the possibility of collaboration of the protecting Powers charged with safeguarding the interests of belligerents; in this respect, the protecting Powers may, besides their diplomatic personnel, appoint delegates from among their own nationals or from among the nationals of other neutral Powers. These delegates must be subject to the approval of the belligerent near which they exercise their mission.

"Representatives of the protecting Power or its accepted delegates shall be permitted to go any place, without exception, where prisoners of war are interned. They shall have access to all places occupied by prisoners and may interview them, as a general rule without witnesses, personally or through interpreters.

"Belligerents shall so far as possible facilitate the task of representatives or accepted delegates of the protecting Power. The military authorities shall be informed of their visit.

"Belligerents may come to an agreement to allow persons of the same nationality as the prisoners to be permitted to take part in inspection trips."

In addition, the Protecting Powers were specifically given such functions as: receiving complaints from prisoners of war (Art. 42); conferring with the representatives ("agents") of prisoners of war (Arts. 43 and 44); and assuring that prisoners of war who were subjected to judicial prosecutions were adequately protected (Arts. 60, 62, 65, and 66). Evidence that the drafters of the convention were attempting merely to formalize and perpetuate an existing status, and not to create a new one, is found in the use in relation to the exercise of its functions by the Protecting Power of such terms as "mediation" (Art. 31) and "good offices" (Art. 87).

17. Ch. 2 of the Annex to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, 36 Stat. 2277; Treaty Series, No. 539; 2 A.J.I.L. Supp. 90 (1909).

18. The U.S.S.R. took the position that, as it was a party to the Fourth Hague Convention of 1907, the Annex to which, it asserted, covered "all the main questions of the regime of captivity" (but not, as has previously been pointed out in note 8 above, the question of the designation or functions of the Protecting Powers), there was no need for it to consider an Italian proposal to apply reciprocally the provisions of the 1929 Convention (Report of the International Committee of the Red Cross on its Activities during the Second World War (hereinafter referred to as ICRC Report), Vol. I, p. 412). While Japan stated its intention to "apply this Convention *mutatis mutandis,* to all prisoners of war" *(ibid.* 443), the Protecting Powers were never permitted to function in a manner even remotely resembling their manner of functioning in the territories" of most of the other belligerents. As a result of the foregoing, and of the disappearance of many Powers of Origin during the course of hostilities, the ICRC estimates that during World War II approximately 70% of all prisoners of war were deprived of the services of a Protecting Power. De la Pradelle, *op. cit.* 226. Thus, Germany denied the status of states to Poland, Yugoslavia, France and Belgium (after the 1940 armistices), Free France, and Italy (after Mussolini's overthrow in 1943), and refused to permit the intervention of Protecting Powers on behalf of their captured personnel. Pictet, "La Croix-Rouge et les Conventions de Genève," in 76 Hague Academy Recueil des Cours 5, 87 (1950, I).

19. The 1949 Geneva Convention Relative to the Treatment of Prisoners of War (hereinafter referred to as the 1949 Convention), 6 U.S. Treaties 3316; 75 U.N. Treaty Series 135 (I: 972); 47 A.J.I.L. Supp. 119 (1953). There were signed, on the same day, three other conventions in which, for the first time in other than a prisoner-of-war convention, references were made to Protecting Powers: Art. 8 and others of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (the successor to the 1929 Red Cross Convention mentioned in note 15 above), 6 U.S. Treaties 3114; 75 U.N. Treaty Series 31 (I: 970); Art. 8 and others of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S. Treaties 3217; 75 U.N. Treaty Series 85 (I: 971); and Art. 9 and others of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U. S. Treaties 3516; 75 U.N. Treaty Series 287 (I: 973); 50 A.J.I.L Supp. 724 (1956). This latter convention will undoubtedly prove of major importance in extending the functions of the Protecting Power in any future international conflict.

20. References to the Protecting Power are contained in 36 of its 132 substantive articles (4, 8, 10, 11, 12, 23, 56, 58, 60, 62, 63, 65, 66, 68, 69, 71, 72, 73, 75, 77, 78, 79, 81, 96, 98, 100, 101, 104, 105, 107, 108, 120, 121, 122, 126, and 128) as well as in two of its Annexes The basic charter for the Protecting Power is contained in Art. 8, which reads:

"The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

"The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

"The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties."

21. Le Comité International de la Croix-Rouge et le Conflit de Corée: Recueil de Documents, Vol. I, p. 16 (1952).

22. The U.N. Command permitted the ICRC to perform its usual functions with respect to the Communist prisoners of war held by the UNC. Pictet, Commentary 546. As we shall see many of these functions parallel, or may be substituted for, those of a Protecting Power. Unfortunately, all efforts of the ICRC to act north of the battle line were repulsed by the Communists. Treatment of British Prisoners of War in Korea 33-34 (British Ministry of Defence, 1955).

23. Up to the end of 1959 there had been 77 ratifications of, and accessions to, these conventions. International Committee of the Red Cross, Annual Report, 1959, at p. 45 (1959). These include all of the more important Powers except Canada and the Republic of China. The use of the institution of the Protecting Power has since been resorted to in the Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague on May 14, 1954 (249 U.N. Treaty Series 215 (I: 3511)), where it is adopted as a means of overseeing the protection of inanimate objects—which is, actually, merely a variation of the protection furnished historically by the Protecting Power, a very large part of its energies having once been directed towards the protection of the embassy buildings and diplomatic archives of the Protected Power.

24. As was aptly stated by one author: "What happened was that an existing usage was taken, and transformed into a regulation. It was the organ which created the function." Siordet, *op. cit.* 3.

25. It must at all times be borne in mind that the Protecting Power is *not* a general agent of the Power of Origin. In his book, The Present Law of War and Neutrality (1954), Castrén defines the over-all relationship between these two Powers as follows (at p. 92):

"The protecting Power does not act in its own name but rather as a kind of caretaker or *intermediary*. Nevertheless, it acts *independently* in so far as the State whose interests it protects cannot demand, but only request, it to perform certain services, and the protecting Power itself decides the way in which it discharges its mission. Nor may a belligerent give instructions to those organs of the protecting Power which carry out this mission. Instead, requests to the protecting Power have to be made through *diplomatic channels*. The protecting Power may refuse to act when compliance with a request would be contrary to its own interests or infringe the lawful right of the enemy State."

26. Siordet states that the designation of a Protecting Power is no longer optional but is now "quasi obligatoire" ("De l'Application et du Contrôle des Conventions de Genève de 1949," in 1956 Revue Internationale de la Croix-Rouge 464, 468); that it is now put in the "imperative form" (The Geneva Conventions of 1949: The Question of Scrutiny 36); and that in performing its mission the Protecting Power is no longer the special representative of one of the parties, but is "the representative of all the Contracting Parties to the Convention" *(ibid.)*.

27. This is the step which the United States apparently failed to take when it was requested to perform the functions of the Protecting Power for Great Britain during the Boer War. See discussion above.

28. The 1949 Convention contains no provisions with respect to the qualifications of a Protecting Power, the method of designation, etc., leaving these problems for settlement under general international law. Heckenroth, Les Puissances Protectrices et les Conventions de Genève 62 and 224 (unpublished thesis, Université d'Aix-Marseille, 1951). This solution will work until one belligerent arbitrarily elects to deny its consent to every neutral nominated by its enemy. In the light of the adamant refusal of the U.S.S.R. to permit any type of inspection to take place on its territory during peacetime, it seems unlikely that such activity would be permitted in time of war, even though the U.S.S.R. participated actively in the drafting of the 1949 Geneva Conventions and has ratified them, as have all of its satellites, without any reservations as to Art. 8.

29. Franklin, *op. cit.* 164-165. A similar conclusion is reached in Pictet, Commentary 95-96, wherein this statement appears:

"It became more and more common for these neutral Powers to find themselves responsible for representing the respective interests of two opposing Parties at one and the same time. This gave them additional authority, and incidentally altered their role; for once a Power represented the interests of two opposing belligerents, it became not so much the special representative of each of them, as the common agent of both,

or a kind of umpire. This enabled it to bring directly into play that powerful instrument, the argument of reciprocity, to obtain the improvements desired."

In 1945 Switzerland alone represented 34 belligerents, and in many cases it represented opposing belligerents in the territory of each other. Eroglu, *op. cit.* 144-148.

30. For some of these possible situations see Siordet, *op. cit.* 49-53; and Heckenroth, *op. cit.* 229-236.

31. The French Delegation strongly urged that a provision be included in the 1949 Convention setting up an international body to perform the functions of Protecting Powers in the absence of the latter (Final Record, Vol. II B, p. 27; *ibid.*, Vol. III, pp. 30-31). The substance of this proposal was included in Resolution 2 adopted by the Diplomatic Conference (*ibid.*, Vol. I, p. 361), but, as far as the writer has been able to ascertain, no steps have been taken, or are contemplated, to implement the resolution. The U.S.S.R. opposed both the original French proposal and the adoption of the resolution, stating as to the latter that it "sees no need to consider this question or to create such a body, since the problem of the Protecting Powers has been satisfactorily solved by the Conventions established in the present Conference." Declaration made by the Delegation of the U.S.S.R. at the time of the signing of the conventions. *Ibid.*, Vol. I. n. 201.

32. Pictet, Commentary 117-118. All of the Communist countries (and Portugal) made reservations to Art. 10 to the effect that they would not recognize as legal "requests by the Detaining Power to a neutral State or to a humanitarian organization, to undertake the functions performed by a Protecting Power, unless the consent of the Government of the country of which the prisoners of war are nationals is obtained." While there is a not unnatural tendency to view with suspicion this position taken almost uniquely by the U.S.S.R. and its satellites (see, for example, Brockhaus, "Sowjetunion und Genfer Kriegsgefangenen-Konvention von 1949," 2 Ost-Europa Recht 286, 291 (1956)), it appears to have a valid basis. If there is an existing Power of Origin, not only is its consent to the designation of a Protecting Power to act on its behalf essential, but it has the right to make the selection itself in the first place! And the statements made at the Diplomatic Conference by Soviet representatives Morosov (Final Record, Vol. II B, pp. 29 and 351) and Sokirkin (*ibid.*, p. 347) make it clear that they merely desired to limit specifically the right of the Detaining Power to select a substitute for the Protecting Power to those cases where there is no existing Power of Origin—a limitation as to which there should have been no dispute. It is to be hoped that by overruling the Soviet thesis the Diplomatic Conference did not establish the proposition that a Detaining Power may, on its own, select and designate a substitute for a Protecting Power even though there is a Power of Origin in being.

33. Neither the 1929 Convention nor the working (Stockholm) draft used at the Diplomatic Conference includes the term "consular" in specifying the authorized representatives of the Protecting Power. The authorization for the Protecting Power to use this category of personnel as representatives was proposed by Australia and was unanimously approved. Final Record, Vol. II B, p. 58.

34. Janner, *op. cit.* 52.

35. Siordet, *op. cit.* 27. A provision of the working (Stockholm) draft used at the Diplomatic Conference would have required the Detaining Power to give "serious grounds" for any refusal to approve the nomination of a non-career individual by the Protecting Power. Final Record, Vol. I, p. 73. This proposal was equally lacking in logic, since a state need give no reasons for refusing to agree to the assignment to a post in its territory of a member of the diplomatic or consular service of the Protecting Power or for declaring such an individual *persona non grata*. The provision was deleted at Geneva. *Ibid., Vol.* II B, pp. 58 and 110.

36. De la Pradelle, "Le Contrôle de l 'application des Conventions Humanitaires en cas de Conflit armé," in 2 Annuaire Français de Droit International 343, 344 (1956).

37. Letter of Instructions of Secretary of State William Jennings Bryan, dated Aug. 17, 1914 (9 A.J.I.L. Supp. 118 (1915)). See also, Franklin, *Op. cit.* 114; United States Foreign Service Manual, Vol. 2, Consular Affairs, pars. 924.1 and 931.

38. "It is not the function of the Protecting Power to command or to overrule; it is its function to observe, to comment, to make representations, and to send reports to the outside world. If we are faced with an unscrupulous belligerent, the presence of the Protecting Power and the ability of the Protecting Power to examine what is going on and to observe is the only preventive measure which we have." Statement of Quentin-Baxter, representative of New Zealand, at the 1949 Diplomatic Conference, Final Record, Vol. II B, p. 344.

39. Thus, Heckenroth, *op. cit.* 135, and Janner, *op. cit.* 52, have each listed seven separate categories of functions of the Protecting Power, but the lists coincide with respect to only four functions! Still a third functional listing appears in Pictet, Commentary 98–99.

40. Yingling and Ginnane *loc. cit.* 397. In the British Army Manual of Military Law (Part III, The Law of War on Land, 1958) 92, the Protecting Power is termed "the principal organ, apart from the Contracting Parties themselves, for ensuring the observance of the Convention." Part III of the Manual was largely the work of the late Sir Hersch Lauterpacht.

41. Final Record, Vol. II B, p. 110.

42. *Ibid.;* Siordet, *op. cit.* 24–25.

43. The right of visitation granted by Art. 126 is reiterated in Arts. 56 (labor detachments), 98 (prisoners undergoing disciplinary punishment), and 108 (prisoners undergoing judicial punishment).

44. Pictet, Commentary 571.

45. See note 19 above.

46. A similar restriction is contained in Art. 126 of the 1949 Convention with respect to visits to places where prisoners of war may be. This is the only area in which the 1949 Convention specifically permits the activities of the Protecting Power to be restricted by the Detaining Power. While it is, of course, a very important one, it is not believed that a Detaining Power could really justify the imposition of such a restriction except in very rare cases, such as prohibiting visits to extremely forward collecting points during the actual course of an attack.

47. The proponents of the distinction between the two pairs of conventions argued that it was "obvious and reasonable that the activities of a Protecting Power in sea warfare and on the field of battle must be restricted, "but that as to the Prisoner of War and Civilian Conventions" "the vital force which animates those rules and gives them effect is the presence of the Protecting Power." Final Record, Vol. II B, p. 344. The pessimism which may be apparent in the text is occasioned by the fact that the U.S.S.R. took the position that, even without such a restrictive limitation in the convention, it would exist in fact. *Ibid.* 345.

48. Pictet, Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field 101 (1952). Even there it is admitted that "this is precisely what it [the Protecting Power] would, in such a case, be debarred from doing. It will only be possible to show after the event whether or not the restriction was justified." In Pictet, Commentary, published 8 years later, a much more realistic approach is taken (at p. 611):

"If they are to justify the prohibition of visits, military necessities must be imperative. Whether they are or not is a matter for the Detaining Power alone to decide and the right of supervision of the Protecting Powers is restricted by this exercise of sovereignty. Such a decision must not be lightly taken, however, and any prohibition of visits must be an exceptional measure."

49. In Pictet, Commentary, *loc. cit.,* the following remedial procedure is suggested:

"The Protecting Powers and the International Committee will have the right to bring the temporary nature of the prohibition to the notice of the Detaining Power and, after a certain length of time, to request it to raise all restrictions. Moreover, the Protecting Power will be able to check afterwards whether the prohibition of visits has been used by the Detaining Power to violate the Convention. In any case, it is not in the interests of the Detaining Power to misuse this reservation, because it would very soon be suspected of deliberately violating the Convention by evading supervision by qualified witnesses."

50. As stated in the ICRC Report, Vol. I, p. 39:

"Despite partial overlapping, the functions of the Protecting Power are fundamentally dissimilar in kind and extent [from those of the ICRC]. The Protecting Power is the mandatory of one or both belligerents, with competency to protect the rights and interests of the States from which it derives authority. The Committee is concerned exclusively with humanitarian tasks; its functions are not limited to those which are guaranteed by law, but embrace such enterprises in the interests of humanity as appear essential, or which are justified through a request made by a belligerent."

51. *Ibid.*

52. In Pictet, Commentary 119, the following statement appears:

"The Convention in this case [paragraph 3 of Article 10] no longer uses the words 'undertake the functions performed by a Protecting Power,' but speaks only of 'humanitarian functions.' The distinction is logical. There is no longer any question of a real substitute, and a humanitarian organization cannot be expected to fulfil *all* the functions incumbent on a Protecting Power by virtue of the Conventions." See also Final Record, Vol. II B, pp. 61 and 63.

53. See above.

54. ICRC Report, Vol. I, pp. 342–343. At that time a prisoners' representative was known as a "man of confidence." In the 1929 Convention they were called "agents."

55. See, for example, Art. 78, wherein specific provision is now contained permitting individual complaints to be transmitted to the Protecting Power either directly, as had been provided in Art. 42 of the 1929 Convention, or through the medium of the prisoners' representative. Although Art. 42 of the 1929 Convention, the predecessor of Art. 78 of the 1949 Convention, made no mention of the ICRC as an authorized recipient of complaints from prisoners of war, the ICRC took the position that "it is, according to the spirit of the [1929] Convention, undoubtedly meant to be placed, in this respect, on the same footing as the Protecting Powers." ICRC Report, Vol. I, p. 341. This conclusion is subject to dispute and, in view of the fact that Art. 78 of the 1949 Convention again omits all reference to the ICRC, it would, in interpreting that article, now be even more difficult to accept the ICRC position. Certainly, if such had been the intention

of the drafters, they could easily have attained their objective by merely including the ICRC in the article, along with the Protecting Power, as they did in a number of other articles. Their failure to do so in the light of the announced ICRC position strongly militates against the ICRC interpretation.

56. Castrén, *op. cit.* 95; Pictet, Le Droit International et l'Activité du Comité International de la Croix-Rouge en temps de Guerre 25 (1943). It is more probable that, as in World War II, it will be the Detaining Power which will object where activities of the ICRC appear to duplicate those being performed by the Protecting Power. That the ICRC does not consider the Protecting Power to be a rival, but rather another means of making the life of a prisoner of war a little less miserable, is apparent from the communication sent by its President early in the Korean conflict in which he said: "The International Committee views, in the activities of the 'Protecting Powers,' a forceful instrument for insuring full implementation of the Geneva Conventions and an always desirable corollary to the activities which the Committee itself undertakes." Le Comité International de la Croix-Rouge et le Conflit de Corée: Recueil de Documents, Vol. I, p. 32.

57. Heckenroth, *op. cit.* 229.

58. *Ibid.* 222.

59. In Pictet, Wounded and Sick Commentary 101-102, the following statement appears: "As it stands, Article 8 is not perfect, far from it. But we have to consider the huge advance which it represents in international humanitarian law. We have to realize that, to achieve this much, the diplomats assembled in Geneva had to cope with divergent opinions; they had to reconcile the claims of the sovereignty of their respective countries with the claims of humanity; and they had to harmonize two opposed conceptions of the role of the Protecting Power, viewed by some as their agent (of whom one demands the maximum), by others as the agent of the enemy (to whom one accords the minimum)."

III

The Employment of Prisoners of War

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From the days when the Romans first came to appreciate the economic value of prisoners of war as a source of labor, and began to use them as slaves instead of killing them on the field of battle,[1] until the drafting and adoption by a comparatively large number of members of the then family of sovereign states of the Second Hague Convention of 1899,[2] no attempt to regulate internationally the use made of prisoner-of-war labor by the Detaining Power[3] had been successful.[4] The Regulations attached to that Convention dealt with the subject in a single article,[5] as did those attached to the Fourth Hague Convention of 1907[6] which, with relatively minor changes, merely repeated the provisions of its illustrious predecessor. A somewhat more extensive elaboration of the subject was included in the 1929 Geneva Convention relative to the Treatment of Prisoners of War[7] (hereinafter referred to as the 1929 Convention). And, although still far from perfect, the provisions concerning prisoner-of-war labor contained in the 1949 Geneva Convention relative to the Treatment of Prisoners of War[8] (hereinafter referred to as the 1949 Convention) constitute an enlightened attempt to legislate a fairly comprehensive code governing the major problems involved in the employment of prisoners of war by the Detaining Power.[9] The purpose of this study is to analyze the provisions of that code and to suggest not only how the draftsmen intended them to be interpreted, but also how it can be expected that they will actually be implemented by Detaining Powers in any future war.[10]

While there are very obvious differences between the employment of workers available through a free labor market and the employment of prisoners of war, even a casual and cursory study will quickly disclose a remarkable number of similarities. The labor union which is engaged in negotiating a contract for its members is vitally interested in: (1) the conditions under which they will work, including safety provisions; (2) their working hours and the holidays and vacations to which they will be entitled; (3) the compensation and other monetary benefits which they will receive; and (4) the grievance procedures which will be available to them. (Of course, in each industry there will also be numerous items peculiar to that industry.) Because of the uniqueness of

* Reprinted in 23 MIL. L. REV. 41 (1964).

prisoner-of-war status, the 1949 Diplomatic Conference which drafted the latest prisoner-of-war convention felt it necessary, in negotiating for the benefit of future prisoners of war, to continue to cover certain items in addition to those listed above, such as the categories of prisoners of war who may be compelled to work (a problem which does not normally exist for labor unions in a free civilian society, although it may come into existence in a total war economy); and, collateral to that, the specific industries in which they may or may not be employed. Inasmuch as these latter problems lie at the threshold of the utilization of prisoner-of-war labor, they will be considered before those enumerated above.

Before proceeding to a detailed analysis of the labor provisions of the 1949 Convention, and how one may anticipate that they will operate in time of war, it seems both pertinent and appropriate to survey briefly the history of, and the problems encountered in, the utilization of prisoner-of-war labor during the past century. That period is selected because its earliest date represents the point at which cartels for the exchange of prisoners of war had ceased to have any considerable importance and yet belligerents were apparently still unaware of the tremendous potentiality of the economic asset which was in their hands at a time of urgent need.

The American Civil War (1861-1865) was the first major conflict involving large masses of troops and large numbers of prisoners of war in which exchanges were the exception rather than the rule.[11] As a result, both sides found themselves encumbered with great masses of prisoners of war; but neither side made any substantial use of this potential pool of manpower, although both suffered from labor shortages.[12] This was so, despite the statement in Lieber's Code[13] that prisoners of war "may be required to work for the benefit of the captor's government, according to their rank and condition," and despite the valiant efforts of the Quartermaster General of the Union Army, who sought unsuccessfully, although fully supported by Professor Lieber, to overcome the official reluctance to use prisoner-of-war labor. The policy of the Federal Government was that prisoners of war would be compelled to work "only as an instrument of reprisal against some act of the enemy."[14]

In 1874 an international conference, which included eminent representatives from most of the leading European nations, met in Brussels at the invitation of the Tsar of Russia "in order to deliberate on the draft of an international agreement respecting the laws and customs of war."[15] This conference prepared a text which, while never ratified, constituted a major step forward in the effort to set down in definitive manner those rules of land warfare which could be considered to be a part of the law of nations. It included, in its Article 25, a provision concerning prisoner-of-war labor which adopted, but considerably amplified, Lieber's single sentence on the subject quoted above. This article was

subsequently adopted almost verbatim by the Institute of International Law when it drafted Articles 71 and 72 of its "Oxford Manual" in 1880;[16] and it furnished much of the material for Article 6 of the Regulations attached to the Second Hague Convention of 1899 and the same article of the Regulations attached to the Fourth Hague Convention of 1907.

Despite all of these efforts, the actual utilization of prisoner-of-war labor remained negligible during the numerous major conflicts which preceded World War I. This last was the first modern war in which there was total economic mobilization by the belligerents; and there were more men held as prisoners of war and for longer periods of time than during any previous conflict. Nevertheless, it was not until 1916 that the British War Office could overcome opposition in the United Kingdom to the use of prisoner-of-war labor;[17] and after the entry of the United States into the war, prisoners of war held in this country were not usefully employed until the investigation of an attempted mass escape resulted in a recommendation for a program of compulsory prisoner-of-war labor, primarily as a means of reducing disciplinary problems.[18] When the belligerents eventually did find it essential to make use of the tremendous prisoner-of-war manpower pools which were available to them, the provisions of the Regulations attached to the Fourth Hague Convention of 1907 proved inadequate to solve the numerous problems which arose, thereby necessitating the negotiation of a series of bilateral and multilateral agreements between the various belligerents during the course of the hostilities.[19] Even so, the Report of the "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties," created by the Preliminary Peace Conference in January, 1919, listed the "employment of prisoners of war on unauthorized works" as one of the offenses which had been committed by the Central Powers during the war.[20]

The inadequacies in this and other areas of the Fourth Hague Convention of 1907, revealed by the events which had occurred during the course of World War I, led to the drafting and ratification of the 1929 Convention.[21] It was this Convention which governed many of the belligerents during the course of World War II;[22] but once again international legislation based on the experience gained during a previous conflict proved inadequate to control the more serious and complicated situations which occurred during a subsequent period of hostilities.[23] Moreover, the proper implementation of the provisions of any agreement must obviously depend in large part upon the good faith of the parties thereto—and belligerents in war are, perhaps understandably, not motivated to be unduly generous to their adversaries, with the result that frequently decisions are made and policies are adopted which either skirt the bounds of legal propriety or actually exceed such bounds. The utilization of prisoner-of-war labor by the Detaining Powers proved no exception to the foregoing. Practically all prisoners

of war were compelled to work.[24] To this there can be basically no objection. But during the course of their employment many of the protective provisions of the 1929 Convention (and of the Fourth Hague Convention of 1907 which it complemented) were either distorted or simply disregarded.

The leaders of Hitler's Nazi Germany were aware of its shortage of labor and appreciated the importance of the additional pool of manpower afforded by prisoners of war as a source of that precious wartime commodity. Nevertheless, for a considerable period of time they permitted their ideological differences with the Communists to overcome their common sense and urgent needs.[25] And in Japan, which, although not a party to the 1929 Convention, had committed itself to apply its provisions, those relating to prisoner-of-war labor were among the many which were assiduously violated.[26]

Like the other belligerents, the United States found an urgent need for prisoner-of-war labor, both within its home territory and in the rear areas of the embattled continents. One study even goes so far as to assert that the use of Italian prisoners of war in the Mediterranean theater was the only thing which made it possible for the United States to sustain simultaneously both the Italian campaign and the invasion of Southern France, thereby hastening the downfall of Germany.[27] Similarly, it was found that in the United States the use of prisoners of war for work at military installations, and in agriculture and other authorized industries, served to release both Army service troops and civilians for other types of work which were more directly related to the war effort.[28]

While the benefits of prisoner-of-war labor to the Detaining Power are patent, benefits flowing to the prisoners of war themselves as a result of their use in this manner are no less apparent. The reciprocal benefits resulting from the proper use of prisoner-of-war labor is well summarized in the following statement:

> The work done by the PW has a high value for the Detaining Power, since it makes a substantial contribution to its economic resources. The PW's home country has to reckon that the work so done increases the war potential of its enemy, maybe indirectly; and yet at the same time it is to its own profit that its nationals should return home at the end of hostilities in the best possible state of health. Work under normal conditions is a valuable antidote to the trials of captivity, and helps PW to preserve their bodily health and morale.[29]

During the close reappraisal of the 1929 Convention which followed World War II, the provisions thereof dealing with the labor of prisoners of war were not overlooked; and the Diplomatic Conference which met in Geneva in 1949 redrafted many of those provisions of the 1929 Convention in an effort to plug the loopholes which the events of World War II had revealed. It is the 1949 Convention resulting from this work which will be used in the review and

analysis of the rights and obligations of belligerents and prisoners of war in any future conflict insofar as prisoner-of-war labor is concerned.

Categories of Prisoners of War Who May be Compelled to Work

In general, Article 49 of the 1949 Convention provides that all prisoners of war, except commissioned officers, may be compelled to work. However, this statement requires considerable elaboration and is subject to a number of limitations.

a. The Detaining Power is specifically limited in that it may compel only those prisoners of war to work who are physically fit, and the work must be of a nature to maintain them "in a good state of physically and mental health." In determining physical fitness, it is prescribed that the Detaining Power must take into account the age, sex, and physical aptitude of each individual prisoner of war. It may be assumed that these qualities are to be considered not only in determining whether a prisoner of war should be compelled to work but also in determining the type of work to which the particular prisoner of war should be assigned. For example, women (and it must be accepted that in any future major war there will be many female prisoners of war) should not be given tasks requiring the lifting and moving of heavy loads; and, frequently, men who are physically fit to work may not have the physical aptitude for certain jobs by reason of their size, weight, strength, age, lack of experience, et cetera.[30] It would appear that the provisions of Article 49 of the 1949 Convention require the Detaining Power, within reasonable limits, to assure the assignment of the proper man to the job.

Moreover, under the provisions of Articles 31 and 55 of the 1949 Convention, the determination of physical fitness must not only be made by medically qualified personnel and at regular monthly intervals, but also whenever the prisoner of war considers himself physically incapable of working. It should be noted that the first of the cited articles is a general one which requires the Detaining Power to conduct thorough medical inspections, monthly at a minimum, primarily in order to supervise the general state of health of the prisoners of war and to detect contagious diseases; while the second, which calls for a medical examination at least monthly, is intended to verify the physical fitness of the prisoner of war for work, and particularly for the work to which he is assigned.[31] It is evident that one medical examination directed simultaneously towards both objectives would meet the obligations thus imposed upon the Detaining Power.[32]

The provision of Article 55 which authorizes a prisoner of war to appear before a medical board whenever he considers himself incapable of working has grave potentialities. It can be expected that well-organized prisoners of war, intent upon creating as many difficulties as possible for the Detaining Power,

will be directed by their anonymous leaders to report themselves *en masse* and at frequent intervals as being incapable of working and to request that they be permitted to appear before the medical authorities of the camp. Is the Detaining Power to be helpless, if thousands of prisoners of war, many more than can be examined by available medical personnel, all elect at the same time to claim sudden physical unfitness and to demand physical examinations? Where the Detaining Power has good grounds for believing that such is the situation, and this will normally be quite apparent, it would undoubtedly be justified in compelling every prisoner of war to work until his turn for examination is reached in regular order with the complement of medical personnel which had previously been adequate for the particular prisoner-of-war camp. Thus the act of the prisoners of war themselves in attempting to turn a provision intended for their protection into an offensive weapon, illegal in its inception, would actually result in their causing harm to the very people it was intended to protect—the truly physically unfit prisoners of war.

The suggestion has been made that the medical examinations to determine physical fitness for work should preferably be made by the retained medical personnel of the Power upon which the prisoners of war depend.[33] This suggestion is based upon the fact that Article 30, in providing for the medical care and treatment of prisoners of war, states that they "shall have the attention, preferably, of medical personnel of the Power on which they depend and, if possible, of their nationality." However, there is considerable difference between permitting the medical personnel of the Power on which the prisoner of war depends to render medical assistance when he ill or injured, and permitting such personnel to say whether or not he is physically qualified to work. It is not believed that any Detaining Power would, or that the Convention intended that it should, permit retained medical personnel to make final decisions in this regard.[34]

b. In his Instructions, Lieber gave no indication that the labor of *all* prisoners of war, regardless of rank, was not available to the Detaining Power in some capacity. However, Article 25 of the Declaration of Brussels and Article 71 of the "Oxford Manual" both provided that prisoners of war could only be employed on work which would not be "humiliating to their military rank." The Second Hague Convention of 1899 reverted to Lieber's rather vague phrase, "according to their rank;" and the Fourth Hague Convention of 1907 went a step further, adding to the foregoing phrase the words "officers excepted," thereby giving a legislative basis to a practice which had, in fact, already been followed.[35]

Both the 1929 Convention and the 1949 Convention are much more specific in this regard, the latter amplifying and clarifying the already more detailed provisions of its predecessor. While the first paragraph of Article 49 of the 1949

Convention authorizes the Detaining Power to utilize the labor of "prisoners of war," the second paragraph of that article specifies that non-commissioned officers (NCOs) may only be required to do supervisory work, and the third paragraph states that officers may not be compelled to work. It thus becomes clear that, as used in the first paragraph of this article, the term "prisoners of war" is intended to refer only to enlisted men below the non-commissioned officer grade.

During World War II several problems arose with respect to the identification of non-commissioned officers for labor purposes. In the first place, many NCOs had had their identification documents taken from them upon capture (probably for intelligence purposes) and were thereafter unable to establish their entitlement to recognition of their grade.[36] On the other hand, a number of individuals apparently claimed NCO grades to which they were not actually entitled, probably in order to avoid hard labor as well as to be entitled to the higher advances in pay.[37] In a number of respects the 1949 Convention attempts to obviate these problems. Thus, Article 21 of the 1929 Convention provided only that, upon the outbreak of hostilities, the belligerents would communicate to one another the titles and ranks in use in their armies in order to assure "equality of treatment between corresponding ranks of officers and persons of equivalent status." This was construed as limiting the requirements of this exchange of information to the ranks and titles of commissioned officers. Article 43 of the new Convention makes it clear that information is to be exchanged concerning the ranks and titles of *all* persons who fall within the various categories of potential prisoners of war enumerated in the Convention.[38] Further, during World War II the military personnel of each belligerent carried such identification documents, if any, as that belligerent elected to provide to its personnel. In addition, as just noted, it was not unusual for capturing personnel to seize these documents for whatever intelligence value they might have, leaving the prisoner of war with no official identification material. The 1949 Convention attempts to rectify both of these defects. In Article 17 it provides for an identification card containing, as a minimum, certain specified material concerning identity; prescribes the desirable type of card; provides that it be issued in duplicate; and states that while the prisoner of war must exhibit it upon the demand of his captors, under no circumstances may it be taken from him. This article, if complied with by the belligerents, should do much to eliminate the problem of identifying non-commissioned officers, which existed during World War II and which undoubtedly resulted in many incorrect decisions.

Two other problems connected with the labor of non-commissioned officers are worthy of comment. On occasions disputes may arise as to the types of work which can be construed as falling within the term "supervisory." The drafters

of the 1949 Convention made no attempt to solve this problem. There is much merit in the solution offered by one authority, who says:

> The term "supervisory work" is generally recognized as denoting administrative tasks which usually consist of directing the other ranks; it obviously excludes all manual labor.[39]

The other problem relates to the right of a non-commissioned officer, who has exercised the privilege given him under both conventions to request work other than supervisory, thereafter to withdraw his request. During World War II different practices were followed by the belligerents. Thus Germany gave British non-commissioned officers the right to withdraw their requests;[40] while the policy of the United States was not to grant such requests for non-supervisory work in the first place, unless they were for the duration of captivity in the United States.[41] It has been urged that, inasmuch as a non-commissioned officer is free to undertake non-supervisory work, he should be equally free to discontinue such work, subject to the right of the Detaining Power to provide him with such employment only if he agrees to work for a fixed term, which may be extended upon his request.[42] This appears to be a logical and practical solution to the problem, although it is probably one to which not every belligerent will subscribe.

Officers cannot be required to do even supervisory work unless they request it. Once they have done so, the problems relating to their labor are very similar to those relating to the voluntary labor of non-commissioned officers, except that they were apparently rather generally permitted to discontinue working whenever they decided to do so. In general, the labor of officers has not caused any material dissension between belligerents.[43]

c. Scattered throughout the 1949 Convention are a number of other provisions specifically limiting the work which may be required of certain categories of enemy personnel, prisoners of war or others, held by a Detaining Power. Thus, medically trained personnel who, when captured, were not assigned to the medical services in the enemy armed forces and who are, therefore, ordinary prisoners of war, may be required to perform medical functions for the benefit of their fellow prisoners of war; but if they are so required, they are entitled to the treatment accorded retained medical personnel[44] and are exempted from any other work (Article 32). The same rule applies to ministers of religion who were not serving as such when captured (Article 36). Prisoners of war assigned to provide essential services in the camps of officer prisoners of war may not be required to perform any other work (Article 44). And prisoners' representatives may likewise not be required to perform any other work, but this restriction applies only "if the accomplishment

of their duties is thereby made more difficult" (Article 81). While these various provisions are not of very great magnitude in the over-all prisoner-of-war picture, they can, of course, be of major importance to the particular individuals involved.

Types of Work Which Prisoners of War May Be Compelled to Perform

The types of work which prisoners of war may be compelled to perform and the industries to which they may be assigned have generated much controversy. Long before final agreement was reached thereon at the 1949 Geneva Diplomatic Conference, the article of the Convention concerned with the subject of authorized labor was termed "the most disputed article in the whole Convention, and the most difficult of interpretation."[45] Unfortunately, it appears fairly certain that the agreements ultimately reached in this area are destined to magnify, rather than to minimize or eliminate, this problem.[46]

The early attempts to draft rules concerning the categories of labor in which prisoners of war could be employed merely authorized their employment on "public works which have no direct connection with the operations in the theater of war,"[47] or stated that the tasks of prisoners of war "shall have nothing to do with the military operations."[48] The insufficiency of these provisions having been demonstrated by the events of World War I, an attempt at elaboration was made in drafting the comparable provisions (Article 31) of the 1929 Convention, in which were included not only prohibitions against the employment of prisoners of war on labor having a "direct relation with war operations," but also against their employment on several specified types of work ("manufacturing and transporting arms or munitions of any kind, or . . . transporting material intended for combatant units").

During World War II these latter provisions proved no more successful than their predecessors in regulating prisoner-of-war labor. The term "direct relation with war operations" once again demonstrated itself to be exceedingly difficult to interpret[49] in a total war in which practically every economic resource of the belligerents is mobilized for military purposes.[50] So each belligerent attempting to comply with the labor provisions of the 1929 Convention found itself required to make a specific determination in all but the very few obvious cases as to whether a particular occupation fell within the ambit of the prohibitions.[51] As could be expected, there were many disputed decisions.

In drafting a proposed new convention aimed at obviating the many difficulties which had arisen during the two world wars, the International Committee of the Red Cross attempted a new approach to the prisoner-of-war labor problem. Instead of specifying prohibited areas in broad and general terms, as had been the previous practice, leaving to the belligerents, the Protecting Powers, and the humanitarian organizations the decision as to whether a specific

task was or was not prohibited, it decided to list affirmatively and with particularity the categories of labor in which Detaining Powers would be permitted to employ prisoners of war, at least impliedly prohibiting their use in any type of work not specifically listed.[52] The International Red Cross Conference held at Stockholm in 1948, to which this new approach was proposed, accepted the idea of affirmatively specifying the areas in which prisoners of war could be required to work; but, instead of the enumeration of specifics which the Committee had prepared, the Conference substituted general terms.[53] The Committee was highly critical of this action.[54] At the 1949 Diplomatic Conference the United Kingdom proposed the substitution of the original proposal in place of that contained in the draft adopted at Stockholm, and it was this original text, with certain amendments which will be discussed later, which ultimately became Article 50 of the 1949 Convention.[55] While there is considerable merit to the new approach, the actual phraseology of the article leaves much to be desired.[56]

An analysis of the various provisions contained in Article 50 of the 1949 Convention and, to the extent possible, a delimitation of the areas covered, or probably intended to be covered, by each category of work which a prisoner of war may be "compelled" to do,[57] and the problems inherent in each, is in order.

(1) *Camp Administration, Installation or Maintenance.* This refers to the management and operation of the camps established for the prisoners of war themselves; in other words, broadly speaking, it constitutes their own "housekeeping." Early in World War II the United States divided all prisoner-of-war labor into two classes: class one, that related to their own camps; and class two, all other.[58] This distinction still appears to be a valid one. It has been estimated that the use of prisoners of war in the United States for the maintenance and operation of their own camps and of other military installations[59] constituted their major utilization.[60] While this is believed to be somewhat of an overstatement, it can be assumed that a very considerable portion of them will always be so engaged. However, it can also be assumed that in any future major conflict demands for prisoner of-war labor will be so great that shortages will exist, requiring that the administration of prisoner-of-war camps be conducted on an extremely austere basis.

(2) *Agriculture.* This field of prisoner-of-war utilization, with its collateral field of food processing, combines with camp administration to account for the labor of the great majority of employed prisoners of war.[61] There are no restrictions imposed by the Convention on the employment of prisoners of war in agriculture,[62] the fact that the product of their labor may eventually be used in the manufacture of a military item or be supplied to and consumed by combat troops being too remote to permit of, or warrant, restrictions.

(3) *Production or Extraction of Raw Materials.* This category of authorized compulsory employment includes activities in such industries as mining, logging, quarrying, et cetera. It is one of the areas in which problems are constantly arising and in which there are frequent disagreements between belligerents as well as between Detaining Powers and Protecting Powers or humanitarian organizations. Thus, after the conclusion of World War II the International Committee of the Red Cross reported that it was called upon to intervene more frequently with respect to prisoners of war who worked in mines than with respect to any other problem.[63]

Inasmuch as the utilization of prisoners of war in this field has been, and continues to be, authorized, the problems which arise usually relate to the physical ability of the particular prisoner of war to participate in heavy and difficult labor of this nature, and to working conditions, including safety precautions and equipment, rather than to the fact of the utilization of prisoners of war in the specific industry. The first of these problems has already been reviewed and the latter will be discussed at length in the general analysis of that specific problem.

(4) *Manufacturing Industries (except Metallurgical, Machinery, and Chemical).*[64] In modern days of total warfare and the total mobilization of the economy of belligerent nations, it has become increasingly impossible to state with positiveness that any particular industry does not have *some* connection with the war effort. Where the degree of such connection is the criterion for determining the permissibility of the use of prisoners of war in a particular industry, as it was prior to the 1949 Convention, problems and disputes are inevitable. In this respect, by authorizing compulsory prisoner-of-war labor in most manufacturing industries and by specifically prohibiting it in the three categories of industries which will be engaged almost exclusively in war work, the new Convention represents a positive and progressive development in the law of war and has probably eliminated many potential disputes.

During World War II the nature of the item manufactured and, to some extent, its intended ultimate destination determined whether or not the use of prisoners of war in its manufacture was permissible. Thus, in the United States it was determined that prisoners of war could be used in the manufacture of truck parts, as these had a civilian, as well as a military, application; but that they could not be used in the manufacture of tank parts, as these had only a military application.[65] Under the 1949 Convention neither the nature nor the ultimate destination nor the intended use of the item being manufactured is material. *All* motor vehicles fall within the category of "machinery" and prisoners of war therefore may not be used in their manufacture. On the other hand, prisoners of war may be used in a food processing or clothing factory, even though some,

or perhaps all, of the food processed or clothing manufactured may be destined for the armed forces of the Detaining Power.

Two sound bases have been advanced for the decision of the Diplomatic Conference to prohibit in its entirety the compelling of prisoners of war to work in the metallurgical, machinery, and chemical industries: first, that in any general war these three categories of industries will unquestionably be totally mobilized and will be used exclusively for the armaments industry; and second, that factories engaged in these industries will be key objectives of enemy air (and now of enemy rocket and missile) operations and would, therefore, subject the prisoners of war to military action from which they are entitled to be isolated.[66] The Diplomatic Conference apparently balanced this total, industry-wide prohibition of compulsory labor in the three specified industries against the general authorization to use prisoners of war in every other type of manufacturing without requiring the application of any test to determine its relationship to the war effort.

It should be borne in mind that the prohibition under discussion is directed only against *compelling* prisoners of war to work in the specified industries. (As we shall see, by inverted phraseology, subparagraphs b, c, and f of Article 50 also prohibit the Detaining Power from compelling them to do certain other types of work where such work has "military character or purpose.") The question then arises as to whether they may volunteer for employment in those industries. Based upon the discussions at the Diplomatic Conference,[67] it clearly appears that the prohibitions contained in Article 50 are not absolute in character and that a prisoner of war may volunteer to engage in the prohibited employments, just as he is affirmatively authorized by Article 52 to volunteer for labor which is "of an unhealthy or dangerous nature." The problem will, of course, arise of assuring that the prisoner of war is a true volunteer and that neither mental coercion nor physical force has been used to "persuade" him to volunteer to work in the otherwise prohibited field of labor.[68] However, the fact that this particular problem is difficult of solution (and that the possibility undoubtedly exists that some prisoners of war will be coerced into "volunteering") cannot be permitted to justify an incorrect interpretation of these provisions of the Convention, as to which the indisputable intent of the Diplomatic Conference is clearly evidenced by the *travaux préparatoires*.

(5) *Public Works and Building Operations Which Have No Military Character or Purpose.* With respect to this portion of the subparagraph, it is first necessary to determine the meaning to be ascribed to the phrase "military character or purpose." This is no easy task.[69] Because the term defies definition in the ordinary sense, it will be necessary to define by example. Moreover, the discussions at the Diplomatic Conference, unfortunately, provide little that is helpful on this problem.

A structure such as a fortification clearly has, solely and exclusively, a "military character." Conversely, a structure such as a bowling alley clearly has, solely and exclusively, a civilian character. The fortification is intended for use in military operations; hence it has not only a "military character" but also a "military purpose." The bowling alley is intended for exercise and entertainment; hence it does not have a "military purpose," even if some or all of the individuals using it will be members of the armed forces.[70]

These examples have been comparatively black and white. Unfortunately, as is not unusual, there is also a large gray area. This is especially true of the term "military purpose." A structure will usually be clearly military or clearly civilian in character; but whether its purpose is military or civilian will not always be so easy of determination. A sewer is obviously civilian in character, and the fact that it is to be constructed between a military installation and the sewage disposal plant does not give it a military purpose. On the other hand, a road is likewise civilian in character, but a road leading only from a military airfield to a bomb dump would certainly have a military purpose. And a theater is civilian in character, but if it is a part of a military school installation and is to be used exclusively or primarily for the showing of military training films, then it, too, would have a military purpose. However, a theater which is intended solely for entertainment purposes, like the bowling alley, retains its civilian purpose, even though the audience will be largely military.

To summarize, if the public works or building operations clearly have a military character, prisoners of war may not be compelled to work thereon; if they do not have a military character, but are being undertaken exclusively or primarily for a military use, then they will usually have a military purpose and again prisoners of war may not be compelled to work thereon; while if they do not have a military character and are not being built exclusively or primarily for a military use, then they have neither military character nor purpose, and prisoners of war may be compelled to work thereon, even though there may be incidental military use.[71]

Having determined, insofar as is possible, the meaning of the phrase "military character or purpose," let us apply it to some of the problems which have heretofore arisen. Although the use of compulsory prisoner-of-war labor in the construction of fortifications has long been considered improper,[72] after World War II a United States Military Tribunal at Nürnberg found "uncertainty" in the law, and held such labor not obviously illegal where it was ordered by superior authority and was not required to be performed in dangerous areas.[73] Under the 1949 Convention such a decision would clearly be untenable. A fortification is military in character and the use of compulsory prisoner-of-war labor in its construction is prohibited, no matter what the circumstances or location may be. The same is, of course, true of other construction of a uniquely

military character such as ammunition dumps, firing ranges, tank obstacles, et cetera. On the other hand, bush clearance and the construction of firebreaks in wooded areas far from the battle fronts, the digging of drainage ditches,[74] the building of local air-raid shelters,[75] and the clearing of bomb rubble from city streets [76] are typical of the categories of public works and building operations which have neither military character nor purpose.

If the foregoing discussion has added but little light to the problem, it is hoped that it has, at least, focused attention on an area which can be expected to produce considerable controversy; and here, too, the problem will be further complicated by the question of volunteering.

(6) *Transportation and Handling of Stores Which Are Not Military in Character or Purpose.* Article 31 of the 1929 Convention prohibited the use of prisoners of war for "transporting arms or munitions of any kind, or for transporting material intended for combatant units." The comparable provisions of the 1949 Convention clarify this in some respects and obscure it in others.

The former provision created problems in the determination of the point of time at which material became "intended" for a combatant unit and of the nature of a "combatant unit." These problems have now been eliminated, the ultimate destination of the material transported or handled no longer being decisive.

Creating new difficulties is the fact that the problem of the application of the amorphous term "military in character or purpose" is presented once again. Apparently a prisoner of war may now be compelled to work in a factory manufacturing military uniforms or gas masks or camouflage netting, as these items are neither made by the three prohibited manufacturing industries nor is their military character or purpose material; but once manufactured, a prisoner of war may not be compelled to load them on a truck or freight car, as they probably have a military character and they certainly have a military purpose. Conversely, prisoners of war may not be compelled to work in a factory making barbed wire, inasmuch as such a factory is in the metallurgical industry; but they may be compelled to handle and transport it where it is destined for use on farms or ranches, as it would have no military character or purpose. Surely, the Diplomatic Conference intended no such inconsistent results, but it is difficult to justify any other conclusions.

Just as was determined with respect to public works and building operations, it is extremely doubtful that the ultimate destination or intended use of the stores is, alone, sufficient to give them a military character or purpose. Thus, agriculture and food processing are, as has been seen, authorized categories of compulsory labor for prisoners of war. The food grown and processed obviously has no military character; and the fact that it will ultimately be consumed by members of the armed forces, even in a battle area, does not give it a military purpose. Accordingly, prisoners of war may be compelled to handle and transport such

stores. The same reasoning would apply to blankets and sleeping bags, to tents and tarpaulins, to socks and soap.

In this general category, again, the prohibition is only against compulsion, and the prisoner of war who volunteers may be assigned to the work of transporting and handling stores, even though they have a military character or purpose. And, once again, the problem will arise of assuring that the prisoner of war has actually volunteered for the work to which he is assigned.

(7) *Commercial Business, and Arts and Crafts.* It is doubtful whether very many prisoners of war will be given the opportunity to engage in commercial business. The prisoner-of-war barber, tailor, shoemaker, cabinetmaker, et cetera, will usually be assigned to ply his trade within the prisoner-of-war camp, for the benefit of his fellow prisoners of war as a part of the camp activities and administration. However, it is conceivable that in some locales they might be permitted to set up their own shops or to engage in their trades as employees of civilian shops owned by citizens of the Detaining Power.

That prisoners of war will be permitted to engage in the arts and crafts is much more likely. No prisoner-of-war camp has ever lacked artists, both professional and amateur, who produce paintings, wood carvings, metal objects, et cetera, which find a ready market, through the prisoner-of-war canteen, among the military and civilian population of the Detaining Power. However, normally this category of work will be done on spare time as a remunerative type of hobby, rather than as assigned labor.

(8) *Domestic Service.* The specific inclusion of this category of labor merely permits the continuation of a practice which was rather generally followed during World War II and which has rarely caused any difficulty, inasmuch as domestic services have, of course, never been construed as having a "direct relation with operations of war." As long as the domestic services are not required to be performed in an area where the prisoner of war will be exposed to the fire of the combat zone, which is specifically prohibited by Article 23 of the 1949 Convention, the type of establishment in which he is compelled to perform the domestic service, and whether military or civilian, is not material.

(9) *Public Utility Services Having No Military Character or Purpose.* This is the third and final usage in Article 50 of the term "military character or purpose." Its use here is particularly inept, inasmuch as it is difficult to see how public utility services such as gas, electricity, water, telephone, telegraph, et cetera, can, under any circumstances, be deemed to have a military character.[77] With respect to military purpose, the conclusions previously reached are equally applicable here. If the utility services are intended exclusively or primarily for military use, they will have a military purpose and the Detaining Power is prohibited from compelling prisoners of war to work on them. Normally, however, the same

public utility services will be used to support both military and civilian activities and personnel and will not have a military purpose.

(10) *Unhealthy, Dangerous, or Humiliating Labor.* Article 52 of the 1949 Convention contains special provisions with respect to labor which is unhealthy, dangerous, or humiliating. These terms are not defined and it may be anticipated that their application will cause some difficulties and controversies. Nevertheless, the importance of the provision cannot be gainsaid.

Employing a prisoner of war on unhealthy or dangerous work is prohibited "unless he be a volunteer." *Assigning* a prisoner of war to labor which would be considered humiliating for a member of the armed forces of the Detaining Power is prohibited. No differences can be perceived to have resulted from the use of the verb "employed on" in the first instance and "assigned to" in the second. Accordingly, it is believed that the omission of the clause "unless he be a volunteer" in the case of "humiliating" labor would preclude a prisoner of war from volunteering for labor which is considered to be of a humiliating nature and that such a clause would be mere surplusage. However, this is probably not so.

Article 32 of the 1929 Convention forbade "unhealthful or dangerous work." In construing this provision the United States applied three separate criteria: first, the inherent nature of the job (mining, quarrying, logging, et cetera); second, the conditions under which it was to be performed (under a tropical sun, in a tropical rain, in a millpond in freezing weather, et cetera); and third, the individual capacity of the prisoner of war.[78] These criteria would be equally relevant in applying the substantially similar provisions of Article 52 of the 1949 Convention.[79]

It is quite apparent that there are criteria available for determining whether a particular job is unhealthy or dangerous and is, therefore, one upon which prisoners of war may not be employed. Nevertheless, there will undoubtedly be some borderline cases in which disputes may well arise as to the utilization of non-volunteer prisoners of war. However, there unquestionably will be more jobs in clearly permissible categories than there will be prisoners of war available to fill them. Accordingly, the Detaining Power, which is attempting to handle prisoners of war strictly in accordance with the provisions of the Convention, can easily avoid disputes by not using prisoners of war on labor of a controversial character.

The third paragraph of Article 52 specifies that "the removal of mines or similar devices shall be considered as dangerous labor." By this simple statement the Diplomatic Conference, after one of its most heated and lengthy discussions,[80] made it completely clear that the employment of prisoners of war on mine removal is prohibited unless they are volunteers. The compulsory use of prisoners of war on this type of work was one of the most bothersome

problems of prisoner-of-war utilization of World War II, particularly after the termination of hostilities.

The application of the prohibition against the assignment of prisoners of war to work considered humiliating for members of the armed forces of the Detaining Power should cause few difficulties.[81] Certainly the existence or non-existence of a custom or rule in this regard in the armed forces of the Detaining Power should rarely be a mater of controversy.[82] It is probable that, in the main, problems in this area will arise because the standard adopted is that applied in the armed forces of the Detaining Power rather than that applied in the armed forces of the Power upon which the prisoners of war depend. While this decision was indubitably the only one which the Diplomatic Conference could logically have reached, it is not unlikely that prisoners of war will find this difficult to understand and that there will be tasks which they consider to be humiliating, even though the members of the armed forces of the Detaining Power do not, particularly where the prisoners of war come from a nation having a high standard of living and are held by a Detaining Power which has a considerably lower standard.

Conditions of Employment

We have so far considered the two aspects of prisoner-of-war labor which are peculiar to that status: who may be compelled to work; and the fields of work in which they may be employed. Our discussion now enters the area in which most nations have laws governing the general conditions of employment of their own civilian citizens—laws which, as we shall see, are often applicable to the employment of prisoners of war.

General Working Conditions. Article 51 of the Convention constitutes a fairly broad code covering working conditions. Its first paragraph provides that:

> Prisoners of war must be granted suitable working conditions, especially as regards accommodation, food, clothing and equipment; such conditions shall not be inferior to those enjoyed by nationals of the Detaining Power employed in similar work; account shall also be taken of climatic conditions.

These provisions, several of which derive directly from adverse experiences of World War II, are, for the most part, so elementary as to require little exploratory discussion. However, one major change in basic philosophy is worthy of note. The 1929 Convention provided, in Articles 10 and 11, that the minimum standard for accommodations and food for prisoners of war should be that provided for "troops at base camps of the detaining Power." This standard was equally applicable to working prisoners of war. Article 25 of the 1949 Convention contains an analogous provision with respect to accommodations

for prisoners of war generally—but the quotation from Article 51 given above makes it abundantly clear that, as to the lodging, food, clothing, and equipment of working prisoners of war, the minimum standard is no longer that of base troops of the Detaining Power, but is that of "nationals of the Detaining Power employed in similar work. " While this represents a continuation of adherence to a national standard, it is probable that the new national standard will be higher than the one previously used, inasmuch as workers are frequently a favored class under wartime conditions.[83]

With regard to a somewhat similar provision contained in the second paragraph of the same article, less optimism appears to be warranted. This paragraph, making applicable to working prisoners of war "the national legislation concerning the protection of labor and, more particularly, the regulations for the safety of workers," was the result of a proposal made by the U.S.S.R. at the Diplomatic Conference, which received the immediate support of the United States and others.[84] This support was undoubtedly premised on the assumption that, if adopted, the proposal would increase the protection afforded to working prisoners of war. Second thoughts indicate that this provision may constitute a basis for reducing the protection which it was intended to afford prisoners of war engaged in dangerous employments. The International Committee of the Red Cross has found it necessary to point out that national standards may not here be applied in such a way as to reduce the minimum standards established by the Convention.[85] It now appears unfortunate that the Diplomatic Conference adopted the U.S.S.R. proposal rather than the suggestion of the representative of the International Labor Organization that it be guided by the internationally accepted standards of safety for workers contained in international labor conventions then already in being.[86] Moreover, the safety laws and regulations are not the only safety measures which are tied to national standards. The third paragraph of Article 51 requires that prisoners of war receive training and protective equipment appropriate to the work in which they are to be employed "and similar to those accorded to the nationals of the Detaining Power."[87] This same paragraph likewise provides that prisoners of war "may be submitted to the normal risks run by these civilian workers." Inasmuch as the test as to what are "normal risks" is based upon the national standards of the Detaining Power, this provision, too, would appear to be a potential breeding ground for disagreement and dispute, particularly as the "normal risks" which civilian nationals of the Detaining Power may be called upon to undergo under the pressures of a wartime economy will probably bear little relationship to the risks permitted under normal conditions.

The reference to the climatic conditions under which the labor is performed, contained in the portion of Article 51 quoted above, is one of the provisions deriving from the experiences of World War II.[88] The 1929 Convention

provided, in Article 9, that prisoners of war captured "where the climate is injurious for persons coming from temperate climates, shall be transported, as soon as possible, to a more favorable climate." It is well known that in a large number of cases this was not done. The 1949 Convention contains a somewhat similar general provision (in Article 22) concerning evacuation; but it was recognized that, despite the best of intentions, belligerents will not always be in a position to arrange the immediate evacuation of prisoners of war from the areas in which they are captured. Accordingly, the Diplomatic Conference wrote into the Convention the quoted additional admonition with respect to climatic conditions and prisoner-of-war labor. It follows that, where a Detaining Power cannot, at least for the time being, evacuate prisoners of war from an unhealthy climate, whether tropical or arctic, it must, if it desires to utilize the labor of the prisoners of war in that area even temporarily, make due allowances for the climate, giving them proper clothing,[89] the necessary protection from the elements, appropriate working periods, et cetera.

Article 51 of the 1949 Convention concludes with a prohibition against rendering working conditions more arduous as a disciplinary measure.[90] In other words, the standards for working conditions, be they international or national, established by the Convention may not be disregarded in the administration of disciplinary punishment to a prisoner of war, and it is immaterial whether the act for which he is being punished occurred in connection with, or completely apart from, his work. Thus, a Detaining Power may not lower safety standards, avoid requirements for protective equipment, lengthen working hours, withhold required extra rations, et cetera, as punishment for misbehavior. On the other hand, "fatigue details" of not more than two hours a day, or the withdrawal of extra privileges, both of which are authorized as disciplinary punishment, undoubtedly could be imposed, as they obviously do not fall within the terms of the prohibition; and the extra rations to which prisoners of war are entitled under Article 26, when they are engaged in heavy manual labor, could undoubtedly be withheld from a prisoner of war who refuses to work, inasmuch as he would no longer meet the requirement for entitlement to such extra rations.

In the usual arrangement contemplated by the Convention for the utilization of the labor of prisoners of war, the prisoners, each working day, go from their camp to their place of employment, returning to the camp upon the completion of their working period. However, another arrangement is authorized by the Convention. Thus, where the place at which the work to be accomplished is too far from any prisoner-of-war camp to permit the daily round trip, a so-called "labor detachment" may be established.[91] These labor detachments, which were widely used during World War II, are merely miniature prisoner-of-war camps, established in order to meet more conveniently a specific labor requirement. Article 56 of the 1949 Convention requires that it be organized and administered

in the same manner as, and as a part of, a prisoner-of-war camp. Prisoners of war making up a labor detachment are entitled to all the rights, privileges, and protections which are available under the Convention to prisoners of war assigned to, and living in, a regular prisoner-of-war camp.[92] However, the fact that local conditions render it impossible to make a labor detachment an exact replica of a prisoner-of-war camp does not necessarily indicate a violation of the Convention. As long as the provisions of the Convention are observed with respect to the particular labor detachment, it must be considered to be properly constituted and operated.[93]

One other point with respect to labor detachments is worthy of note. While Article 39 requires that prisoner-of-war camps be under the "immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power," there is no such requirement as to labor detachments. Although each labor detachment is under the authority of the military commander of the prisoner-of-war camp on which it depends, who will, of course, be a commissioned officer, there appears to be no prohibition against the assignment of a non-commissioned officer as the immediate commander. In view of the large number of labor detachments which will probably be established by each belligerent, it is safe to assume that the great majority of them will be under the supervision of non-commissioned officers.

A situation under which the utilization of prisoner-of-war labor will usually, although not necessarily, require the establishment of labor detachments is where they are employed by private individuals or business organizations. This is the method by which most of the many prisoners of war engaged in agriculture will probably be administered. During World War II, prisoners of war performing labor under these circumstances were frequently denied the basic living standards guaranteed to them by the 1929 Convention. Article 57 of the 1949 Convention specifically provides, not only that the treatment of prisoners of war working for private employers "shall not be inferior to that which is provided for by the present Convention," but also that the Detaining Power, its military authorities, and the commander of the prisoner-of-war camp to which the prisoners belong, all continue to be responsible for their maintenance, care, and treatment; and that these prisoners of war have the right to communicate with the prisoners' representative in the prisoner-of-war camp.[94] It remains to be seen whether the changes made in the provisions of the applicable international legislation will be successful in accomplishing their purpose.

One problem which may arise in the use of prisoner-of-war labor by private employers is that of guarding the prisoners of war. Frequently, the Detaining Power will provide military personnel to guard such prisoners of war. When it does so, the problems presented are no different from those which arise at the prisoner-of-war camp itself. If paroles have been given to and accepted by the

prisoners of war concerned, there are likewise no problems peculiar to the situation.[95] But suppose that civilian guards are used. What authority do they have to compel a prisoner of war to work if he refuses to do so? Or to prevent a prisoner of war from escaping? And to what extent may they use force on prisoners of war?

If a prisoner of war assigned to work for a private employer refuses to do so, the proper action to take would unquestionably be to notify the military commander of the prisoner-of-war camp to which he belongs. The latter is in a position to have an independent investigation made and to impose disciplinary or judicial punishment, if and as appropriate.

If a prisoner of war assigned to work for a private employer who is not provided with military guards attempts to escape, the authority of the civilian guards is extremely limited. That they may use reasonable force, short of firearms, seems fairly clear. That the guards may use firearms to prevent the escape is highly questionable.[96] Detaining Powers would be well advised not to assign any prisoner of war to this type of labor, where he is to be completely unguarded or guarded only by civilians, unless the prisoner of war has accepted parole, or unless the Detaining Power has evaluated the likelihood of attempted escape by the particular prisoner of war and has determined to take a calculated risk in his case.

It would not be appropriate to leave the subject of conditions of employment without at least passing reference to the possibility of special agreements in this field between the opposing belligerents. Strangely enough, despite the fact that prisoner-of-war labor has been the subject of special agreements (or of attempts to negotiate special agreements) between opposing belligerents on a number of occasions during both World War I and World War II,[97] and despite numerous references elsewhere in the 1949 Convention to the possibility of special agreements, nowhere in the articles of the Convention concerned with prisoner-of-war labor is there any reference made to this subject. Nevertheless, such agreements, provided that they do not adversely affect the rights of prisoners of war, may be negotiated under the provisions of Article 6 of the Convention, as well as under the inherent sovereign rights of the belligerents.[98]

Working Hours, Holidays, and Vacations. Article 53 of the 1949 Convention covers all aspects of the time periods of prisoner-of-war labor. As to the duration of daily work, it provides that (1) this must not be excessive; (2) it must not exceed the work hours for civilians in the same district; (3) travel time to and from the job must be included; and (4) a rest of at least one hour (longer, if civilian nationals receive more) must be allowed in the middle of the day.

It thus appears that the new Convention contains the same prohibition as its predecessor against daily labor which is of "excessive" duration. Here, again, we have the application of the national standard, and in an area in which such

standard had proved to be disadvantageous to prisoners of war during World War II.[99] The Greek Delegation to the Diplomatic Conference attempted to obtain the establishment of an international standard—a maximum of eight hours a day for all work except agriculture, where a maximum of ten hours would have been authorized. This proposal was overwhelmingly rejected.[100] As has already been pointed out with regard to other problems, where a national rather than an international standard has been adopted, very few nations at war could afford to grant to prisoners of war more favorable working conditions than those accorded their own civilian citizens.[101] With respect to hours of daily work, it must be noted, too, that the limitations contained in the article cannot be circumvented by the adoption of piece work, or some other task system, in lieu of a specific number of working hours. The Convention specifically prohibits rendering the length of the working day excessive by the use of this method.[102]

The provision for a midday rest of a minimum of one hour is new and is only subject to the national standard if the latter is more favorable to the prisoner of war than the international standard established by the Convention. It may be necessary for the Detaining Power to increase the midday rest period given to prisoners of war, if its own civilian workers receive a rest period in excess of one hour, but it may not, under any circumstances, be shortened to less than one hour.

Article 53 further provides that prisoners of war shall be entitled to a 24-hour holiday every week, preferably on Sunday "or the day of rest in their country of origin." Except for the quoted material, which was adopted at the request of Israel but which should be of equal importance to the pious Moslem, a similar provision was contained in the 1929 Convention. This provision is not subject to national standards, whether or not the national standard is more liberal.[103] And finally, this same article grants to every prisoner of war who has worked for one year a vacation of eight consecutive days with pay. This provision is new and is of a nature to create minor problems, as, for example, whether normal days of rest are excluded from the computation of the eight days, what activity is permitted to the prisoner of war during his "vacation," and what he may be required to do during this period. However, despite these administrative problems, the provision should prove a boon to every person who undergoes a lengthy period of detention as a prisoner of war.

Compensation and Other Monetary Benefits. The 1929 Convention provided, in Article 34, that prisoners of war would be "entitled to wages to be fixed by agreements between the belligerents." No such agreements were, in fact, ever concluded.[104] The comparable provision of the 1949 Convention (Article 62) provides for "working pay"[105] in an amount to be fixed by the Detaining Power, which may not be less than one-fourth of one Swiss franc for a full working

day.[106] The amount so fixed must be "fair" and the prisoners of war must be informed of it, as must the Protecting Power.

With regard to the establishment by the Detaining Power of a "fair working rate of pay," several matters should be noted. First, no basis can be seen for attempting to determine what is "fair" by endeavoring to compare the "working pay" of prisoners of war with the wages of civilian workers. There are too many diverse and unequal factors involved;[107] and the extremely nominal minimum set by the Convention is clearly indicative of the fact that there was no intention on the part of the Diplomatic Conference to establish any such relationship. Second, while there appears to be nothing to preclude a Detaining Power from establishing a fair basic "working rate of pay," and then providing for amounts in addition thereto for work requiring superior skill or heavier exertion or greater exposure to danger, or as a production incentive, no authority exists for establishing different working rates of pay for prisoners of war of different nationalities who have the same competence and are engaged in the same types of work.[108] And finally, the rate established as "fair" may not thereafter be administratively reduced by having a part of it "retained" by the camp administration. The authority for this procedure, which was contained in Article 34 of the 1929 Convention, has been specifically and intentionally deleted from the 1949 Convention.

There is one provision of the new Convention which could render this entire subject moot. An individual account must be kept for each prisoner of war. All of the funds to which he becomes entitled during the period of his captivity, including his working pay, are credited to this account and all of the payments made on his behalf or at his request are deducted therefrom (Article 64). Under Article 34 of the 1929 Convention it then became the obligation of the Detaining Power to deliver to the prisoner of war "the pay remaining to his credit" at the end of his captivity. Under Article 66 of the 1949 Convention, upon the termination of the captivity of a prisoner of war, it will be the responsibility of the Power in whose armed forces he was serving at the time of his capture, and *not* of the Detaining Power, to settle any balance due him. Under these circumstances, there appears to be little reason why a Detaining Power should not be extremely generous in establishing its "fair working rate of pay." In effect, it will, for the most part, merely be creating a future liability on the part of its enemy! This factor may result in the negotiation of agreements between belligerents fixing mutually acceptable "working rates of pay," despite the lack of a specific provision for such agreements in the 1949 Convention—agreements which, as has been noted, were not reached under the 1929 Convention where there was specific provision for them.

A number of changes have been embodied in the 1949 Convention with regard to the types of work which entitle a prisoner of war to working pay. Of

major importance is the fact that, while Article 34 of the 1929 Convention specifically provided that "prisoners of war shall not receive wages for work connected with the administration, management and maintenance of the [prisoner-of-war] camps," Article 62 of the present Convention is equally specific that prisoners of war "permanently detailed to duties or to a skilled or semi-skilled occupation in connection with the administration, installation or maintenance of camps" *will* be entitled to working pay. This article also contains a specific provision under which non-medical service medical personnel (Article 32), and retained medical personnel and chaplains (Article 33) are entitled to working pay. And while the prisoners' representative and his advisers are, primarily, paid out of canteen funds, if there are no such funds, these individuals, too, are entitled to working pay from the Detaining Power. Finally, because enlisted men assigned as orderlies in officers' camps are specifically exempted from performing any other work (Article 44), it appears that they should be entitled to working pay from the Detaining Power.[109]

What of the prisoner of war who is the victim of an industrial accident or contracts an industrial disease and is thereby incapacitated, either temporarily or permanently? Does he receive any type of compensation, and, if so, what, when, from whom, and how?

The Regulations attached to the Second Hague Convention of 1899 and to the Fourth Hague Convention of 1907 were silent on this problem. The multilateral prisoner-of-war agreement negotiated at Copenhagen in 1917 adopted a Russian proposal which placed upon the Detaining Power the same responsibility in this regard that it had towards its own citizens; but the British-German agreement, which was negotiated at The Hague in 1918, provided merely that the Detaining Power should provide the injured prisoner of war with a certificate as to his occupational injury.[110] The procedure adopted at Copenhagen was subsequently incorporated in Article 27 of the 1929 Convention, and in 1940, after some abortive negotiations with the British, Germany enacted a law implementing this procedure.[111] The United States subsequently established this same policy,[112] but the United Kingdom considered that it was only required to furnish the injured prisoner of war all required medical and other care.[113]

Inasmuch as no payments were ever, in fact, made to injured prisoners of war by the Detaining Powers after their repatriation,[114] it is not surprising that in drafting the pertinent provisions of the 1949 Convention the Diplomatic Conference replaced the 1929 procedure with one more nearly resembling that which had been adopted by the British and Germans at The Hague in 1918.[115] It may actually be asserted that there is little difference between the previous practice and the present policy.

The procedure established by the 1949 Convention is contained in the somewhat overlapping provisions of Articles 54 and 68. When a prisoner of war sustains an injury as a result of an industrial accident (or incurs an industrial disease), the Detaining Power has the obligation of providing him with all required care, medical, hospital, and general maintenance during the period of his disability and continuation in the status of a prisoner of war.[116] The only other obligation of the Detaining Power is to provide the prisoner of war with a statement, properly certified, "showing the nature of the injury or disability, the circumstances in which it arose and particulars of medical or hospital treatment." Also, a copy of this statement must be sent to the Central Prisoners of War Agency. This latter action insures its permanent availability.

If the prisoner of war desires to make a claim for compensation while still in that status, he may do so, but his claim will be addressed, not to the Detaining Power, but to the Power on which he depends and will be transmitted to it through the medium of the Protecting Power.[117] The Convention makes no provision for the procedure to be followed beyond this point, probably for the reason that the problem is a domestic one which would be inappropriate for inclusion in an international convention. Nevertheless, it may well be that, in the long run, the present policy, by transferring responsibility to the Power upon which he depends, upon the repatriation of the prisoner of war, will prove of more value to the disabled prisoner of war than the apparently more generous policy expressed in the 1929 Convention.[118]

Grievance Procedures. In general, any prisoner of war who believes that the rights guaranteed to him by the 1949 Convention are, in any manner whatsoever, being violated in connection with his utilization as a source of labor, would have the right to avail himself of any of the channels of complaint established by the Convention: to the representatives of the Protecting Power (Articles 78 and 126); to the prisoners' representative (Articles 78, 79, and 81); and, perhaps, to representatives of the International Committee of the Red Cross (Articles 9, 79, 81, and 126).[119] Nevertheless, the Diplomatic Conference felt it advisable to include in Article 50 (which lists the classes of authorized labor) a specific provision permitting prisoners of war to exercise their right of complaint, should they consider that a particular work assignment is in a prohibited industry. It is somewhat difficult to perceive the necessity for this provision or that it adds anything to the general protection otherwise accorded to the prisoner of war by the appropriate provisions of the Convention. In fact, the danger always exists that by this specific provision the draftsmen may have unwittingly diluted the effect of the general protective provisions in areas where no specific provision has been included.

Conclusion

Utilization of prisoner-of-war labor means increased availability of manpower and a reduction in disciplinary problems for the Detaining Power, and an active occupation, better health and morale, and, perhaps, additional purchasing power for the prisoners of war. It is obvious that both sides will have much to gain if all of the belligerents comply with the labor provisions of the 1949 Convention.

On the whole, it is believed that these labor provisions represent an improvement in the protection to be accorded prisoners of war in any future conflict. True, they contain ambiguities and compromises which can serve any belligerent which is so minded as a basis for justifying the establishment of policies which are contrary to the best interests of the prisoners of war detained by it and which are probably contrary to the intent of the drafters. However, it must be assumed that nations which have ratified or adhered to the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, many of which were likewise involved in its drafting, will, to the maximum extent within their capabilities, implement it as the humanitarian charter which it was intended to be. And, in any event, two factors are always present which tend to call forth this type of implementation: the presence of the Protecting Power and the doctrine of reciprocity.[120] Information as to the interpretation and implementation of the Convention by a belligerent is made known to the other side through the Protecting Powers and thus becomes public knowledge with the resulting effect, good or bad, on world public opinion. Policies which, while perhaps complying with a strict interpretation of the Convention, are obviously overly restrictive in an area where a more humanitarian attitude appears justified and could easily be employed, will undoubtedly result in the adoption of an equally or even more restrictive policy by the opposing belligerent. Such retorsion can easily lead to charges of reprisals, which are outlawed, and thus create a situation which, whether or not justified, can only result in harm to all of the prisoners of war held by both sides. While there were nations which, during World War II, appeared to be disinterested in the effect that their treatment of prisoners of war was having on the treatment received by their own personnel detained by the enemy, it is to be hoped that in any future war, even one which represents the "destruction of an ideology,"[121] at the very least, concern for the fate of its own personnel will cause each belligerent to apply the doctrine *pacta sunt servanda* scrupulously in establishing policies which implement, among others, the labor provisions of the Geneva Prisoner of War Convention of 1949.

Notes

1. Davis, "The Prisoner of War," 7 A.J.I.L. 521, 523 (1913).

2. 32 Stat. 1803; U. S. Treaty Series, No. 403; 1 A.J.I.L. Supp. 129 (1907).

3. The Detaining Power is the state which holds captured members of the enemy armed forces in a prisoner-of-war status. The Power in whose armed forces they were serving at the time of capture is known as the "Power upon which they depend."

4. Part of Art. 76 of Professor Francis Lieber's famous General Orders No. 100, April 24, 1863, "Instructions for the Government of the Armies of the United States in the Field," had dealt with this subject unilaterally; and provisions with respect thereto had likewise been included in Art. 25 of the Declaration drafted at the Brussels Conference of 1874 (2 U. S. Foreign Relations (1875) 1017; 1 A.J.I.L. Supp. 96 (1907)), and in Arts. 71 and 72 of the "Oxford Manual" drafted by the Institute of International Law in 1880 (Annuaire de l'Institut de Droit International, 1881-1882). While these efforts unquestionably influenced in material degree the decisions subsequently reached at the international level, none of them constituted actual international legislation.

5. Art. 6 thereof (cited note 2 above) reads:

"The State may utilise the labour of prisoners of war according to their rank and aptitude. Their tasks shall not be excessive, and shall have nothing to do with military operations.

"Prisoners may be authorised to work for the public service, for private persons, or on their own account.

"Work done for the State shall be paid for according to the tariffs in force for soldiers of the national army employed on similar tasks.

"When the work is for other branches of the public service or for private persons, the conditions shall be settled in agreement with the military authorities.

"The wages of the prisoners shall go towards improving their position, and the balance shall be paid them at the time of their release, after deducting the cost of their maintenance."

6. 36 Stat. 2277; U. S. Treaty Series, No. 539; 2 A.J.I.L. Supp. 90 (1908).

7. 47 Stat. 2021; U. S. Treaty Series, No. 846; 27 A.J.I.L. Supp. 59 (1933).

8. 6 U. S. Treaties 3316; T.I.A.S., No. 3364; 75 U. N. Treaty Series 135 (I:972); 47 A.J.I.L. Supp. 119 (1953).

9. Arts. 49 through 57 and Art. 62 are the basic articles of the 1949 Convention relating to the subject of prisoner-of-war labor. Mention will also be made of a number of other articles which touch on the subject.

10. The author does not believe in the inevitability of major wars in the future, but he does believe, as did the 59 states which sent representatives to the Diplomatic Conference in Geneva in 1949 and the 87 states which have since either ratified or adhered to the four Conventions for the Protection of War Victims produced at that Conference, that, human nature being what it is, the outlawing of war and the existence of a state of peace are insufficient reasons for the apathy and attitude of complete disregard of the development of the law of war which has characterized many experts in the field of international law. Fortunately, there is evidence that a change in this attitude has occurred in recent years.

11. A general cartel governing the exchange of prisoners of war was entered into in 1862 (the Dix-Hill Cartel, July 22, 1862, War of the Rebellion, Series II, Vol. IV, p. 266 (1899)), but it was not observed to any great degree by either side. Lewis and Mewha, History of Prisoner of War Utilization by the United States Army, 1776-1945 (hereinafter referred to as Lewis, History), pp. 29-30 (1955).

12. Lewis, History 27, 41. For a vivid fictional, but factually accurate, picture of this waste of manpower in the South, with its resulting evils to the prisoners of war themselves, see Kantor, Andersonville (1955).

13. Note 4 above.

14. Lewis, History 37, 38-39.

15. Preamble, Declaration of Brussels, note 4 above.

16. Note 4 above.

17. Belfield, "The Treatment of Prisoners of War," 9 Transactions of the Grotius Society 131 (1924).

18. Lewis, History 57. This was not the case in France, where the American Expeditionary Force had started planning for prisoner-of-war utilization even before any were captured, the established policy there being that all except officers would be compelled to work. *Ibid.* 59-62.

19. See, for example, the Final Act of the Conference of Copenhagen, executed by Austria-Hungary, Germany, Rumania, and Russia on Nov. 2, 1917 (photostatic copy on file in The Army Library, Washington, D. C.); the Agreement between the British and Turkish Governments respecting Prisoners of War and Civilians, executed at Bern on Dec. 28, 1917 (111 Brit. and For. State Papers 557); the Agreement between France and Germany concerning Prisoners of War, executed at Bern on April 26, 1918 *(ibid.* 713); and the Agreement between the United States of America and Germany Concerning Prisoners of War, Sanitary Personnel, and Civilians, executed at Bern on Nov. 11, 1918 (U. S. Foreign Relations, 1918, Supp. 2, p. 103; 13 A.J.I.L. Supp. 1 (1919)). This latter Agreement contained a section of eleven articles (41-51) relating to prisoner-of-war labor.

20. 14 A.J.I.L. 95, 115 (1920); History of the United Nations War Crimes Commission 35 (1948).

21. Note 7 above. The "Final Report of the Treatment of Prisoners of War Committee," published in 30 International Law Association Reports 236 (1921), had contained a set of "Proposed International Regulations for the Treatment of Prisoners of War."

22. As the U.S.S.R. was not a party to this Convention, it considered that its relations with Germany and the latter's allies on prisoner-of-war matters were governed by the Fourth Hague Convention of 1907. Report of the International Committee of the Red Cross on its Activities during the Second World War (hereinafter referred to as ICRC Report), Vol. I, p. 412. (No mention was made by the U.S.S.R. of the situation created by the *si omnes* clause contained in that Convention.) Japan, which was likewise not a party to the 1929 Convention, nevertheless announced its intention to apply that Convention *mutatis mutandis* on a basis of reciprocity. *Ibid.* 443.

23. "The international instruments regulating the treatment of prisoners of war were drawn up on the basis of the experience gained in the war of 1914–1918 and did not contemplate the wholesale and systematic use which many countries have since made of captive labor." Anon., "The Conditions of Employment of Prisoners of War: The Geneva Convention of 1929 and its Application," 47 International Labour Review 169 (Feb., 1943).

24. In February, 1944, only 60% of the prisoners of war in the United States were being employed; by April, 1945, that figure had increased to more than 93%. Lewis, History 125. In Germany "the mobilisation of prisoner labour has been organised as part of the general mobilisation of man-power for the execution of the economic programme." Anon., "The Employment of Prisoners of War in Germany," 48 International Labour Review 316, 318 (Sept., 1943).

25. Thus, it has been stated that the improved feeding of Russian prisoners of war by the Nazis in 1942 was instituted in order to obtain an adequate labor performance, and "must be assessed as a tactical sacrifice of dogma for the sake of short-range benefits to the warring Reich." Dallin, German Rule in Russia 423 (1957). In the Milch Case (U. S. *v.* Erhard Milch), 2 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 (hereinafter referred to as Trials) 782, the Military Tribunal quoted a 1943 statement of Himmler who, in speaking of the Russian prisoners of war captured early in the war, deplored the fact that at that time the Germans "did not value the mass of humanity as we value it today, as raw material, as labor."

26. "The policy of the Japanese Government was to use prisoners of war and civilian internees to do work directly related to war operations." Judgment of the International Military Tribunal for the Far East 1082 (mimeo., 1948).

27. Lewis, History 199.

28. Fairchild and Grossman, The Army and Industrial Manpower 194 (1959).

29. 1 ICRC Report 327. See also Pictet, Commentary on the Geneva Convention relative to the Treatment of Prisoners of War (hereinafter referred to as Pictet, Commentary) 260 (1960); Flory, Prisoners of War 71 (1942); Girard-Claudon, Les prisonniers de guerre en face de l'évolution de la guerre 151 (unpublished thesis, Université de Dijon, 1949); Feilchenfeld, Prisoners of War 47 (1948). Art. 49 of the 1949 Convention specifically states that the utilization of prisoner-of-war labor is "with a view particularly to maintaining them in a good state of physical and mental health."

30. During World War II the Nazi use as miners of prisoners of war who did not have the necessary physical aptitude for this type of work and who were inexperienced was a constant source of trouble. The I. G. Farben Case (U. S. *v.* Krauch), 8 Trials 1187. The ICRC Delegate in Berlin finally proposed to the German High Command that prisoners of war over 45 years of age be exempted from working as miners, but this proposal was rejected by the Germans on the ground that the 1929 Convention made no reference to age as a criterion of physical qualification for compulsory labor. 1 ICRC Report 329-331. This situation has now been rectified.

31. The procedures followed in the United States during World War II were as follows:

"Prisoners of war . . . are given a complete physical examination upon their first arrival at a prisoner of war camp. At least once a month thereafter, they are inspected by a medical officer. Prisoners are classified by the attending medical officer according to their ability to work, as follows: (a) heavy work; (b) light work; (c) sick, or otherwise incapacitated—no work. Employable prisoners perform work only when the job is commensurate with their physical condition." MacKnight, "The Employment of Prisoners of War in the United States," 50 International Labour Review 47 (July, 1944).

Major MacKnight's statement was based, at least in part, upon the U. S. War Department's Prisoner of War Circular No. 1, Regulations Governing Prisoners of War, sec. 87 (Sept., 1943), which was, in turn, taken from Art. 48 of the 1918 U. S.-German Agreement, note 19 above.

32. Art. 31 speaks of "medical inspections," while Art. 55 uses the term "medical examinations." (A similar variation is found in the French version of the 1949 Convention.) It does not appear that any substantive

difference was intended by the draftsmen, particularly inasmuch as Art. 31 considerably amplifies the term "inspection," making it clear that much more than a mere visual inspection was intended.

33. Pictet, Commentary 289. Captured medical service personnel are not prisoners of war and are entitled to be repatriated as soon as possible. Arts. 28 and 30, 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. 6 U. S. Treaties 3114; T.I.A.S., No. 3362; 75 U. N. Treaty Series 31 (I:970). However, the Detaining Power may temporarily retain some of these individuals to provide needed medical attention to prisoners of war, primarily those belonging to the armed forces of the Power to which the medical service personnel themselves belong (Art. 33). When so employed they are known as "retained medical personnel."

34. Similarly, the function of determining whether a prisoner of war should be repatriated for medical reasons is not allocated to the retained medical personnel, but is the responsibility of the medical personnel of the Detaining Power and of the Mixed Medical Commissions (Art. 112).

35. During the Russo-Japanese War (1904-1905) the Japanese exempted officer prisoners of war from the requirement to work. Ariga, La guerre russo-japonaise au point de vue de droit international 114 (1907). But compare Takahashi, who stated that Japan did not impose labor on any Russian prisoners of war! International Law Applied to the Russo-Japanese War 125 (1908).

36. The ICRC states that 26,000 German non-commissioned officer prisoners of war, whose identity papers had been taken from them in England, were compelled to work while interned in the United States because of their inability to prove their status. 1 ICRC Report 339. The German General Staff urged German non-commissioned officer prisoners of war to work, probably in order to avoid the deterioration, both physical and mental, which comes to the completely inactive prisoners of war. *Ibid.*

37. Early in 1945 the U. S. military authorities discovered that many German prisoners of war had false documents purporting to prove non-commissioned status. They thereupon required all German prisoners of war who claimed to be non-commissioned officers to produce proof of such status in the form of a *"soldbuch"* or other official document. Thousands were unable to do so and were reclassified as privates. A Brief History of the Office of the Provost Marshal General, World War II, 516 (mimeo., 1946). To some extent these may have been the same prisoners of war referred to in the preceding note.

38. It appears to the writer that the U. S. Army has created problems for itself in this respect by the establishment of a "specialist" classification of enlisted men who, although grouped in the same statutory grades as non-commissioned officers, are specifically stated not to be such. U. S. Army Regulations 600-201, June 20, 1956. The strict interpretation of the term "non-commissioned officers" contemplated by the U.S.S.R. is evidenced by its expressed desire to limit non-commissioned officer labor exemption privileges to regular army ("re-enlisted") personnel. Final Record of the Diplomatic Conference of Geneva of 1949 (hereinafter referred to as Final Record), Vol. IIA, pp. 348, 361, 566.

39. Pictet, Commentary 262.

40. Sec. 59, German Regulations, Compilation of Orders No. 13, May 16, 1942. The apparent magnanimity of this provision is somewhat nullified by the last two sentences thereof, which indicate that "the employment of British non-commissioned officers has resulted in so many difficulties that the latter have by far outweighed the advantages. The danger of sabotage, too, has been considerably increased thereby."

41. U. S. War Department Technical Manual 19-500, Enemy Prisoners of War, Oct. 5, 1944, Ch. 5, Sec. I, para. 4c. A draft revision of this Manual, which is currently under consideration in the Department of the Army, provides that "a non-commissioned officer may, at any time, revoke his voluntary request for work."

42. Pictet, Commentary, *loc. cit.* The Commentary continues with the statement that "during the Second World War, however, prisoners of war were sometimes more or less compelled to sign a contract for an indefinite period which bound them throughout their captivity; that would be absolutely contrary to the present provision. " The present writer confesses himself unable to identify the portion of Art. 49 of the 1949 Convention which so provides, or to determine wherein, in this respect, it differs from the provisions of the 1929 Convention..

43. 1 ICRC Report 337-338.

44. Note 33 above.

45. Statement of Mr. William E. Gardner (U.K.), IIA Final Record 442. In a statement in a similar vein, Brig. Gen. Joseph V. Dillon, then the Provost Marshal General of the U. S. Air Force, and a member of the U. S. Delegation at Geneva, later wrote:

"Perhaps no section of the Convention gave rise to more debate and expressions of differences of view than that dealing with 'Labour of Prisoners of War.' At the outset, it appeared that all that could be agreed upon was the fact that the 1929 treatment of the subject was inadequate and ambiguous." "The Genesis of the 1949 Convention Relative to the Treatment of Prisoners of War," 5 Miami Law Quarterly 40, 51 (1950).

46. Baxter, Book Review, 50 A.J.I.L. 979 (1956).

47. Art. 25, Declaration of the Conference of Brussels (1874), note 4 above; Art. 71, "Oxford Manual" (1880), note 4 above.

48. Art. 6, Second Hague Convention of 1899, notes 2 and 5 above. The only changes incorporated in Art. 6, Fourth Hague Convention of 1907, note 6 above, were periphrastic in nature.

49. "What constituted a direct relation with war operation was a matter of personal opinion or, indeed, guess." Dillon, *loc. cit.* note 45 above, at 52. Similarly, in the I. G. Farben Case (U. S. v. Carl Krauch), 7 Trials 1, the Military Tribunal said (8 *ibid.* 1189):

"To attempt a general statement in definition or clarification of the term 'direct relation to war operations' would be to enter a field that the writers and students of international law have found highly controversial...."

50. Flory, "Vers une nouvelle conception du prisonnier de guerre?" 58 Revue générale de droit international public 58 (1954); Janner, La Puissance protectrice en droit international d'après les expériences faites par la Suisse pendant la seconde guerre mondiale 54 (1948; original in German); Feilchenfeld, *op. cit.* note 29 above, at 13.

51. The United States found it necessary to establish a Prisoner of War Employment Review Board, which was called upon to make a great number of decisions in this area. Mason, "German Prisoners of War in the United States," 39 A.J.I.L. 198 (1945). Postwar researchers have collated lists which include literally hundreds of occupations as to which specific decisions were made. Lewis, History 146-147, 166-167, 203; Tollefson, "Enemy Prisoners of War," 32 Iowa Law Review 51, note on 62 (1946).

52. Draft Revised or New Conventions for the Protection of War Victims 82-83 (Art. 42) (XVIIth International Red Cross Conference, Stockholm, 1948).

53. "... work which is normally required for the feeding, sheltering, clothing, transportation and health of human beings ..." 1 Final Record 83. It is of interest that this was substantially the policy which had been followed by the United States in interpreting the provisions of Art. 31 of the 1929 Convention. MacKnight, *loc. cit.* note 31 above, at 54.

54. Remarks and Proposals submitted by the International Committee of the Red Cross (Diplomatic Conference, Geneva, 1949) 51-52.

55. Art. 50 reads:

"Besides work connected with camp administration, installation or maintenance, prisoners of war may be compelled to do only such work as is included in the following classes:

(*a*) agriculture;

(*b*) industries connected with the production or the extraction of raw materials, and manufacturing industries, with the exception of metallurgical, machinery and chemical industries; public works and building operations which have no military character or purpose;

(*c*) transport and handling of stores which are not military in character or purpose;

(*d*) commercial business, and arts and crafts;

(*e*) domestic service;

(*f*) public utility services having no military character or purpose.

"Should the above provisions be infringed, prisoners of war shall be allowed to exercise their right of complaint, in conformity with Article 78."

56. In its Report to the Plenary Assembly of the Diplomatic Conference, Committee II (Prisoners of War) characterized this article as one which "clarifies [it] by a limitative enumeration of the categories of work which prisoners may be required to do." 2A Final Record 566. On the contrary, the expression "military character and purpose" used in subparas. *b, c,* and *f,* of Art. 50, is almost indefinable. As to these subparagraphs, the basic problem, which existed when the words "war operations" were used, remains unchanged. Pictet, Commentary 266.

57. The difficulties experienced in selecting the appropriate verb to be used in the opening sentence of Art. 50 were typical of the over-all drafting problem. The following terms were contained in or suggested for the various texts, beginning with the original ICRC draft, which was submitted to the 1948 Stockholm Conference, and continuing chronologically through the various drafts, amendments, and discussions, until final approval of the article by the Plenary Assembly: "obliged to" (note 52 above); "required to" (1 Final Record 83); "obliged to" (3 *ibid.* 70); "employed on" (2A *ibid.* 272); "engaged in" (*ibid.* at 470); "obliged to" (*ibid.* at 344); "compelled to" (2B *ibid.* 176); and "compelled to" (Art. 50, note 55 above).

58. Par. 77, Prisoner of War Circular No. 1, note 31 above. Para. 78 of the same Circular contained the following informative enumeration:

"78. Labor in class one is primarily for the benefit of prisoners. It need not be confined to the prisoner of war camp or to the camp area. Class one labor includes:

"*a.* That which is necessary for the maintenance or repair of the prisoner of war camp compounds including barracks, roads, walks, sewers, sanitary facilities, water pipes, and fences.

"*b.* Labor incident to improving or providing for the comfort or health of prisoners, including work connected with the kitchens, canteens, fuel, garbage disposal, hospitals and camp dispensaries.

"*c.* Work within the respective prisoner companies as cooks, cook's helpers, tailors, cobblers, barbers, clerks and other persons connected with the interior economy of their companies. In apportioning work, consideration will be given by the company commander to the education, occupation, or profession of the prisoner."

59. The utilization of prisoner-of-war labor for the operation and maintenance of military installations occupied by the armed forces of the Detaining Power does *not* fall within the classification of camp administration referred to in the Convention. While many such uses would probably come within the category of domestic services (cooks, cook's helpers, waiters, kitchen police, etc.), which are authorized, it would seem that many others are no longer permitted. (Employment in the Prisoner of War Information Bureau maintained by the Detaining Power is specifically authorized by Art. 122.)

60. Fairchild, *op. cit.* note 28 above, at 190. See also MacKnight, *loc. cit.* note 31 above, at 57.

61. In the spring of 1940 more than 90% of the Polish prisoners of war held by the Germans were employed in agriculture; and while this figure later dropped considerably, it always remained extremely high. Anon., "The Employment of Prisoners of War in Germany," note 24 above, at 317. In the United States, even though more than 50% of the man-months worked in industry by prisoners of war were performed in agricultural work, the demands for such labor could never be fully met. Lewis, History 125-126. An exception to the foregoing occurred in Canada, where the great majority of prisoners of war were used in the lumbering industry. Anon., "The Employment of Prisoners of War in Canada," 51 International Labour Review 335, 337 (March, 1945).

62. Pictet, Commentary 266. It is interesting to note that the enumeration originally prepared by the ICRC (note 52 above), which was ultimately restored to the Convention at the behest of the U.K. Delegation to the Conference, did not include agriculture as a separate item. A member of the U.S. Delegation urged that it be specifically listed, and his proposal was adopted without discussion or opposition. 2A Final Record 470.

63. 1 ICRC Report 329. For a specific example, see note 30 above. Unfortunately, little data is available concerning the activities of Protecting Powers in this regard, as they rarely publish any details of their wartime activities, even after the conclusion of peace (Levie, " Prisoners of War and the Protecting Power, " 55 A.J.I.L. 374, 378 (1961)). An unofficial report of Swiss activities as a Protecting Power during World War II is contained in Janner, note 50 above.

64. The source of some of the wording and punctuation of subpara. (*b*) of Art. 50 is somewhat obscure. As submitted by Committee II (Prisoners of War) to the Plenary Assembly of the Diplomatic Conference, it read:

". . . manufacturing industries, with the exception of iron and steel, machinery and chemical industries and of public works, and building operations which have a military character or purpose" (2A Final Record 585-586). Although this portion of Art. 50 was approved by the Plenary Assembly without amendment, in the Final Act of the Conference (which is, of course, the official, signed version of the Convention), the same provision reads:

". . . manufacturing industries, with the exception of metallurgical, machinery and chemical industries; public works and building operations which have no military character or purpose" (1 Final Record 254). These changes in wording and punctuation (made in the English version only) represent a considerable clarification and should eliminate many disputes which might otherwise have arisen. However, it would be interesting to know their origin!

65. Lewis, History 77. After World War II one of the U. S. Military Tribunals at Nuernberg held:

". . . as a matter of law that it is illegal to use prisoners of war in armament factories and factories engaged in the manufacture of airplanes for use in the war effort." The Milch Case (U. S. *v.* Erhard Milch), note 25 above, at 867. The decision would, in part, probably have been otherwise had the defense been able to show that the airplanes were intended exclusively for civilian use.

66. Pictet, Commentary 268-269.

67. As indicated in note 57 above, the decision to use the words "compelled to" in the first sentence of Art. 50 was reached only after the consideration and rejection of numerous alternatives. Words such as "prisoners of war may only be employed in" were strongly urged because they would preclude the Detaining Power from using pressure to induce prisoners of war to "volunteer" for work which they could not be compelled to do (2A Final Record 343); and words such as "prisoners of war may be obliged to do only" ("compelled to do only") were just as strongly urged on the very ground that the alternative proposal would preclude volunteering (*ibid.* at 342). The proponents of the latter position were successful in having their phraseology accepted by the Plenary Assembly.

68. See Levie, "Penal Sanctions for Maltreatment of Prisoners of War," 56 A.J.I.L. 433, at 450, note 71 (1962). The ICRC appears to be inconsistent in asserting that the prohibition against prisoners of war working in these industries is absolute (Pictet, Commentary 268), but that prisoners of war may volunteer to handle stores which are military in character or purpose *(ibid.* at 278), work which the Detaining Power is likewise prohibited from compelling prisoners of war to do. The statement that the absolute prohibition of Art. 7 against the voluntary renunciation of rights by prisoners of war was necessary "because it is difficult, if not impossible, to prove the existence of duress or pressure" (*ibid.* at 89) is, of course, equally applicable to all of the prohibitions of Art. 50, but the Diplomatic Conference obviously elected to take a calculated risk in this regard insofar as prisoner-of-war labor is concerned.

69. In his article (note 45 above, at p. 52), General Dillon showed considerable restraint when he said merely that many delegations believed that the phrase "will create some difficulty in future interpretations. " He had been much more vehement at the Diplomatic Conference! (2A Final Record 342-343.)

70. The test is whether it is intended for military use, and not whether it is intended for use by the military. A bowling alley or a tennis court or a clubhouse might be intended, perhaps exclusively, for use by the military, but such structures certainly have no military use *per se* and, therefore, they do not have a "military purpose."

71. The foregoing position closely resembles the legal interpretation of the phrase in question proposed by the present author and approved by The Judge Advocate General of the United States Army in an unpublished opinion written in 1955 (JAGW 1955/88). It differs from the ICRC position, which is that "everything which is commanded and regulated by the military authority is of a military character, in contrast to what is commanded and regulated by the civil authorities." Pictet, Commentary 267.

72. Flory, *op. cit.* note 29 above, at 74.

73. The High Command Case (U. S. *v.* Wilhelm von Leeb), 11 Trials 534. No such uncertainty existed in the minds of the members of the Tribunal with respect to the use of prisoners of war in the construction of combat zone field fortifications. *Ibid.* 538.

74. Lewis, History 89.

75. Sec. 738, German Regulations, Compilation of Orders No. 39, July 15, 1944.

76. Pictet, Commentary 267-268, where a distinction is justifiably drawn between clearing debris from city streets and clearing it from an important defile used only for military purposes.

77. In Pictet, Commentary 268, the statement is made that these public utility services have a military character "in sectors where they are under military administration." The present writer finds it impossible to agree that the nature of the administration of these public services can determine their inherent character. If this were possible, then public utility services administered by the military authorities in an occupied area, as is normally the case, would be military in character, even though originally constructed for and then being used almost exclusively by the civilian population of the occupied territory.

78. Lewis, History 112; MacKnight, *loc. cit.* note 31 above, at 55. The latter continues with the following statement:

". . . The particular task is considered, not the industry as a whole. The specific conditions attending each job are decisive. For example, an otherwise dangerous task may be made safe by the use of a proper appliance, and an otherwise safe job rendered dangerous by the circumstances in which the work is required to be done. Work which is dangerous for the untrained may be safe for those whose training and experience have made them adept in it." The third criterion mentioned in the text has already been discussed above.

79. In determining whether an industry was of a nature to require special study, The Judge Advocate General of the United States Army rendered the following opinion in 1943:

". . . If in particular industries the frequency of disabling injuries per million man-hours is:

"*a.* Below 28.0—prisoner-of-war labor is generally available therein;

"*b.* Between 28.0 and 35.0—the industry should be specifically studied, from the point of view of hazard, before assigning prisoner-of-war labor therein;

"*c.* Over 35.0—prisoner-of-war labor is unavailable, except for the particular work therein which is not dangerous. . . ."

80. Those interested in the history and background of this problem and the debate at the Diplomatic Conference are referred to the following sources: 1 ICRC Report 334; 3 Final Record 70-71; 2A *ibid.* 272-273, 443-444, 345; 2B *ibid.* 290-295, 298-299; Pictet, Commentary 277-278.

81. "This rule has the advantage of being clear and easy to apply. The reference is to objective rules enforced by that Power and not the personal feelings of any individual member of the armed forces. The essential thing is that the prisoner concerned may not be the laughing stock of the those around him." Pictet, Commentary 277.

82. Although prohibitions against the use of prisoners of war on humiliating work were contained in Art. 25 of the Declaration of Brussels and Art. 71 of the Oxford Manual (note 4 above), there was no similar

provision in the 1929 Convention. Nevertheless, during World War II the United States recognized the prohibition against the employment of prisoners of war on degrading or menial work as a "well settled rule of the customary law of nations" (MacKnight, *loc. cit.* note 31 above, at 54), and even prohibited their employment as orderlies for other than their own officers (Lewis, History 113). While this latter type of work is prohibited for personnel of the U. S. Army, it is believed that the prohibition is based upon policy rather than upon the "humiliating" nature of an orderly's functions. Apparently this is settled policy for the United States, as the same rule is found in the draft of the new directive on the subject of prisoner-of-war labor which is being prepared by the U. S. Army.

83. In addition, Art. 25 prescribes specific minimum standards for accommodations; Art. 26 provides for such additional rations as may be necessary because of the nature of the labor on which the prisoners of war are employed; and Art. 27 provides that prisoners of war shall receive clothing appropriate to the work to which they are assigned. It has been asserted that not only must the living conditions of prisoner-of-war laborers not be inferior to those of local nationals, but also that this provision may not "prevent the application of the other provisions of the Convention if, for instance, the standard of living of citizens of the Detaining Power is lower than the minimum standard required for the maintenance of prisoners of war." Pictet, Commentary 271. While the draftsmen did intend to establish two separate standards (2A Final Record 401), at least as to clothing, it is difficult to believe that any belligerent will provide prisoners of war with a higher standard of living than that to which its own civilian citizens have been reduced as a result of a rigid war economy.

84. *Ibid.* 275.

85. Pictet, Commentary 271-272.

86. 2A Final Record 275.

87. It could be argued that a proper grammatical construction of the provision of the Convention makes only the protective equipment and not the training subject to national standards. However, this is debatable, and, even if true, it would merely result in the application of an international standard in the very area where the national standard would probably be highest.

88. The Judgment of the International Military Tribunal for the Far East (note 26 above, at 1002) mentioned "forced labor in tropical heat without protection from the sun" as one of the atrocities committed against prisoners of war by the Japanese. The motion picture, "The Bridge on the River Kwai," graphically portrayed the problem.

89. Art. 27 of the 1949 Convention specifically mentions that, in issuing clothing to prisoners of war (without regard to the work at which they are employed), the Detaining Power "shall make allowance for the climate of the region where the prisoners are detained. "

90. Art. 89 of the 1949 Convention contains an enumeration of the punishments which may be administered to a prisoner of war as a disciplinary measure for minor violations of applicable rules and regulations.

91. At the Diplomatic Conference Mr. B. J. Wilhelm, the representative of the International Committee of the Red Cross, stated that experience had indicated that the majority of all prisoners of war were maintained in labor detachments. 2A Final Record 276. This is confirmed by the series of articles which had appeared in the International Labour Review during the course of World War II. See 47 International Labour Review 169, note 23 above, at 187 (general); 48 *ibid.* 316, note 24 above, at 318 (Germany); Anon., "The Employment of Prisoners of War in Great Britain," 49 *ibid.* 191 (Feb., 1944); and MacKnight, *loc. cit.* note 31 above, at 49 (United States).

92. In addition to the requirements of Art. 56 for the observance of the present Convention in labor detachments, specific provisions as to these detachments are contained in Arts. 33 (medical services), 35 (spiritual services), and 79 and 81 (prisoners' representatives), among others.

93. For example, Art. 25 provides that the billets provided for prisoners of war must be adequately heated. The fact that the parent prisoner-of-war camp has central heating, while the billets occupied by the men of the labor detachment have separate, but adequate, heating facilities, does not constitute a violation of the Convention.

94. This latter provision is included in order to enable them to register a complaint concerning their treatment, should they believe that it is below Convention standards. Of course, complaints may also be made to the representatives of the Protecting Power, who may visit these detachments whenever they so desire (Arts. 56 and 126), but these latter are not always immediately available, while the prisoners' representatives are. During World War II, both Great Britain and the United States provided for inspections by their own military authorities of the treatment of prisoners of war who were working for private employers. Anon., "The Employment of Prisoners of War in Great Britain," note 91 above, at 192; Mason, *loc.* cit. note 51 above, at 212.

95. Members of the U. S. Armed Forces may not accept parole, except for very limited purposes. Code of Conduct, Exec. Order No. 10631, Aug. 17, 1955, 20 Fed. Reg. 6057; The Law of Land Warfare, FM

27-10, U. S. Army, July, 1956, sec. 187. The British rule is substantially similar. Manual of Military Law, Part III, The Law of War on Land, 1958, sec. 246, note 1.

96. In Pictet, Commentary 296, the argument is made, and with considerable merit, that escape is an act of war and that only military personnel of the Detaining Power are authorized to respond to this act of war with another act of war—the use of weapons against a prisoner of war. This theory finds support in the safeguards surrounding the use of weapons against prisoners of war, especially those involved in escapes, found in Art. 42 of the 1949 Convention.

97. See, for example, the World War I agreements listed in note 19 above, and Lauterpacht, "The Problem of the Revision of the Laws of War," 29 Brit. Yr. Bk. of Int. Law 360, 373 (1952).

98. By becoming parties to the Convention they have given up their sovereign right to enter into special agreements adversely affecting the rights guaranteed to prisoners of war by the Convention.

99. Statement of Mr. R. J. Wilhelm, the representative of the International Committee of the Red Cross, 2A Final Record 275.

100. 2B *ibid.* 300.

101. The Conference of Government Experts called by the ICRC in 1947 had originally considered setting maximum working hours, but finally decided against it as being "discrimination in favour of PW, which would not be acceptable to the civilian population of the DP." Report on the Work of the Conference of Government Experts 176 (1947). As stated in Anon., "The Conditions of Employment of Prisoners of War," note 23 above, at 194:

"The prisoner cannot expect better treatment than the civilian workers of the detaining Power.... His fate depends upon the extent to which the standards of the country where he is imprisoned have been lowered through the exigencies of the war."

102. During World War II, many countries used the piece or task-work method of controlling prisoner-of-war labor. Pictet, Commentary 282; Anon., "The Employment of Prisoners of War in Canada," note 61 above, at 337. In the United States the piece-work system was used, but to control pay rather than work hours. Lewis, History 120-121. As long as the pay does not drop below the minimum prescribed by the Convention, there would appear to be no objection to this procedure.

103. Nor was it subject to national standards in the 1929 Convention, but the Germans refused to accord prisoners of war a weekly day of rest on the ground that the civilian population did not receive it. Janner, *op.cit.* note 50 above.

104. Pictet, Commentary 313; ICRC Report 286.

105. Actually, Art. 62 refers to "working rate of pay" twice and to "working pay" four times, while Arts. 54 and 64 refer only to "working pay." The term "indemnité de travail" is used in the French version of all of these articles and the difference in English appears to be an error in drafting. The report of the Financial Experts at the 1949 Diplomatic Conference (2A Final Record 557) states:

"It appeared that the expression 'wages' was inappropriate and might give the impression that prisoners of war while fed and housed at the cost of the Detaining Power were in addition being remunerated for their work at a rate corresponding to the remuneration of a civilian worker responsible for maintaining himself and his family out of his wages. For this reason, it was decided to substitute the terms 'working pay' wherever this was necessary."

106. The inadequacy of the minimum set by the Convention, which amounts to approximately six cents a day in money of the United States (approximately 5 d. in British money), is illustrated by the fact that almost a century ago, in 1864, during the American Civil War, the Federal Government set the rate of prisoner-of-war pay at ten cents a day for the skilled and five cents a day for the unskilled! Lewis, History 39. During World War II the United States paid prisoners of war 80 cents a day. *Ibid.* at 77. Under the incentive of the piece-work system it was possible to increase this to $1.20 a day. *Ibid.* at 120.

107. For some of these differences, see the quotation in note 105 above, and Mojonny, The Labor of Prisoners of War 24 (unpublished thesis, Indiana University, 1954). For a contrary view, see Pictet, Commentary 115.

108. During World War II the Germans habitually paid Soviet prisoners of war as little as one-half of the amount paid to prisoners of war of other nationalities. Dallin, note 25 above, at 425. Art. 16 of the 1949 Convention specifically prohibits "adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria."

109. This was the policy followed by the United States during World War II. Prisoner of War Circular No. 1, note 31 above, sec. 85.

110. Flory, *op. cit.*, note 29 above, at 79-80. The prisoner-of-war agreement concluded between France and Germany in 1915 had still a different approach: it provided that, upon repatriation, prisoners of war who had suffered industrial accidents would be treated as wounded combatants. Rosenberg, "International Law Concerning Accidents to War Prisoners Employed in Private Enterprises," 36 A.J.I.L. 294, 297 (1942).

111. Lauterpacht, *loc. cit.* note 97 above. Lauterpacht labels the negotiations as "elaborate" and as "concerning the relatively trivial question of the interpretation of Article 27."

112. Prisoner of War Circular No. 1, note 31 above, secs. 91 and 92; MacKnight, *loc. cit.* note 31 above, at 63.

113. Lauterpacht, *loc. cit.*

114. *E.g.*, Lewis, History 156.

115. In the British Manual of Military Law, *op. cit.* note 95 above, sec. 185, note 1, the statement is made that during the World War II negotiations the United Kingdom "considered that its domestic workmen's compensation legislation was too complex and so bound up with the conditions of free civilian workmen as to make it impracticable to apply it to prisoners of war." That position has become no less valid with the passing of the years since the end of that war.

116. Arts. 40 and 95 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (6 U. S. Treaties 3516; 75 U.N. Treaty Series 287 (I:973); 50 A.J.I.L. Supp. 724 (1956)) place upon the Detaining Power the additional burden of providing compensation for occupational accidents and diseases. The variation between the two conventions was noted by the Co-ordination Committee of the Diplomatic Conference (2B Final Record 149), but Committee II, to which had been assigned the responsibility for preparing the text of the prisoner-of-war convention, determined that such a provision was not necessary for prisoners of war (2A Final Record 402).

117. The suggestion has been made that, "since under Article 51, paragraph 2, he [the prisoner of war] is covered by the national legislation [of the Detaining Power] concerning the protection of labour," a prisoner of war disabled in an industrial accident or by an industrial disease would, while still a prisoner of war, be entitled to benefit from local workmen's compensation laws. Pictet, Commentary 286-287. It is believed that the application of this general provision of the Convention has been restricted in this area by the specific provision on this subject.

118. Anon., "The Conditions of Employment of Prisoners of War," note 23 above, at 182; Pictet, *loc. cit.*

119. The availability of the latter as a channel of complaint is not clearly defined. Levie, "Prisoners of War and the Protecting Power," *loc. cit.* note 63 above, at 396.

120. The activities of the International Committee of the Red Cross are likewise a major deterrent to the improper application of the Convention.

121. Statement of German General Keitel, quoted in the "Opinion and Judgment of the International Military Tribunal," 41 A.J.I.L. 172, 228-229 (1947).

IV

Across The Table At Pan Mun Jom

*38 Saint Louis University Magazine 10 (March 1965)**

In July 1951 the writer, then an Army legal officer stationed in Tokyo, was suddenly ordered to an undisclosed destination in Korea, for an undisclosed purpose, for about two weeks. In view of what was being discussed at great length over the radio and in the press, it was not difficult to conclude that the assigned mission was to help negotiate with the North Korean and Chinese Communists for an armistice to end fighting in Korea. One year later the writer was the last of the original staff to return to Tokyo, and there still was no agreement with the Communists on such an armistice. In fact, that agreement was not reached until July, 1953, two years rather than two weeks after the opening of the talks!

To write with purported authority on the basis of experiences which occurred more than a decade ago would be presumptuous in most areas of human conduct. Not so with respect to the negotiating techniques employed by the Communists. In this regard they all wear the same old school tie, whether they are Russian or Chinese, Bulgarian or North Korean. A perusal of both official and unofficial reports concerning negotiations with Communists conducted yesterday, a year ago, or a decade ago, will quickly reveal the use of some or all of the definitely non-diplomatic methods early adopted by Soviet negotiators. Subsequently they have been developed and refined until they have become standard operating procedure for any self-respecting Communist who is given the task of negotiating with representatives of a "decadent" capitalistic system.

Without attempting to be a psychiatrist, it is safe to say that one of the first things which impressed the United Nations Command (UNC) personnel at the armistice negotiations was that, without exception, every Communist representative, from senior delegate to substitute interpreter, suffered from an inferiority complex. This "chip-on-the-shoulder," "I'm-as-good-as-you-are" attitude is undoubtedly one of the many things which makes negotiations with Communists so difficult. Perhaps Soviet successes in space and Chinese nuclear successes will mitigate this, but psychiatrists will probably agree that a complete

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change in this mental attitude will require many more successes and a considerable period of time.

The publicly expressed Communist opposition to the use of helicopters by the UNC representatives was unquestionably motivated by their inability to provide a helicopter lift for their own personnel. When the UNC put in gravel walks around its side of the conference area at Pan Mun Jom, the Communists immediately put in gravel walks on their side. When the UNC lined the sides of its walks with rocks, they lined the sides of their walks with bricks and painted them white. When the UNC planted small fir trees in its area, they planted big ones in theirs. When the UNC installed green sentry boxes to protect its military police from the weather, they countered with sentry boxes for their guards which were painted like barber poles—until jokes by the Western correspondents caused them to reconsider and repaint. Similarly, it was undoubtedly this inferiority complex which caused the almost hysterical demands that the UNC negotiators stop referring to the Communist side as "North Korean Communists" and "Chinese Communists" and give them their "rightful' names, "Democratic Peoples' Republic of Korea" and "Chinese Peoples' Volunteers."

Another characteristic which appears to be endemic among Communists is a complete lack of a sense of humor and an accompanying marked inability to be on the receiving end of a joke. The incident of the sentry boxes which has just been mentioned was one example of this. Another involved a ten-year-old Korean boy who one day followed the UNC convoy into the neutral zone. He was arrested by the Communists who claimed that he was a spy for the United Nations Command. The UNC liaison officers demanded and obtained his return and the Western press treated the whole thing as a huge joke, making numerous references to the ten-year-old "master spy." There were no further attempts by the Communists, except behind the bamboo curtain, to capitalize on that particular incident. Similarly, when a small anti-epidemic team of the Republic of Korea Army inadvertently drove its truck into the neutral zone the Communists, in returning the men to the UNC liaison officers, labeled the incident a "very serious violation" of the agreement creating the neutral zone. The Western press wrote humorous stories about the "invasion of the neutral zone by soldiers armed to the teeth with DDT spray guns," and nothing further was heard about the matter from the Communists.

When the meetings began at Kaesong, the Communists did everything possible to create the impression that they were the hosts and that the UNC personnel were the visiting suppliants. Communist guards armed with sub-machine guns swarmed around the entire conference area. Packages of Chinese cigarettes and decanters of Chinese wine were on the conference table. And the Communists attempted to dictate who could be included in the UNC party and refused to pass a UNC convoy which included news correspondents.

Within twenty-four hours General Matthew B. Ridgway, the UNC Commander, ordered the conferences halted and laid down the terms upon which he would permit them to be resumed. The Communists quickly agreed. This was the first of a number of occasions upon which an immediate display of a firm and irrevocable intent brought quick acquiescence from the Communists. Not only the armed guards but the cigarettes and wine disappeared. It is perhaps appropriate to add that none of the UNC personnel had ever availed themselves of the Communist "hospitality" and that when, more or less intentionally, American cigarettes were left overnight on the conference table, they would be found untouched the following day.

Until the advent of the Communist era, the agenda was something upon which agreement was normally reached during the first few minutes of a diplomatic conference if not before hand. Now, reaching an agreement on the agenda sometimes has become harder than reaching agreement on substantive matters. This is primarily because of the Communists' attempt to trick the other side into concessions by means of the wording on agenda items.

For example, both sides were agreed at the very outset that there should be an item concerned with the selection of a military demarcation line, a dividing line between the opposing military forces once the cease-fire became effective. The UNC delegation proposed that this subject be included under the rubric "Establishment of a military demarcation line." The Communists refused to accept this proposed terminology, submitting as a counter-proposal the phrase "Establishment of the thirty-eighth parallel as a military demarcation line." Obviously, after agreement on such wording for the agenda item, there would have been little need for substantive discussions. Any attempt to discuss locating the military demarcation line at a point other than at the thirty-eighth parallel would have met with an immediate complaint by the Communists that the discussion was not within the framework of the mutually accepted agenda and with absolute refusal to take part in negotiations which would "violate" the now sacrosanct agenda. Here, again, the UNC refused to make any concession and the Communists eventually accepted the UNC-proposed terminology which thus permitted the substantive discussions to cover a whole range of suggested demarcation lines with the battle line finally being agreed upon for that purpose. Parenthetically, it is interesting to recall that while it took many months to get the Communists to abandon the thirty-eighth parallel, some months thereafter, when the UNC suggested using that line for determining which civilian refugees would be entitled to be sent to the other side, the Communists asserted that the UNC was attempting to revive the "obsolete" thirty-eighth parallel.

It is comparatively simple to trace the continuity over the years of the use of the agenda technique by the Communists. The problem of China has, of course, plagued the United Nations since early in 1950. The difference between the

traditional approach to the establishment of an agenda item and the Communist approach is well illustrated by the two items inscribed on the agenda of the Sixteenth Session of the General Assembly in 1961. The item proposed by New Zealand, worded so as to permit complete discussion of all aspects of the problem, was: "Question of the representation of China in the United Nations." The item proposed by the USSR (which was then still acting as Communist China's sponsor in the United Nations), was: "Restoration of the lawful rights of the Peoples' Republic of China."

The use of tactful language in international negotiations is merely evidence of bourgeois decadence in so far as the Communists are concerned. (Khrushchev's shoe-pounding performance at the 1960 meeting of the United Nations General Assembly, which so astounded most non-Communist representatives, was probably considered to be quite normal by the representatives of the satellite nations.) Any proposal that they made was invariably labeled "fair and reasonable." Just as invariably, any proposal made by the UNC was labeled "absurd and arrogant." Libelous statements about the United States, the Republic of Korea and the Republic of China were the Communist order of the day. Every UNC action was characterized as "barbarous" and "criminal" and every UNC statement as "deceitful" and a "fabrication." It was obvious that all of this was part of a strategy aimed at making the UNC negotiators lose their tempers, the theory probably being that when emotionally disturbed, unintended statements might be inadvertently made. But whatever the theory, the plan failed to work as the UNC representatives, naive as some of them may have been when the negotiations began, quickly came to appreciate what was being attempted and had no difficulty in avoiding the pitfall which had been so carefully prepared for them. In fact, the Communists soon found it necessary to completely reverse their tactics and to attempt to induce reciprocity by purported loss of temper on their side, loss of temper which could be turned on and off like water from a faucet. After a few polite but patently amused requests that they stop yelling across the table, this tactic was more or less abandoned, especially when one of the UNC staff officers pointed out that yelling in Chinese or Korean served no useful purpose since it was in a language he did not understand.

Major General (later General) Henry I. Hodes, one of the original members of the United Nations Command Delegation and the senior member of the first UNC sub-delegation (the other was Rear Admiral Arleigh. A. Burke, later an Admiral and Chief of Naval Operations), had a faculty for rubbing his Communist counterpart, Chinese Major General Hsieh Fang, the wrong way. The informal sub-delegation meetings on the military demarcation line had come to a complete halt. After both sides had maneuvered for some time with no perceptible progress being made, General Hodes suggested that a coin be

tossed to determine who would "break the ice." Hsieh Fang indicated great astonishment that General Hodes would be willing to let such an important matter be determined by the toss of a coin. To him the negotiatory technique employed was a matter of the utmost importance. General Hodes was just interested in getting the discussions moving. On another occasion, Hsieh Fang attempted to indicate his low regard for the United Nations Command Delegation by referring to Admiral Joy (almost a Chinese name) as "your Senior Delegate, whose name I do not recall." General Hodes answered him by referring to the Communist Senior Delegate and adding the phrase "whose name I trust you do recall." That ended that interchange very quickly.

When the UNC negotiators had no objection to something proposed by the Communists they would unhesitatingly so state. Not so the Communists. They would concede that their views were generally the same as those expressed by the UNC representative, or that they could see no reason why agreement should not be reached on the matter under discussion. It was just plain impossible to get them to say a simple "yes." Naturally, there was much speculation on the UNC side that this difficulty arose because the Communist representatives were not permitted on their own initiative to agree on even a minor administrative matter. No such difficulty was encountered when it came to getting them to say "no."

Over the course of time both sides became very reticent about the manner in which they proposed compromises. The UNC negotiators soon found that if they offered a compromise position somewhere between the announced positions of the two sides, the Communists would reject it out of hand, but that for all subsequent negotiations the two extremes were the original Communist position and the UNC compromise proposal. The UNC negotiators evened the score when the Communists made a proposal calling for agreement to a demand made by UNC on one matter in return for UNC agreement to a Communist demand on an entirely unrelated matter. The UNC accepted the Communist concession on its demand and declined to agree to the Communist demand on the other matter. It worked—but only once.

The Communists were either amazingly unimaginative or severely restricted when it came to administrative matters. Every suggestion without exception for expediting the progress of the negotiations was made by the UNC representatives. And that wasn't because they jumped the gun, either. On a number of occasions the UNC representatives would ask the Communists for a suggestion as to how some administrative matter should be handled. The Communists would come right back and ask for the UNC opinion. It would be given to them, and the next day they would agree to it, usually with some minor and unimportant modification made just to show that they had had a hand in reaching the decision. Incidentally, Navy Lieutenant Horace G.

Underwood, the senior UNC interpreter, stated that he had found it necessary to adopt the policy of intentionally inserting at least one fairly obvious error in all interpretations on which agreement was required, because then the Communists would be satisfied when they corrected the error, whereas, if there was no error, they invariably proposed some change in substance. More inferiority complex?

If any reader of this article should ever have the necessary but exhausting chore of negotiating with representatives of a Communist nation, he undoubtedly will encounter many of the techniques discussed here. For it is safe to say that Communist negotiating techniques are as immutable as the laws of nature.

V

Maltreatment of Prisoners of War In Vietnam

*48 Boston University Law Review 323 (1968)**

After the adoption of the Southeast Asia (Gulf of Tonkin) Resolution by the Congress of the United States in August, 1964,[1] there was a substantial increase in the American military presence in South Vietnam and consequent and parallel increases in the range and extent of belligerent activities. In accordance with its customary practice, the International Committee of the Red Cross[2] (hereinafter referred to as the ICRC) thereupon addressed a letter to the several parties to the conflict,[3] pointing out that they had all ratified or adhered to, and were bound by, the 1949 Geneva Conventions for the Protection of Victims of War.[4] The ICRC reminded the parties of their specific obligations under the Conventions,[5] and requested information as to the measures being taken by each of them to conform to the duties devolving upon them.

Replies were received from all of the parties concerned. The United States advised that it "has always abided by the humanitarian principles enunciated in the Geneva conventions and will continue to do so." Specifically, it affirmed that it was "applying the provisions of the Geneva Conventions [in Vietnam] and we expect the other parties to the conflict to do likewise."[6] The Republic of Vietnam (hereinafter referred to as South Vietnam) assured the ICRC that it was "fully prepared to respect the provisions of the Geneva Conventions and to contribute actively to the efforts of the International Committee of the Red Cross to ensure their application."[7]

The reply received from the Democratic Republic of Vietnam (hereinafter referred to as North Vietnam) was the usual propaganda tirade which appears to be endemic in Communist documents, thus making it rather difficult to isolate any truly responsive portions. However, the letter did state that North Vietnam would "regard the pilots who have carried out pirate-raids, destroying the property and massacring the population of the Democratic Republic of Vietnam, as major [war] criminals caught in flagrante delicto and liable for judgment in accordance with the laws of the Democratic Republic of Vietnam, *although captured pilots are well treated.*"[8] The National Liberation Front (hereinafter referred to as the NLF), the political arm of the Vietcong, flatly

* Reprinted in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 361 (Richard Falk ed., 1969).

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

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

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

Inasmuch as the long list of States which have ratified or adhered to the 1949 Geneva Conventions[11] contains all of the Communist countries, including the major sponsors of North Vietnam and the NLF, *viz* the USSR and the People's Republic of China, it is obvious that the refusal of North Vietnam and the NLF to consider themselves bound by even the limited humanitarian provisions enumerated in Article 3 of the Convention[12] cannot be because these provisions are in any manner contrary to the Communist concept of the law of war.[13] The only alternative is to assume that they consider that it is in their own self-interest not to be under any of the constraints imposed by a requirement to comply with these purely humanitarian aspects of the law of war. However, one engaged in armed hostilities, even as a rebel in a civil war, cannot thus divest himself of the requirement to comply with those portions of the law of war which constitute a part of the customary rules of international law recognized by all civilized nations—and, as we shall shortly see in more detail, the provisions of Article 3 of the Convention, for the most part, fall within this category.[14]

A. *The USSR during World War II*

During World War II, the USSR acknowledged that it was bound by the 1907 Hague Regulations[15] and the 1929 Geneva Wounded-and-Sick Convention,[16] and took the position that the provisions of these two agreements covered "all the main questions of captivity."[17] Based upon this statement the ICRC assumed that there would be, among other things, exchanges of lists of prisoners of war and of mail and relief packages, and that its delegates would be

permitted and enabled to enter Russia and to inspect prisoner-of-war camps located in that country. This was also the assumption of the enemies of the USSR. Despite continuous efforts on the part of the ICRC, however, none of these things ever eventuated.[18] One author ascribed this negative policy adopted by the USSR to the alleged "official Soviet position, that any soldier who fell into enemy hands was *ipso facto* a traitor and deserved no protection from his government."[19]

B. *North Korea*

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

C. *North Vietnam*

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

It would seem, at this point, to be fairly well established that the Communist countries, while ready to become parties to humanitarian war conventions, are not ready to comply with their provisions, for they are either not concerned about obtaining reciprocal treatment for their captured personnel, or, possibly,

they may assume that by their present method they will still obtain humane treatment for Communist personnel without any need to reciprocate—which is what has actually occurred in both Korea and Vietnam. Unfortunately, the result of this procedure can only be that eventually the other side in international armed conflicts, and the established government in civil armed conflicts, will refuse to apply the Convention until confirmation of the fact that it is being applied by the Communist side.[24] Although this procedure certainly would leave much to be desired from the immediate humanitarian point of view, it might, in the long run, prove to be more humanitarian to the greater number of persons. Of course, the argument would undoubtedly be made, in opposition to such a procedure, that the obligation to comply with the Convention does not depend upon reciprocity, but upon the undertaking made to all the other parties thereto, and also that the Convention creates individual rights which may not be withdrawn because of the failure of one side to comply.[25] While this may well be true, it is unquestionably going to be increasingly difficult to persuade a country engaged in armed conflict with a Communist country, or an established government engaged in civil strife with a Communist uprising, that it must give Communist prisoners of war the benefits of the Convention while its own captured personnel do not even receive the minimum benefits of customary international law. They will undoubtedly tend to take the position that there must be a point at which the refusal of the Communist side to comply with the provisions of the Convention releases the other side from its obligations thereunder.[26]

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

Whether the fighting which is taking place in Vietnam constitutes an international armed conflict or a civil war has been the subject of considerable dispute. It is the official position of the United States that what is taking place in Vietnam is an international armed conflict.[27] This position has received support from unofficial sources.[28] Opponents of United States participation in the Vietnamese hostilities assert that it is a civil war.[29] Before proceeding to a discussion of specific instances of the improper treatment of prisoners of war, let us examine the law applicable under the various possibilities.

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

> [T]he present Convention shall apply to all cases of declared war *or of any other armed conflict* which may arise between two or more of the High Contracting Parties, *even if the state of war is not recognized by one of them.* (Emphasis added).

The meaning of the quoted provisions is clear; and at no time since the drafting of the Convention in 1949 has any state indicated the existence of any question

with respect to that meaning. In fact, it is among those provisions of the Convention which have been given both uniform interpretation and general approval.[30]

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

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

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

The idea of including in an international convention a provision regulating civil wars was extremely novel.[39] While the ICRC had been aiming for such an extension of the Geneva-type Conventions for many years, it was not successful in this respect until the 1949 Diplomatic Conference.[40] The main objection voiced during the discussions in committee and in the plenary sessions of the Diplomatic Conference was that under a number of the proposals the established government would seemingly be required to apply the Convention even in cases of brigandage.[41] The other problem that had to be solved was the

determination as to which provisions of the Convention should in an appropriate case be applied.[42] The compromise ultimately adopted left the term "armed conflict not of an international character" undefined—which; in effect, was a determination to make the term as broad and all-encompassing as possible. On the other hand, the minimum provisions which the parties to the armed conflict are obligated to apply are enumerated at length, rather than providing for the application of the entire Convention (as the working draft had done) or of all provisions falling within certain broad categories (as the USSR had proposed).[43]

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

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

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

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

It has been said that the established government cannot be prejudiced by applying Article 3, "for no Government can possibly claim that it is *entitled* to make use of torture and other inhuman acts prohibited by the Convention as a means of combating its enemies."[52] It would certainly seem that this argument is equally applicable to the insurgent party, for how can armed conflict be conducted with different rules controlling the actions of the two contending sides ?[53]

Finally, there is much merit in a further statement made in the official ICRC interpretation of Article *3* of the Convention to the effect that:

> If an insurgent party applies Article 3, so much the better for the victims of the conflict. No one will complain. If it does not apply it, it will prove that those who regard its actions as mere acts of anarchy or brigandage are right . . . .[54]

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

What if, despite the foregoing, insurgents take the position that they are not bound by the provisions of Article 3, and this position gains acceptance? Except for the rare case such as Algeria, where the insurgents themselves sought application of the Convention,[55] Article 3 will become a dead letter. Unusual, indeed, would be the government willing to grant captured insurgents the benefits flowing from Article 3 while knowing that its own personnel, when captured, are tortured, otherwise maltreated and slaughtered. Although the requirement for granting these benefits to captured insurgents is stated to be absolute, and not to be dependent upon reciprocity,[56] once again it will be extremely difficult to convince any governtnent and its people that such a unilateral compliance should be expected of them.

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

IV. The Pertinent Customary Law of War

In the opinion rendered by the Nuremberg International Military Tribunal (hereinafter referred to as IMT), which all Communist nations seemingly regard as a revelation second only to those of Marx, Engels and Lenin (and, it is to be assumed, of Mao in China), it is stated that by 1939 the 1907 Hague Regulations[57] were "declaratory of the laws and customs of war."[58] It is also there confirmed that an individual is not held as a prisoner of war for purposes of revenge or punishment, but merely to prevent him from further participation in the conflict and that he is, therefore, a helpless person whom it is contrary to military tradition to kill or injure.[59] One of the subsequent Nuremberg Military Tribunals, in deciding *The High Command Case,*[60] correctly construed the IMT opinion as holding that by 1939 both the 1907 Hague Regulations and the 1929 Geneva Prisoner-of-War Convention[61] "were binding insofar as they were in substance an expression of international law as accepted by the civilized nations

of the world."[62] Every military force engaged in armed conflict, whether or not international in character, and whether representing an old or a new state, an established government or an insurgent party, is bound to comply with these established rules of the "civilized nations of the world." Failure to do so places that military force, and the political organization which it represents and from which it takes its orders and policies, in direct violation of the foregoing principles enunciated at Nuremberg.[63]

The Tribunal in *The High Command Case* did not limit itself to the general statement that the 1907 Hague Regulations and the 1929 Geneva Prisoner-of-War Convention now represented customary law. Inasmuch as there were obviously provision in those two Conventions dealing with details which could not be construed as customary law, the Tribunal assumed the task of designating exactly which provisions of the two agreements did fall within that category. It proceeded to review the specific provisions of each of the two Conventions and found that those provisions requiring humane treatment of prisoners of war, and those protecting them from acts of violence, insults, public curiosity, corporal punishment and acts of cruelty, were "an expression of the accepted views of civilized nations."[64]

Of course, the Tribunal in *The High Command Case* was concerned only with those aspects of the law accepted by civilized nations of the world under which violations had been proven in the case before it. Its list is not, therefore, all-inclusive. Some writers have extended it to include the four groupings listed in Article 3 of the Convention,[65] probably on the extremely plausible theory that in rejecting both the ICRC and USSR proposals[66] the Diplomatic Conference had selected for inclusion in Article 3 (to be binding on both sides in a *civil* war) only those humanitarian principles which already had received demonstrable acceptance by the civilized nations of the world.[67] It also appears that both the Tribunals and the writers have definite ideas with respect to the imposition upon prisoners of war of vicarious punishment in the form of reprisals.[68]

Do these customary rules of warfare apply to insurgents? There seems little doubt that they do, even though the rules have so frequently been honored only in the breach. The Soviet textbook states that "the laws and customs of war apply not only to armies in the strict sense of the word, but also to levies, voluntary detachments, organised resistance movements and partisans."[69] Under existing circumstances, where every insurgent movement other than one which is avowedly anti-Communist immediately becomes a "national liberation movement" enjoying full Communist support, further citation of authority would appear to be redundant.

From the foregoing, it may be properly concluded that apart from any international legislation represented by the Hague or Geneva or other

Conventions, minimum customary law requires that prisoners of war be treated humanely; forbids the use against them of all forms of violence including corporal punishment, torture, cruelty and killing; and protects them from insults and public curiosity. With this in mind, we may now proceed to an examination of the incidents reported to have occurred or to have been threatened in Vietnam, applying the provisions of the Convention generally, those of Article 3, or customary international law where appropriate.[70]

V. Charges Made Against the United States

It has already been pointed out that the United States responded promptly to the ICRC letter concerning the application of the Geneva Conventions in Vietnam and committed itself to apply the 1949 Convention.[71] This commitment was thereafter adopted by the various nations which have furnished military forces to support South Vietnam and it has been reiterated on several appropriate occasions.[72] Although, strangely enough, no report has been found of a Vietcong or North Vietnamese charge of improper treatment of their captured personnel by United States military forces in Vietnam,[73] there has been one charge of improper action in this respect made in the United States.

As early as 1964, when American personnel were serving in Vietnam solely as advisers to South Vietnamese military units, reports began to reach the United States of the maltreatment of Vietcong prisoners of war by members of the South Vietnamese combat forces.[74] American photographers and newsmen were present during these episodes and, presumably, American military personnel were also present. Photographs of this nature continued to appear in the American press from time to time during 1965 and occasionally, although much more rarely, during subsequent years.[75] In a few instances American personnel were pictured standing by while the maltreatment of the prisoners of war occurred.[76] These incidents apparently took place either at the scene of the fighting or during evacuation from it.

Humanitarian reaction to these clear indications of violations of the Convention quickly appeared in the United States.[77] The legal problem presented by these incidents, in view of the nature of the United States position in Vietnam, is whether the United States had a duty or was in a position to do more than remonstrate with the South Vietnamese authorities.[78]

There is no provision in the Convention making a contracting party responsible for violations committed by one of its allies against prisoners of war captured and held by that ally. A search of the Final Record of the 1949 Diplomatic Conference which drafted the Convention has failed to bring to light even a suggestion to this effect made by any delegation.[79] The reasons for this lacuna are obvious. To have included such a provision would have created vicarious responsibility for a situation which, in the great majority of cases, could

not be remedied by the state so held responsible. Moreover, no state would willingly accept a responsibility which could well bring it into sharp conflict with one or several of its allies during the course of a life-or-death struggle.

There was, then, no legal duty imposed upon the United States by the 1949 Convention to ensure that South Vietnamese troops did not maltreat personnel captured by them. Of course, it is equally clear that the United States (and every other contracting party) is under a moral obligation to exert all its influence to bring about full compliance with the relevant provisions of the Convention by any other party engaged in armed conflict.[80]

When units of the United States armed forces were committed to combat a new situation arose, because, unlike the earlier period just mentioned, the United States itself then began to take prisoners of war. These prisoners were turned over to the South Vietnamese for detention in prisoner-of-war camps. At first, the transfer of custody was made in the field immediately upon capture. But apparently because most of the incidents of maltreatment occurred at this time and in this area, in mid-1966 the United States changed its procedure. Thereafter, prisoners of war captured by United States units were evacuated to divisional headquarters and from there directly to the rear-area prisoner-of-war camps maintained by the South Vietnamese.[81] The United States Commander-in-Chief in Vietnam has stated categorically that "these prisoners are not being mistreated. They are handled in accordance with the provisions of the Geneva Conventions."[82] There is no evidence to indicate that his statement is not correct, nor have any claims been made which contradict it.[83] Of course, even after prisoners of war captured by United States forces reach the camps and are turned over to the custody of the South Vietnamese, the United States remains under a contingent responsibility for their humane treatment in accordance with the provisions of the Convention.[84]

VI. Charges Made Against South Vietnam

There appears to be little doubt that at least well into 1966 South Vietnamese combat troops regularly maltreated captured enemy personnel by using threats, torture, and other acts of violence in order to obtain intelligence information.[85] These acts were and remain direct violations of the law of war, whether considered from the point of view of the entire Convention, Article 3, or customary international law. The combined pressure of the ICRC and the United States (and, perhaps, of other allied countries) has apparently gradually made itself felt, at least at the official level. The Government of South Vietnam has complied with the Convention by a liberal interpretation of the provisions of Article 4 defining the categories of persons entitled to prisoner-of-war status,[86] by supplying lists of persons detained as prisoners of war to the Central Tracing Agency of the ICRC,[87] by disseminating to its troops information concerning

the duties imposed upon captors by the Convention and by other methods of instruction of its troops,[88] and by permitting unlimited inspection visits to the prisoner-of-war camps by delegates of the ICRC.[89] The fact that reports of further instances of maltreatment of prisoners of war by South Vietnamese combat troops have become more sporadic probably indicates that the campaign of education has had some degree of success. However, it may also mean that South Vietnamese combat commanders have been able to conceal most of such incidents from those who might report them.

To summarize: while the South Vietnamese Government has now substantially complied with the obligations which the Convention imposes upon it, during the course of a period extending over several years there was apparently an officially countenanced practice of the use of torture on newly-captured prisoners of war by South Vietnamese combat troops for the purpose of extracting information from them. The South Vietnamese Government appears now to accept the fact that such conduct constituted a direct and major violation of the Convention and, therefore, in 1966 instituted a campaign of education which seems to have been at least partially successful in putting an end to this grossly illegal practice. However, instances of maltreatment of newly-captured prisoners of war by South Vietnamese combat troops continue to be reported.[90] The individuals responsible for such incidents, both soldiers who commit the actual violence and commanders who permit and even encourage these acts, are guilty of violations of the Convention and of the customary law of war.

VII. Charges Made Against North Vietnam

A. *Parading Prisoners of War*

With respect to the North Vietnamese treatment of American prisoners of war we have only the information which they have seen fit to disclose.[91] However, even this limited source of information has revealed one major violation of the Convention and the threat of what was asserted to be another. While this latter was apparently prevented by an unprecedented mobilization of world opinion by the United States, it will be discussed below in section VII B.

On July 6, 1966, presumably to whip up local support for the trial of captured American pilots as "war criminals,"[92] the North Vietnamese authorities caused these men, handcuffed in pairs, to be paraded through the crowd-lined streets of Hanoi. Word of the incident was broadcast by Radio Hanoi[93] and press releases[94] and photographs[95] were issued by the official North Vietnamese press agency.

The United States Government immediately charged that this constituted a violation of the Convention.[96] The ICRC clearly was of the same opinion, for on July 14, 1966, it drew the attention of the North Vietnamese Government

to the fact that the Convention specifically prohibited the subjection of prisoners of war to public curiosity.[97] The North Vietnamese did not deny the occurrence of the incident; they merely called attention to their previous communications concerning the nonapplicability of the Convention.[98]

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

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

Both Articles 3 and 13 of the Convention contain provisions which prohibit the exhibiting of prisoners of war by parading them through city streets; and it would appear that this rule has most probably attained the status of being part of the customary law of war.[107] It follows that the actions of North Vietnamese authorities on the two occasions mentioned (and on other less well publicized occasions) were violations of the Convention and of the customary law of war.[108]

B. *War Crimes Trials*

It will be recalled that in answering the letter from the ICRC in August, 1965, North Vietnam referred to captured American pilots as "major [war] criminals caught in flagrante delicto and liable for judgment in accordance with the laws of the Democratic Republic of Vietnam."[109] Many statements of similar import were subsequently made by the North Vietnamese.[110] By mid-July, 1966, press dispatches from Communist newsmen in Hanoi were mentioning that trials were definitely planned[111] and tension began to build in the United States.[112] It was then that the United States mounted a diplomatic offensive which resulted in the intervention of personages from around the world, including those who sided with the United States position in Vietnam, those who opposed it, and those who were neutral.[113] On July 23, 1966, the North Vietnamese Government announced the appointment of a committee "to investigate United States 'war crimes'"[114] and then, on that same day, North Vietnam President Ho Chi Minh took advantage of a cabled inquiry from the Columbia Broadcasting System to state that there was "no trial in view" for the American pilots.[115] A few days later Ho was quoted as saying that the "main criminals" were not captured pilots, "but the persons who sent them there—Johnson, Rusk, McNamara—these are the ones who should be brought to trial."[116] For ten days in July, 1966, there was excitement and debate on this subject throughout the world, with claims, counterclaims, and citation of legal authorities and purported legal authorities for and against the trial.

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

The captured pilots are all members of the United States Navy and Air Force. They were captured when forced to eject from their planes while flying combat missions over North Vietnam. They were wearing American flight uniforms when captured and made no attempt to hide their identity. (Of course, this series of statements includes a number of assumptions—but they all appear to be reasonable ones and there is no indication that any one of them is really disputed.) These facts being accepted, the American pilots are entitled prima facie to prisoner-of-war status under the 1907 Hague Regulations,[117] the 1929 Geneva Prisoner of-War Convention,[118] and the 1949 Geneva Prisoner-of-War Convention.[119] In fact, it would be difficult to imagine a more clear-cut case of entitlement to such status.

The North Vietnamese apparently do not contest the facts stated and assumed above, but they attempt to avoid the conclusion which necessarily flows from these facts by asserting that the Convention does not apply to "war criminals."[120] The syllogism would be: war criminals are not entitled to the protection of the Convention; American pilots are war criminals; therefore, American pilots are not entitled to the protection of the Convention. Both the major and the minor premises of that syllogism are incorrect. The North Vietnamese position therefore necessitates a brief review of the events preceding and following the approval of Article 85 of the Convention by the 1949 Diplomatic Conference.[121]

When the war in the Pacific ended in 1945, General Yamashita, who had commanded the unsuccessful Japanese defense of the Phillipine Islands, was charged with a number of war crimes and was brought to trial before an American Military Commission in Manila. His counsel contended that he was entitled to all of the trial protections contained in the 1929 Prisoner-of-War Convention. These protections were denied to him and on appeal to the United States Supreme Court (after his conviction and death sentence) the denial was affirmed on the ground that the trial protections contained in that Convention applied only to trials for post-capture—not pre-capture—offenses.[122]

In the preparatory work which preceded the 1949 Diplomatic Conference, the ICRC convened a group of "Government Experts" who recommended, as one variation from the 1929 Convention, a provision that prisoners of war prosecuted for pre-capture offenses should enjoy the benefits of the Convention until convicted after a regular trial. When this was submitted to the XVIIth International Red Cross Conference at Stockholm in 1948, where the final draft which was to be the working draft for the 1949 Diplomatic Conference was prepared, it was decided to change the provision drafted by the Government Experts so that prisoners of war would continue to benefit by the provisions of the Convention even *after* conviction of a pre-capture offense.[123]

At the Diplomatic Conference, the USSR proposed an amendment to the draft provision under which once a prisoner of war had been convicted of a war crime (apparently this meant a conventional war crime) or a crime against humanity, he could be treated as an ordinary criminal.[124] This was, in effect, a return to the recommendation made by the Government Experts. General Slavin, chief delegate of the USSR, stated to the committee charged with the preparation of the Prisoner-of-War Convention, that the USSR proposal applied only to prisoners of war who had been convicted.[125] The committee's report to the Plenary Meeting called attention to the difference of approach represented by the Stockholm draft and the USSR proposal, and stated that the great majority of the committee considered that even after a prisoner of war had been convicted of a pre-capture violation of the laws and customs of war, he

should continue to enjoy the protection of the Convention.[126] The Diplomatic Conference rejected the Soviet proposal and approved the Stockholm draft provision.[127]

The effect of Article 85 of the Convention was, then, to change the rule expounded in *Yamashita* and other similar cases.[128] Now a prisoner of war retains the benefits of the Convention from the moment of capture to the moment of release and repatriation. If, while in captivity, he is tried and convicted of a pre-capture violation of the law of war he is entitled to all the judicial safeguards of the Convention.[129]

The USSR and all of the other Communist countries, both those present at the Diplomatic Conference in Geneva and those which subsequently adhered to the Convention, have made reservations to Article 85.[130] This fact caused some concern to the United States Senate when it was asked to give its advice and consent to the ratification of the Convention by the President. In its report to the Senate the Committee on Foreign Relations said:

> [I]n the light of the practice adopted by Communist forces in Korea of calling prisoners of war "war criminals," there is the possibility that the Soviet bloc might adopt the general attitude of regarding a significant number of the forces opposing them as ipso facto war criminals, not entitled to the usual guaranties provided for prisoners of war. As indicated above, however, the Soviet reservation expressly deprives prisoners of war of the protection of the convention only after conviction in accordance with the convention.[131]

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

> The Democratic Republic of Vietnam declares that prisoners of war prosecuted for and convicted of war crimes or crimes against humanity, in accordance with the principles laid down by the Nuremberg Court of Justice shall not benefit from the present Convention, as specified in Article 85.[132]

Having made this reservation, it must be assumed that the North Vietnamese authorities fully understood its meaning—and it is difficult to find any real ambiguity in it so far as the present problem is concerned.[133] The American pilots have not been "prosecuted and convicted." Under Article 85 of the Convention and the North Vietnamese reservation to it, they are entitled to the benefits of the Convention until prosecution *and* conviction for war crimes or crimes against humanity have occurred. The North Vietnamese contention that the American pilots are "war criminals" and not entitled to the protection of the Convention is, therefore, without merit.[134] It is, in and of itself, a major

violation of the Convention to arbitrarily deny prisoner-of-war status to individuals entitled to that status. If the North Vietnamese desire to comply with the international commitment which they have made by voluntarily adhering to the Convention, they are under an obligation to recognize that American pilots captured while flying combat missions over North Vietnam are entitled to the status of prisoners of war and to the protections provided by the Convention which flow from that status.

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

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

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

In the second place, while it appears that the North Vietnamese charge against the American pilots is that they have been guilty of bombing nonmilitary targets, such as civilian residential areas,[135] at this stage in the development of the law of war, there may be considerable doubt expressed as to whether even "target-area" bombing, a much more indiscriminate and inhumane act than that apparently charged against the American airmen, is a violation of international law. During World War II both sides engaged in this type of warfare. No one who lived through that period or has read its history could have forgotten the German bombing of such targets as Warsaw, London, Coventry and Rotterdam, and the Allied bombing of Berlin, Essen, Cologne and Tokyo. No political

leader, no military commander, and no airman was ever convicted of any alleged war crime arising out of these activities.[136] One will look in vain in the opinions of the IMT or of the IMTFE for any reference to such activities as constituting a war crime. For more than ten years the ICRC has been endeavoring, so far with not even a modicum of success, to evolve a convention which would protect the civilian populations in time of war and which would be acceptable to the governments.[137] This proposed Convention, in its Article 10, specifically forbids target-area bombing.[138] The fact that it is considered necessary to include such a prohibition in a new draft international convention on the law of war would seem to indicate rather conclusively that no such prohibition is presently included therein.[139] And, as has been stated, if target-area bombing *is* not definitely outlawed, then certainly the lesser charge which appears to have been levelled against the American pilots does not come within a prohibited category.

In the third place, we have moved far along the road from the era of vicarious punishment to a point where individuals are punished only for their own acts. While evidence, such as "confessions," might be available to the North Vietnamese with respect to some of the airmen, what of the others ? Why is the charge of being a war criminal levelled against *every* captured American airman held by the North Vietnamese?[140] Certainly, there is no evidence available to them that *every* captured American airman participated in bombing or other attacks on purely civilian targets. Some of the airmen were probably shot down on their first missions before they could drop a bomb. Some were probably flying in unarmed reconnaissance planes, perhaps as photographers. Some were probably flying fighter protection armed only with air-to-air weapons. These, and probably many others, are within categories against whom no legitimate war-crimes charge can be laid, even assuming that it can against the others.[141]

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

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

these trials glaringly reveals the danger of trials for pre-capture offenses conducted during the course of the war.[142]

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

VIII. Charges Made Against the Vietcong

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

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

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

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

On September 22, 1965, three more Vietcong terrorists were executed in Da Nang after a trial, conviction and death sentence by a South Vietnamese court.

Four days later, on September 26, the Liberation Radio announced that the Vietcong had retaliated by the executions of two American prisoners of war, Captain Humbert R. Versage [Versace] and Sergeant Kenneth M. Roraback.[150] Once again the United States labeled these reprisal executions as "murder" and as violations of the Convention.[151] It filed a protest with the ICRC which was transmitted to and rejected by the NLF.[152]

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

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

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

> As regards the admissibility of reprisals, it is to be remarked that these are objected to by numerous teachers of international law on grounds of humanity.

> To make this a matter of principle and apply it to every case, exhibits however, "a misconception due to intelligible but exaggerated and unjustifiable feelings of humanity, of the significance, the seriousness and the right of war. It must not be overlooked that here also the necessity of war, and the safety of the State are the first consideration, and not regard for the unconditional freedom of prisoners from molestation."
>
> That prisoners should only be killed in the event of extreme necessity, and that only the duty of self-preservation and the security of one's own State can justify a proceeding of this kind is today universally admitted.[156]

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

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

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

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

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

In considering the opinion quoted above, another Nuremberg Military Tribunal, which would probably not have permitted reprisal executions under any circumstances, stated in its opinion in *The High Command Case:*

> In the Southeast Case [Hostage Case], United States v. Wilhelm List, et al., (Case No. 7), the Tribunal had occasion to consider at considerable length the law relating to hostages and reprisals. It was therein held that under certain very restrictive conditions and subject to certain rather extensive safeguards, hostages may be taken, and after a judicial finding of strict compliance with all preconditions and as a last desperate remedy hostages may even be sentenced to death. It was held further that similar drastic safeguards, restrictions, and judicial preconditions apply to so-called "reprisal prisoners." *If so inhumane a measure as the killing of innocent persons for offenses of others, even when drastically safeguarded and limited, is ever permissible under any theory of international law, killing without full compliance with all requirements would be murder. If killing is not permissible under any circumstances, then a killing with full compliance with all the mentioned prerequisites still would be murder.*
>
> . . . In the instance of so-called hostage taking and killing, and the so-called reprisal killings with which we have to deal in this case, the safeguards and preconditions required to be observed by the Southeast judgment were not even attempted to be met or even suggested as necessary. Killings without compliance with such preconditions are merely terror murders. If the law is in fact that hostage and reprisal killings are never permissible at all, then also the so-called hostage and reprisal killings in this case are merely terror murders.[161]

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

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

The third requirement for a legal reprisal under international law is that it be directed against the state which had first violated the law of war.[164] The "crime" charged by the NLF as the basis for the reprisal was, beyond dispute, an act of the South Vietnamese authorities, and not of the American authorities. The alleged acts of terrorism were committed within the territorial jurisdiction of South Vietnam, the culprits were tried by South Vietnamese courts which reached the decisions finding guilt and ordered the death sentence imposed, and

the executions were carried out by the South Vietnamese authorities. If reprisals were justified, and no ground for them has so far come to light, under the law of war they should have been directed against the state which had by its alleged illegal conduct created the need for and the right to take reprisals. This was obviously not done—and the reason why it was not done is equally obvious.

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

IX. Conclusion

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

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

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

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

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

5. Parading prisoners of war before a hostile populace constitutes a violation of the prohibition, contained in conventional and customary international law,

against subjecting them to insults, public curiosity and humiliating and degrading conduct.

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

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

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

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

Notes

1. P.L. 88-408, 79 Stat. 384, approved August 10, 1964

2. The International Committee of the Red Cross is a century-old humanitarian organization composed entirely of Swiss citizens which maintains a strictly neutral status in all armed conflicts, offering its services equally to both sides. Since 1864 it has been the motivating force behind the series of humanitarian "Geneva" Conventions. Its status and activities in wartime are officially recognized and formalized in the 1949 Geneva Conventions, note 4 infra.

3. This letter, dated June 11, 1965, was sent to the governments of the United States, the Republic of Vietnam (hereinafter referred to as South Vietnam), and the Democratic Republic of Vietnam (hereinafter referred to as North Vietnam). The ICRC stated therein that it would "endeavor to deliver it also to the National Liberation Front." 60 Am. J. Int'l L 92 (1966), 4 Int'l Legal Mat. 1171 (1965).

4. There are four of these Conventions. Our concern here will be solely with the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter referred to as the Convention]. The United States ratified this Convention on August 2, 1955. 6 U.S.T. 3316, T.I A.S. No. 3364, 213 U.N.T.S. 383. South Vietnam adhered to it (as the State of Vietnam) on Nov. 14, 1953 (181 U.N.T.S. 351). North Vietnam adhered to it on June 28, 1957 (274 U.N.T.S. 339). Ratifications and adherences by other States involved in Vietnam, either directly or indirectly, are as follows: Republic of the Philippines, Oct. 6 1952 (141 U.N.T.S. 384); USSR, May 10, 1954 (191 U.N.T.S. 367); Thailand, Dec. 29, 1954 (202 U.N.T.S. 332); People's Republic of China, Dec. 28, 1956 (260 U.N.T.S. 442); Australia, Oct. 14, 1958 (314 U.N.T.S. 332); New Zealand, May 2, 1959 (330 U.N.T.S. 356); and the Republic of Korea, Aug. 16, 1966 (55 Dep't State Bull. 694 (1966)).

5. Concerning the Prisoner-of-War Convention, the ICRC letter, supra note 3, said: "In particular the life of any combatant taken prisoner, wearing uniform or bearing an emblem clearly indicating his

membership in the armed forces, shall be spared, he shall be treated humanely as a prisoner of war, lists of combatants taken prisoner shall be communicated without delay to the International Committee of the Red Cross (Central Information Agency), and the delegates of the ICRC shall be authorized to visit prison camps." The items so specified clearly indicate that the ICRC considered the armed conflict in Vietnam to be of an international character. Indeed, the tenor of the letter leaves no doubt on this score.

6. 53 Dep't State Bull. 447 (1965), 4 Int'l Legal Mat. 1173 (1965), 5 Int'l Rev. of the Red Cross 477 (1965).

7. 4 Int'l Legal Mat. 1174 (1965), 5 Int'l Rev. of the Red Cross 478 (1965). As we shall see, these promises have not been fully carried out.

8. 5 Int'l Legal Mat. 124 (1966), 5 Int'l Rev. of the Red Cross 527 (1965) (emphasis added)

9. 5. Int'l Rev. of the Red Cross 636 (1965). The final assertion was undoubtedly included because of the charge frequently advanced by American combat troops that the Vietcong made a practice of shooting enemy wounded found on the battlefield. N.Y. Times, Dec. 1, 1965, at 1, col. 8.

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

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

12. See note 34 infra.

13. For arguments supporting this position, see the remarks of General Nikolai Slavin, chief of the Soviet delegation at the 1949 Diplomatic Conference which drafted the Conventions. Final Record of the Diplomatic Conference of Geneva of 1949, Vol. IIB, at 13-14 [hereinafter referred to as Final Record].

14. See text in connection with notes 65-67 infra.

15. Regulations attached to Hague Conventions No. IV of 1907 Concerning the Laws and Customs of War on Land, 36 Stat. 2277, T.S. No. 539, 100 Brit. For. & State Papers 338.

16. 1929 Geneva Convention for the Amelioration of the Condition of Wounded and Sick of Armies in the Field, 47 Stat. 2074, T.S. No. 847, 118 L.N.T.S. 303.

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

18. ICRC Report 404-436.

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

20. Le Comité International de la Croix-Rouge et le Conflit de Corée: Recueil de Documents 16 (1952).

21. Hermes, Truce Tent and Fighting Front 141, 145 (1966); Vatcher, Panmunjom 116 (1958).

22. British Ministry of Defence, Treatment of British Prisoners of War in Korea 3-34 (1955); Vatcher, Panmunjom, photograph opposite 114 (1958), Joyce, Red Cross International 200-201 (1959).

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

24. Although not engaged in armed conflict with a Communist opponent, the French indirectly followed this course of action during the civil war in Algeria with the result that the Provisional Government of the Algerian Republic, the political arm of the rebellion, not only committed itself to apply the 1949 Geneva Conventions, but considered it appropriate to actively seek French compliance. Algerian Office, White Paper on the Application of the Geneva Conventions of 1949 in the Franco-Algerian Conflict (1960). The White Paper cites (at 13) a newspaper article by Professor Roger Pinto, of the Faculty of Law of the University of Paris, giving as one reason for the French reluctance to apply the Conventions "the absence of reciprocity in respect to the humanitarian rules."

25. This argument is particularly applicable to Article 3 dealing with armed conflict not of an international character, note 34 infra, inasmuch as a proposed provision requiring reciprocity, which had been included in the working draft, was intentionally deleted by the 1949 Diplomatic Conference. Castren, Civil War 86 (1966); Coursier, L'Evolution du Droit International Humain, 99 Hague Recueil des Cours 357, 395 (1960); Pinto, Les Règles du Droit International Concernant la Guerre Civile, 114 Hague Recueil des Cours 451, 530 (1965).

26. Under the third paragraph of Article 2, parties to the Convention are not bound with respect to another party to the conflict which is not a party to the Convention unless "the latter accepts and applies the provisions thereof." Under these circumstances it is somewhat difficult to accept the contention that a party to the Convention is absolutely bound when the other party to the conflict is a party to the Convention, even though the other party patently flaunts it and does not even purport to apply its provisions. Such a construction merely encourages adherences by states which have no intention of ever complying with the Convention. Is this, perhaps, what has occurred?

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

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

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

28. Moore, Underwood & McDougal, The Lawfulness of United States Assistance to the Republic of Vietnam 32 (unpublished ms., Yale Law School, May 1966); Moore, The Lawfulness of Military Assistance to the Republic of Vietnam, 61 Am J. Intl L. 1, 2 (1967); Johnson, Aquinas, Grotius and the Vietnam War, 16 Quis Custodiet? 69, 67, 70 (1967); Kutner, "International" Due Process for Prisoners of War, 21 U. Miami L. Rev. 721, 730 (1967). Many of those who support the official position do not find it necessary to reach the question of the nature of the conflict. Deutsch, The Legality of the United States Position in Vietnam, 52 A.B.A.J. 436 (1966). In Partan, Legal Aspects of the Vietnam Conflict, 46 B.U.L. Rev. 281, 299 (1966), the author discusses the problem but reaches no conclusion. See also, the ICRC letter, notes 3 and 5 supra.

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

30. See Stone, Legal Controls of International Conflict 313 n.85 (Rev. ed. 1959), where the following appears: ". . . Art. 2, para. 1, of the revised Prisoners of War Convention, 1949, declaring its provisions applicable not only to declared war but also to 'any armed conflict . . . even if a state of war is not recognized' by a belligerent Contracting Party, is a welcome recognition of the need to place the point beyond doubt." And in Pictet, Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War 22-23 (1960) [hereinafter referred to as Commentary], it is stated: "By its general character, this paragraph deprives belligerents, in advance, of the 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 Institute of Law, Academy of Sciences of the USSR, International Law 420

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

31. A news article from Cairo which appeared in the N.Y. Times, Feb. 12, 1966 at 12, col. 3, stated: "The sources quoted the [North Vietnamese] Ambassador as having rejected the American contention that United States airmen captured in attacks on North Vietnam should be treated as prisoners of war under the terms of the Geneva conventions.

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

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

33. One of the major purposes of the provision was to preclude a State from indulging in the excuses put forward by Japan during the China Incident and by Nazi Germany during World War II as a basis for not applying earlier humanitarian conventions: that there had been no declaration of war, that legally a state of war did not exist, that the existence of a state of war was not recognized, that the armed conflict was only a "police action," etc. See the Judgment of the International Military Tribunal for the Far East 1008-09 (mimeo. 1949) [hereinafter referred to as IMTFE Judgment], Latyshev; The 1949 Geneva Conventions Concerning the Protection of Victims of War, 7 The Soviet State and Law 121 (1954) (original in Russian).

34. Article 3 states:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
>
> The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

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

36. Pictet, The XXth International Conference of the Red Cross: Results in the Legal Field, 7 J. Int'l Comm'n Jurists 3, 15 (1966).

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

torture and other cruel treatment should not be practiced on prisoners and other noncombatants...." Yingling & Ginnane, The Geneva Conventions of 1949 in 46 Am. J. Int'l L. 393, 396 (1952).

38. Greenspan, supra note 29, at 40; Note, The Geneva Conventions of 1949: Application in the Vietnamese Conflict, 5 Va. J. Int'l L. 243, 249 (1965).

39. Pictet, supra note 36; de la Pradelle, Le Contrôle de L'Application des Conventions Humanitaires en cas de Conflit Armé, 2 Annuaire Français de Droit International 343, 364 (1956).

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

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

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

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

44. Id. at 37; Note, The Geneva Conventions of 1949: Application in the Vietnamese Conflict, 5 Va. J. Int'l L. 243, 248 (1965).

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

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

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

48. See text in connection with note 9 supra.

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

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

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

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

53. Several years ago the suggestion was made that in any armed conflict in which United Nations forces were involved, they should not be bound by the law of war, but their opponent should be. The reaction to

this proposal was violent and caustic, and properly so. See Bothe, Le Droit de la Guerre et les Nations Unies (1967).

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

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

56. See note 25 supra; Pictet, Commentary, supra note 30, at 35, Draper, The Geneva Conventions of 1949 at 114 Hague Recueil des Cours 59, 96 (1965).

57. See note 15 supra.

58. Nazi Conspiracy and Aggression: Opinion and Judgment 83 (1947).

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

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

61. 1929 Geneva Convention Relative to the Treatment of Prisoners of War, 47 Stat. 2021, T.S. No. 846, 118 L.N.T.S. 343.

62. United States v. von Leeb et al., 10 Trials 1 at 11 Trials 532-34 (1948).

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

64. United States v. von Leeb et al., 10 Trials 1 at 11 Trials 535-38. But see Draper, supra note 56, at 90, where he states: "Undoubtedly, the prohibition of murder, mutilation or torture is absorbed in the customary prohibitions of the law of war. On the other hand the taking of hostages, outrages upon personal dignity, the passing of sentences by irregular tribunals, unfairly conducted, are not yet prohibited by the customary law of war. . . ."

65. See note 34 supra.

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

67. Pictet, Commentary, supra note 30, at 39 and 141; Smith, The Geneva Prisoner of War Convention: An Appraisal, 42 N.Y.U.L. Rev. 880, 889 (1967); Pinto, supra note 63.

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

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

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

71. See text in connection with note 6 supra.

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

73. That incidents of maltreatment of prisoners of war by American personnel have occurred is beyond dispute. There will never be a war fought in which there are not, at the very least, isolated instances of maltreatment of prisoners of war on both sides. The general moral environment in which the individual soldiers

have been raised may be judged, and the training which they have received while in military service may be measured, by the frequency with which such incidents occur. While Clergy and Laymen Concerned About Vietnam in their book, In the Name of America (issued in February, 1968 after this article had been substantially completed), allocates a chapter of 45 pages to the reprinting of published items about the maltreatment of prisoners of war, there is only an occasional, and frequently misleading, indication (usually based on hearsay) of such misconduct by American troops. The weakness of the "evidence" quoted to support the organization's thesis of misconduct is, in itself, extremely persuasive of the inaccuracy of the conclusion reached by one of the commentators (at 23) that "these combat practices are so widespread in their occurrence as to suggest that their systematic commission is a direct result of decisions reached at the highest levels of civilian and military command." When Ambassador Harriman sent the ICRC a Department of Defense report on the methods used by the several military services of the United States to disseminate information concerning the requirements of the Conventions, the ICRC President replied: "We are convinced that in the context of the war in Vietnam the U.S. Forces are devoting a major effort to the spread of knowledge on the Geneva Conventions." Letter from Samuel A. Gonard to W. Averell Harriman, January 5, 1968, on file in the Department of State.

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

75. St. Louis Post-Dispatch, Oct. 22, 1965, at 3B; id. Nov. 3, 1965, at 2A; id. April 27, 1966, at 2A; id. Feb. 9, 1968, at 1B.

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

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

78. A letter to the editor of the N.Y. Times from the Chairman of the University Committee on Problems of War and Peace at the University of Pennsylvania said: "Responsible American journalists have frequently reported the torture of Vietcong prisoners by their South Vietnamese captors. Because of these reports W. W. Rostow, chairman of the foreign policy research division of our State Department, was asked . . . 'why does the United States not abide by the Red Cross Convention in the treatment of Vietcong prisoners?' His reply was that the United States does not take prisoners in Vietnam, and that we were merely advisers to the South Vietnamese Government, which bore the responsibility for dealing with prisoners.

Because of this immoral apathy, and narrow legalistic position taken by our State Department, neither the United States nor the South Vietnamese, nor the Vietcong, nor the North Vietnamese are committed to adhere to any of the 'sanctions established by international law for the protection of war prisoners.'" N.Y. Times, June 30, 1965, at 36, col. 5. The writer of the letter erred in both his assumptions and his conclusions, but he certainly raised the moral issue.

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

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

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

well-being." N.Y. Times, July 1, 1966, at 6, col. 3. The current official directive establishing this procedure is United States Military Assistance Command, Directive No. 190-3, April 6, 1967.

82. 55 Dep't State Bull. 336, 338 (1966).

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

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

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

86. Id. at 404-05; 7 id. 188. For the categories of persons being given prisoner-of-war status, see para. 4, United States Military Assistance Command, Directive No. 20-5, Sept. 21, 1966.

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

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

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

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

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

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

93. N.Y. Times, July 8, 1966, at 3, col. 1.

94. Id. July 13, 1966, at 1, col. 7, and 5, col. 1.

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

96. Id. at 3, col. 1.

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

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

99. N.Y. Times, May 9, 1967, at 15, col. 1.

100. 56 Dep't State Bull. 825 (1967).

101. Instructions for the Government of the Armies of the United States in the Field, General Orders No. 100, Apr. 23, 1863, Art. 75.

102. See note 61 supra.

103. 2 Bull. JAG 299 (1943).

104. Trial of Lt. Gen. Kurt Maelzer, 11 Law Reports of Trials of War Criminals 53 (1946) [hereinafter cited War Crimes Rep.].

105. IMTFE Judgment, supra note 33, at 1092-95 and 1030-31.

106. See text in connection with note 64 supra.

107. As we have seen, in so far as North Vietnam is concerned there are strong arguments for the position that the entire Convention is applicable and, that at a minimum, Article 3 of the Convention (note 34 supra) is certainly applicable despite the untenable position to the contrary taken by North Vietnam. It is therefore, not even necessary to find that this particular humanitarian rule has attained the status of being a part of the customary law of war in order to find that it is binding on North Vietnam.

108. It has been mentioned that in the parade conducted on July 6, 1966, the prisoners were handcuffed in pairs. During the World War II commando raid on Dieppe the manacling of German prisoners of war by Canadian troops was itself challenged by the German Government as a violation of the law of war and resulted in a series of reprisals and counter-reprisals. For differing versions of this affair see British War Office, The Law of War on Land (Part III of the Manual of Military Law) 53 n.2(a) (1958); Castren, The Present Law of War and Neutrality 159 (1954); and ICRC Report, supra note 17, at 368-70.

109. See text in connection with note 8 supra.

110. N.Y. Times, Sept. 30, 1965, at 1, col. 6 and at 3, col. 3; id. Feb. 12, 1966, at 12, col. 3; id. July 13, 1966, at 1, col. 7 and at 5, col. 1. An ICRC report stated: "The [North Vietnamese] Red Cross and the authorities of the DRVN have made known to the ICRC that the captured American pilots are treated humanely, but that they cannot, however, be considered as prisoners of war. The DRVN Government is in fact of the opinion that the bombing attacks constitute crimes for which these prisoners will have to answer before the courts and that the Third Geneva Convention (prisoners of war) is consequently not applicable to them...." ICRC, Vietnam, supra note 85, at 403.

111. N.Y. Times, July 15, 1966, at 1, col. 3 and at 3, col. 1; id. July 19 1966, at 3, col. 1; id. July 20, 1966, at 1, col. 8. The bombing of Hanoi and Haiphong had begun in June, 1966.

112. Between July 15 and July 25, 1966, the newspapers in the United States carried several stories on this subject every day. Questions were asked of the President and statements were made which indicated that any trials, convictions, and executions would be followed in short order by severe retaliatory action by the United States. Id. July 19, 1966, at 3, col. 3; id. July 21, at 14, col. 2.

113. Neutrals who sought to dissuade the North Vietnamese from their proposed course of action included U Thant, the Secretary General of the United Nations (id. July 17, 1966, at 8, col. 3), the Pope (id. July 21, 1966, at 1, col. 5), and the ICRC (id. July 23, 1966, at 2, col. 6). Americans opposed to the war in Vietnam who interceded with the North Vietnamese included Norman Thomas, The National Committee for a Sane Nuclear Policy (id. July 20, 1966, at 1, col. 8) and the so-called Senate "doves," spearheaded by Senator Frank Church of Idaho (id. July 16 1966, at 1, col. 1 and at 3, col. 2). Many competent observers of the international scene consider that this latter appeal was probably the most effective on Communist pragmatism.

114. Id. July 24, 1966, at 1, col. 1.

115. Id. July 25, 1966, at 1, col. 8.

116. Id. July 26, 1966, at 3, col. 2.

117. Supra note 15, Art. 1.

118. Supra note 61, Art. 1.

119. Supra note 4, Art. 4.

120. N.Y. Times, May 9, 1967, at 15, col. 1. This is also the only logical interpretation which can be placed on the letter of Aug. 31, 1965, from the North Vietnamese Government to the ICRC, note 8 supra. See also the ICRC report quoted in note 110 supra.

121. Article 85 of the Convention reads as follows: "Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."

122. Matter of Yamashita, 327 U.S. 1, 21, 22, 24 (1946). This position was adopted generally by war crimes tribunals and national courts after World War II. 4 War Crimes Rep. 78 (1948). At least one noted Soviet legal writer took the same position, stating: "On account of these inhuman crimes committed by him, Ritz ceased to be a soldier even before he was seized by units of the Red Army, and consequently did not become a war prisoner when he was seized. . . ." Trainin, Hitlerite Responsibility under Criminal Law 88 (1945).

123. Statement of R.J. Wilhelm representing the ICRC. Final Record, supra note 13, Vol. IIA, at 318-19.

124. The proposed amendment stated: "Prisoners of war convicted of war crimes and crimes against humanity under the legislation of the Detaining Power, and in conformity with the principles of the Nuremberg Trial, shall be treated in the same way as persons serving a sentence for a criminal offence in the territory of the Detaining Power." Id. at 319.

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

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

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

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

129. Pictet, Commentary, supra note 30, at 425. Those safeguards are found in Arts. 84-88 and 99-108, inclusive, of the Convention. After World War II several Japanese commanders were tried and convicted of being responsible for unfair trials of captured American airmen. Trial of Lt. Gen. Shigeru Sawada, 5 War Crimes Rep. 1 (1948); Trial of Lt. Gen. Harukei Isayama, id. at 60; Trial of Gen. Tanaka Hisakasu, id. at 66. The IMTFE reviewed and condemned, by implication, the Japanese trials and executions of American airmen. IMTFE Judgment, supra note 33, at 1024-31. In its "Notes on the Case" dealing with United States v. Alstotter et al. (The Justice Case), 6 War Crimes Rep. 1, 103 (1948), the United Nations War Crimes Commission enumerated the requirements for a fair trial, its conclusions being drawn from a number of sources and representing customary international law.

130. The reservation to Article 85 made by the USSR at the time of signature (75 U.N.T.S. 135, 460) and maintained at the time of ratification (191 U.N.T.S. 367) states: "The Union of Soviet Socialist Republics does not consider itself bound by the obligation, which follows from Article 85, to extend the application of the Convention to prisoners of war who have been convicted under the law of the Detaining Power, in accordance with the principles of the Nuremberg trial, for war crimes and crimes against humanity, it being understood that persons convicted of such crimes must be subject to the conditions obtaining in the country in question for those who undergo their punishment." In response to an inquiry concerning the meaning of the foregoing reservation, the Soviet Foreign Ministry said, in a note dated May 26, 1955, to the Swiss Federal Council, that: "[T]he reservation . . . signifies that prisoners of war who, under the laws of the USSR have been convicted of war crimes or crimes against humanity must be subject to the conditions obtaining in the USSR for all other persons undergoing punishment in execution of judgments by the courts. *Once the sentence has become legally enforceable,* persons in this category consequently do not enjoy the protection which the Convention affords." Pictet, Commentary, supra note 30, at 424 (emphasis added).

131. Senate Comm. on Foreign Relations, Geneva Conventions for the Protection of War Victims, S. Exec. Rep. No. 9, 84th Cong., 1st Sess. 28-29 (1955). For some of the factors which caused Senate perturbation, see Levie, Penal Sanctions for Maltreatment of Prisoners of War, 56 Am. J. Int l L. 433, 443 n.37 (1962).

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

133. It has been suggested, for example, that the "and" in the words "prosecuted for and convicted of" might have been intended to be read disjunctively. Note, The Geneva Convention and the Treatment of Prisoners of War in Vietnam, supra note 63, at 862. Under this interpretation it is said that a prisoner of war could be deprived of the benefits of the Convention by the mere filing of a charge against him alleging a war crime or a crime against humanity. But "et" is not given a disjunctive intendment in French, and if "et" or "and" were to be construed disjunctively this would mean that a prisoner of war *prosecuted but not convicted* (prosecuted and acquitted) could still be denied the benefits of the Convention because one of the two alternatives possible under the disjunctive construciton would have been met—he would have been prosecuted. This obviously does not make sense!

134. The argument might be made that absent the Convention we are relegated to customary international law—and that this is what the courts applied in Matter of Yamashita, 327 U.S. 1, and other similar cases. But

as we have already seen in so far as North Vietnam is concerned, it is undeniable that the Convention is applicable (see text in connection with notes 27-33 supra) and, that in any event at a minimum, Article 3 is applicable (see text in connection with notes 34-45 supra). Para. 1(d) of Art. 3 (note 34 supra) specifies the protections to be accorded persons charged with offenses.

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

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

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

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

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

140. It has been intimated that the North Vietnamese take the position that as the United States is guilty of making "aggressive war," the airmen are all guilty of crimes against peace. This is the category of war crime specified in Article 6(a) of the London Charter of the International Military Tribunal, which reads: "Crimes against peace: Namely, planning, preparation, initiation, or waging a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." Nazi Conspiracy and Aggression: Opinion and Judgment 3 (1947). Article 5(a) of the IMTFE differs only in minor respects. IMTFE Judgment, supra note 33, Annex 5-A, at 21. Apart from the trials of the major Nazi leaders by the IMT and by some of the Nuremberg Military Tribunals and of the major Japanese leaders by the IMTFE, no one has ever been tried for this war crime which, obviously, can only be committed by those who have the *power* to make war, and not by those who do the *fighting*. In United States v. von Leeb et al., 10 Trials 1, at 11 Trials 489 (1948), the Military Tribunal said: "If and as long as a member of the armed forces does not participate in the preparation planning, initiating or waging of aggressive war on a policy level his war activities do not fall under the definition of Crimes against Peace. It is not a person's rank or status, but his power to shape or influence the policy of his State, which is the relevant issue for determining his criminality under the charge of Crimes against Peace." This is the real meaning of the announcement by Ho Chi Minh that no trials of American airmen were then contemplated, but that Rusk, McNamara and Johnson were in a different category. See text in connection with note 116 supra.

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

142. Levie, supra note 131, at 461-62. A footnote to the last sentence quoted points out that when trials are postponed until after the cessation of hostilities the deterrent effect of widespread publicity is lost. Id. at 462 n.115.

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

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

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

146. N.Y. Times, June 22, 1965, at 6, col. 1.

147. Id. at 1, col. 7. He had been apprehended in Saigon while attaching a fuse to a bomb which was to have exploded five minutes later.

148. Id. June 25, 1965, at 1, col. 6; id. June 26, 1965, at 1, col. 8 and at 2, col. 7.

149. 53 Dep't State Bull. 55 (1965). The statement also said that "these Communist threats to intimidate, of course, will not succeed." Subsequent events have revealed that this portion of the statement was incorrect!

150. N.Y. Times, Sept. 28, 1965 at 1, col. 1.

151. 53 Dep't State Bull. 635 (1965).

152. ICRC, Vietnam, supra note 85, at 411. Despite the American statement concerning no intimidation, supra note 149, no Vietcong terrorist has been executed since September, 1965, and when three Vietcong terrorists were convicted and sentenced to be executed on November 17, 1967, they were given a last minute reprieve by South Vietnamese Premier Nguyen Can Loc. N.Y. Times, Nov. 17, 1967.

153. 2 Lauterpacht's Oppenheim, International Law 561 (7th ed. 1952). An example of a legitimate act of reprisal is given in United States Army Field Manual 27-10, The Law of Land Warfare 177 (1956), where it is stated: "For example the employment by a belligerent of a weapon the use of which is normally precluded by the law of war would constitute a lawful reprisal for intentional mistreatment of prisoners of war held by the enemy."

154. N.Y. Times, June 22, 1965, at 6, col. 1; and id., Sept. 28, 1965, at 1, col. 1. It should be borne in mind that at no time have the Vietcong or the NLF ever contended that the executed Americans had committed any act warranting execution or that their executions were pursuant to the sentence of a court.

155. N.Y. Times, June 26, 1965, at 2, col. 7.

156. Morgan, The German War Book 74 (1915).

157. See, e.g., para. 20 of the Anglo-German Agreement of July 2, 1917 (111 Brit. & For. State Papers 257, 263); Art. XXI of the Anglo-Turkish Agreement of Dec. 28, 1917 (id. at 557, 566); and para. 42 of the Franco-German Agreement of Apr. 26, 1918 (id. at 713, 721).

158. Supra note 61, Article 2. It is repeated in Article 13 of the 1949 Convention.

159. Flory, Prisoners of War 44 (1942).

160. United States v. List et al., 11 Trials 757, 1252-53 (1948). This case is sometimes referred to as The Southeast Case.

161. United States v. von Leeb et al., 11 Trials 528 (1948) (emphasis added).

162. Notes on The Dreierwalde Case, 1 War Crimes Rep. 86 (1947); Digest of Laws and Cases, 15 War Crimes Rep. 99 (1949). In the former the statement is made that "the killing of prisoners of war constituted a war crime under the customary International Law even before the promulgation and ratification of the Conventions of 1907 [Hague] and 1929 [Geneva]." (Emphasis added).

163. See text in connection with note 64 supra.

164. "According to the existing international law, reprisals against an ally of an enemy-state for acts of the enemy-state are not permissible as they are not directed against the state responsible for the act. Reprisals, therefore, may, according to the existing rules of the laws of war, only be employed against the responsible state." Moritz, The Common Application of the Laws of War Within the NATO-Forces, 13 Mil. L. Rev. 1 (July 1961). To the same general effect, see United States v. List et al. (The Hostage Case), 11 Trials 1270 (1948).

VI

Some Major Inadequacies in the Existing Law Relating to the Protection of Individuals During Armed Conflict

When Battle Rages, How Can Law Protect? 7
14th Hammarskjold Forum, John Carey ed., 1971

In a book published in 1954 the author said: "By 1907 the proportion of the laws of war embodied in general convention(s) far exceeded, and still exceeds to this day, that of the law of peace."[1] What he failed to mention was that, apart from the 1925 Geneva Protocol concerning gas and bacteriological warfare,[2] the conventional law of war relating to the conduct of hostilities dated (and still dates) from 1907;[3] and that there was not (and is not) a single piece of international legislation dealing specifically with what might well be considered a fairly important aspect of modern warfare—war in and from the air![4]

Shortly after the end of World War I an anonymous article appeared in the prestigious *British Yearbook of International Law* the thesis of which was that, the League of Nations having been established, it would be a "disastrous mistake" for the governments of member nations to use this new machinery to codify (or expand?) the law of war; and that the past failure of international law to provide viable solutions to the problems of peace was, at least in part, due to the preoccupation of writers and statesmen with the law of war and their consequent neglect of the law of peace.[5] Two arguments were advanced: first, that inasmuch as war had been abolished, there was no longer anything for the law of war to regulate;[6] and second, that in any event there was no point in wasting time and energy on rules of war because such rules would only be broken.[7] These arguments did not go unchallenged;[8] but that they prevailed with the majority of statesmen and international lawyers of the day is evident from the fact that the Third Hague Peace Conference, which had not been convened because of the advent of World War I, was never called into session and, despite the tremendous technological advances demonstrated during that war, the Regulations attached to the Fourth Hague Convention of 1907[9] continued to be the latest expression of States with respect to the conduct of hostilities.[10] Thus it was these Regulations, drafted in 1907, prior to the advent of such weapons as the tank and the airplane, weapons which had completely

revolutionized warfare, which constituted the basic rules governing hostilities during World War II.

It could easily be assumed that the events of World War II would have caused a less antagonistic attitude towards efforts to modernize the law of war.[11] However, such was not the case. In a statement which could have been written by our anonymous post-World War I author and his adherents, the International Law Commission made the following decision at its 1949 organizational meeting:

> "18. The Commission considered whether the laws of war should be selected as a topic for codification. *It was suggested that, war having been outlawed, the regulation of its conduct had ceased to be relevant.* On the other hand, the opinion was expressed that, although the term 'laws of war' ought to be discarded, a study of the rules governing the use of armed force—legitimate or illegitimate—might be useful. . . . The majority of the Commission declared itself opposed to the study of the problem at the present stage. *It was considered that if the Commission, at the very beginning of its work, were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace.*"[12] (Emphasis added.)

As a result of that decision, and despite strong arguments in support of the need to modernize the law of war advanced by many of the leading international lawyers,[13] the Commission has, more than twenty years later, never of its own volition considered any aspect of the law of war. At the present time, then, we are compelled to apply to wars being fought in the eighth decade of the 20th century rules governing the conduct of hostilities which were drafted in the first decade of that century.[14] Just imagine the chaos if we were using the traffic regulations of that earlier horse-and-buggy decade to regulate today's traffic! Imagine Broadway and Forty-second Street with no traffic lights, no traffic policemen, no stop signs, and a five-mile per hour speed limit! But such are the rules under which the world community of nations, by its ostrich-like attitude, has permitted and continues to permit wars to be fought.[15]

Like the anonymous writer after World War I and like the International Law Commission after World War II, the United Nations itself has long been extremely reluctant to exert any effort toward modernizing the law of war for fear that public opinion might interpret such action as lack of confidence in that organization's ability to maintain the peace.[16] But more recently there is evidence that the General Assembly is becoming increasingly realistic in its approach to this problem and that humanitarian considerations are, at long last, having an effect. The International Conference on Human Rights, meeting in Teheran in May 1968, adopted a resolution which requested the General Assembly to invite the Secretary-General to study

"the need for additional humanitarian international conventions or for possible revision of existing Conventions to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare."[17]

This Resolution, in turn, resulted in the adoption by the General Assembly of Resolution 2444 (XXIII);[18] the preparation of the study *Respect for Human Rights in Armed Conflict* by the Secretary-General;[19] and the adoption by the General Assembly on December 16, 1969, of Resolution 2597 (XXIV), the pertinent operative portions of which read as follows:

1. *Requests* the Secretary-General to continue the study initiated by resolution 2444 (XXIII), giving special attention to the need for protection of the rights of civilians and combatants in conflicts which arise from the struggles of peoples under colonial and foreign rule for liberation and self-determination and to the better application of existing humanitarian international conventions and rules to such conflicts;

2. *Requests* the Secretary-General to consult and cooperate closely with the International Committee of the Red Cross in regard to the studies being undertaken by that body on this question;

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5. *Decides* to give the highest priority to this question at the twenty-fifth session of the General Assembly;

6. *Invites* the Secretary-General to present a further report on this subject to the General Assembly at its twenty-fifth session.[20]

As it will have been noted from the foregoing, there is another powerful force at work in this area—the International Committee of the Red Cross (ICRC).[21] Even during the arid period in the codification of the so-called "Hague" law of war[22] after World War I, the ICRC was successful in obtaining the convening of a diplomatic conference in Geneva in 1929 which not only redrafted the 1906 Geneva Convention,[23] but also drafted the first convention dealing exclusively with the subject of prisoners of war.[24] And in 1949, just shortly after the International Law Commission had reached its decision not to include the law of war on its agenda, another diplomatic conference was convened at Geneva at the instance of the ICRC and, based on many years of preparatory work by the ICRC, it drafted and adopted four humanitarian conventions,[25] including the first ever to deal exclusively with the protection of civilians.[26] Moreover, when Resolution 2444 (XXIII) was adopted by the General Assembly, its basis

was a resolution which had been adopted at the XXth International Conference of the Red Cross at Vienna in 1965;[27] and at the XXIst International Conference of the Red Cross, held in Istanbul in September 1969, a number of relevant resolutions were adopted.[28] Assuredly, with the General Assembly and the ICRC acting together in a concerted effort to reach the identical goal, the prospect for the revision and modernization of the law of war may now be viewed with some minimum degree of optimism. Of course, there is a long international road to travel from proposals, to draft convention, to diplomatic conference, to signed convention, to ratification by a sufficiently large number of States, including the great powers, to make any such revision and modernization meaningful;[29] but the very willingness of the General Assembly to acknowledge that the problem exists is "a giant step forward for all mankind."

It is perhaps appropriate to mention at this point a suggestion which has been offered in order to make work in this area more palatable to those who have heretofore opposed it. This suggestion is that the term "armed conflict" be used as a substitute for the word "war" in the context of rules governing hostilities. It will be recalled that in the 1949 decision of the International Law Commission not to enter this field, those who opposed that decision suggested that the term "laws of war" be discarded.[30] The same suggestion is to be found in the ICRC's proposals and practice and is stated to be based upon the need "to take account of the deep aspiration of the peoples to see peace installed."[31] And the Report, A/7720, makes the same suggestion, but apparently for the perhaps more logical reason that "armed conflict" is a considerably more all-inclusive term, and therefore less subject to dispute, than is "war."[32] Whatever the motivation, such a change appears to be essentially one of semantics, and there does not appear to be any substantive objection to it. Moreover, if it will reduce opposition to the project for the revision and modernization of the applicable law, it will have served a useful and beneficial purpose.[33] Accordingly, the balance of this paper will use the terms "armed conflict," "rules of armed conflict," and "law of armed conflict," and, except where speaking historically, will pointedly refrain from the use of such antiquated terms as "war," "rules of war," and "law of war"!

Assuming then that the time is approaching when affirmative steps will be taken to revise and modernize the law of armed conflict, the question is presented as to the specific areas in which such revision and modernization is needed. Any attempt to answer that question completely would probably necessitate a listing which would cover many pages and explanatory matter which would fill many tomes. This paper, as its title indicates, will be limited to several matters considered to be the major inadequacies relating to the protection of individuals during armed conflict which presently exist and require correction. They are:

1. The non-existence of and the need for a method for the automatic determination that a particular inter-State relationship requires the application of the law of armed conflict;[34]

2. The non-existence of and the need for a method which will ensure the presence in the territory of each party to an armed conflict of a Protecting Power or an international body with adequate authority to police compliance with the law of armed conflict;

3. The non-existence of and the need for a complete and total prohibition of the use in armed conflict of any and all categories of chemical and biological agents; and

4. The non-existence of and the need for a complete code governing the use of air power in armed conflict with emphasis on the outright prohibition of any type of bombing which has as its basic target the civilian population.

In the discussion of each of these inadequacies in the present law governing armed conflict, an effort will be made to show the nature of the particular inadequacy and why it exists and to suggest possible remedies, with the caveat that the suggested remedies are not intended to exclude other, possibly more practical and practicable, solutions. In view of the very nature of the inadequacies discussed, there would appear to be little need to advance arguments as to why each is deemed of sufficient import to be considered a major inadequacy requiring a remedy.

1. *The non-existence of and the need for a method for the automatic determination that a particular inter-State relationship requires the application of the law of armed conflict.*

One of the major inadequacies of the present law of armed conflict is that there is in existence no method for the automatic issuance of an authoritative and effective determination that the relationship between two or more States has reached a point where that law should be applied.

Under Article 1 of the Third Hague Convention of 1907 hostilities were instituted by a "reasoned declaration of war or . . . an ultimatum with conditional declaration of war"; and under Article 2 of that Convention the belligerents had the duty to notify neutrals of the existence of a state of war.[35] Of course, were these provisions uniformly complied with by States, the problem under discussion would not exist. Unfortunately, more often than not they 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 declaration of war and started a policy which has been followed all too frequently since then.[36]

Moreover, a number of nations have denied the applicability of the law of war by the use of subterfuge or perversion of the facts. Thus, the Sino-Japanese conflict of the late 1930s was designated by Japan as a "police action" which, it was claimed, did not bring the law of war into effect; and in numerous other cases the applicability of the provisions of the 1907 Hague and of the 1929 Geneva Conventions was rejected on the mere basis of a denial of the existence of a state of war—despite clear and undeniable evidence to the contrary. Concerning this situation the ICRC later said:

> ". . . Since 1907 experience has shown that many armed conflicts, displaying all the characteristics of a war, may arise without being preceded by any of the formalities laid down in the Hague Convention. Furthermore, there have been many cases where Parties to a conflict have contested the legitimacy of the enemy Government and therefore refused to recognize the existence of a state of war. In the same way, the temporary disappearance of sovereign States as a result of annexation or capitulation has been put forward as a pretext for not observing one or other of the humanitarian Conventions. It was necessary to find a remedy to this state of affairs . . ."[37]

As the problem had thus long been recognized, in preparing the so-called Stockholm draft conventions (the working papers for the 1949 Diplomatic Conference which drafted the four 1949 Geneva Conventions) the ICRC attempted to solve it by proposing the employment of a phrase making each Convention applicable "to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." This proposal was adopted by the Diplomatic Conference without change and without debate.[38]

A great feeling of accomplishment was engendered by the acceptance of this supposedly all-inclusive phrase by the Diplomatic Conference. The same ICRC study quoted above said of it:

> "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 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. . . ."[39]

Unfortunately, it has not uniformly worked out this way in practice. Thus, for example, in Vietnam, where thousands of planes have been shot down, tens of thousands of human beings have been killed, and millions of rounds of

ammunition have been expended, the position has been taken by North Vietnam that the humanitarian conventions governing armed conflict, to which she long ago acceded, do not apply.[40]

Thus, after World War II it was considered necessary to evolve a method which would make it impossible for States to engage in armed conflict and attempt to justify non-compliance with the then law of war by denying the existence of a state of war through some subterfuge such as labelling it a "police action," alleging the lack of a declaration of war, etc. Now, once again, it is necessary to seek a method which will make it impossible for States to engage in armed conflict and attempt to justify non-compliance with the present (or future) law of armed conflict by advancing the same or new subterfuges, such as labelling the armed conflict as "legitimate self-defense," or as "assistance to an ally in an internal conflict," or as "assistance to peoples engaged in a national liberation movement aimed at throwing off the yoke of imperialism," etc.[41] And contriving new phrases of limitation will probably be no more successful in solving the problem than they have in the past as they would merely serve as a basis for future evasions of a different type.

It is suggested that a true and effective solution could be attained by assigning the power to make a determination as to the existence of a state of armed conflict to a pre-selected international body; by making the decision reached by that body as to the existence of a state of armed conflict binding on the States directly involved, as well as on all other Parties to the Convention; and by providing for the automatic imposition of total sanctions whenever this body determines that its decision is not being respected by a State party to the armed conflict in that such State has, despite such decision, continued to deny the applicability of the law of armed conflict, or any part of it, or is, in fact, violating such law.[42]

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 should be decided by the Security Council of the United Nations. He later amplified this proposal by explaining that he had meant that such recognition of belligerency should be given by a majority of the countries represented on the Security Council.[43] A French proposal, which was actually concerned with the problem of a substitute for the Protecting Power, would have established on a permanent basis, immediately upon the Conventions becoming effective, a "High International Committee for the Protection of Humanity," consisting of thirty members elected by the Parties to the Convention 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—"[44]

While this proposal was not incorporated into the Conventions, it was the subject of a resolution adopted by the Diplomatic Conference which recommended 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.[45]

These two proposals are mentioned here because they suggest alternative methods of attempting to solve our problem: one by the use of an established 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 the representatives of States, voting on the basis of decisions reached in Foreign Offices, decisions which are made on the basis of 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 reach a decision, over the opposition of North Vietnam (and, more important, of the Soviet Union), that the situation in Vietnam demands the application of the humanitarian conventions which govern the law of armed conflict.[46]

On the other hand, a specially constituted body of perhaps twenty-five individuals, each of whom is of sufficient personal international stature to be above politics and would act as an individual and as his or her moral and ethical principles dictated, detached and unaffected by instructions, could well constitute an acceptable and effective international body. The provisions for the selection of the members of this body (the "International Commission for the Enforcement of Humanitarian Rights during Armed Conflict"—ICEHRAC) would be sufficiently restrictive to ensure the choice of the type of individual described, without regard to nationality, race, religion, color, or geographical distribution. The ICEHRAC would be selected as soon as the constitutive convention had become effective and would be a permanent body, perhaps self-perpetuating.[47] Any Party to the convention, whether or not itself involved, could, at any time, request a determination by ICEHRAC as to whether the relationship between two or more States was such as to call into effect the application of the law of armed conflict; the States involved would be invited

to present any facts or arguments they desired but would not otherwise participate in the decision-making process;[48] an affirmative decision would immediately be binding not only upon the States involved, but on all of the other Parties to the Convention; and a subsequent finding by ICEHRAC that its decision was not being complied with would automatically, and without further action of any kind, require the application of complete economic and communications sanctions against the violating State by all of the other Parties to the Convention.[49]

To many this proposal will undoubtedly appear Utopian, idealistic, and impractical. However, upon reflection this reaction may appear somewhat less valid. There are today more than one hundred States which are not presently involved in the type of armed conflict under discussion. Each and every one of them considers that should it become involved in such activities in the future, it would be on the side of the angels—so the provisions of any such convention would naturally apply in its favor and against the opponent. Moreover, to what will it have agreed? Merely that a neutral, internationally-created body, which it helped create, may determine that a situation in which that State unexpectedly finds itself calls for the application of the humanitarian law of 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 could not have recourse to certain prohibited methods of conducting hostilities. Can any State advance the argument that it refuses to ratify such a convention because it does not wish its sovereign power of action limited in these respects, it wishes to retain the unfettered ability to kill and maltreat these people at will and that it wishes, for example, to retain the possibility of using weapons which have been banned?[50] Moreover, once such a convention is drafted and presented for signature and ratification, the moral and humanitarian pressure to bring about ratifications would be tremendous and there would be an excellent possibility of its general acceptance.[51] While certain States which have adopted obsolete attitudes magnifying national sovereignty might well oppose such a proposal from beginning to end, it is predictable that they would participate, albeit reluctantly, in the diplomatic conference which was convened to draft such a convention and would eventually, rather than risk international opprobrium, become Parties to it.[52]

This, then, is the suggested remedy to the problem of establishing a method for the automatic determination that an existing situation necessitates the application of the law of armed conflict. While it would, it is true, entail a somewhat broader delegation of authority than States have heretofore been willing to make, it is believed that the time is past when States may argue "national sovereignty" as an excuse for refusing to participate in the creation of

an international institution the sole function of which will be to limit the illegal and nonhumanitarian conduct of hostilities in armed conflict.

2. *The non-existence of and the need for a method which will ensure the presence in the territory of each State party to an armed conflict of a Protecting Power or an international body with adequate authority to police compliance with that law.*

Another major inadequacy in the old law of war and in the present law of armed conflict is that there has never been an "umpire" with sufficient authority to oversee the application of the law, to investigate alleged or possible violations, to determine the facts with respect thereto, and to take the necessary action to ensure the correction of the default.

For many centuries there has existed in customary international law an institution known as the Protecting Power. By the time of the Spanish-American War (1898), the traditional functions of that Protecting Power had come to include some aspects of the protection of prisoners of war.[53] During World War I a number of formal agreements were entered into confirming the existence of the Protecting Power and its activities with respect to prisoners of war, which had until then rested entirely on custom, and specifying a number of functions.[54] Subsequently, in Article 86 of the 1929 Geneva Prisoner-of-War Convention[55] this institution received formal recognition in a general multilateral treaty concerned with ensuring humanitarian treatment for one class of victims of war.

The four 1949 Geneva Conventions reaffirm the Protecting Power as an international humanitarian institution.[56] There is now, therefore, binding international legislation establishing the Protecting Power as an international institution during time of armed conflict and specifying a number of its duties and powers with respect to the protection of wounded and sick, prisoners of war, and civilian noncombatants. Unfortunately, the provision concerning the original designation of Protecting Powers by belligerents is less than clear, apparently relying on customary international law in this respect, although a great deal of time, effort, and controversy were expended at the 1949 Diplomatic Conference with respect to the designation of replacements and substitutes for an original Protecting Power.[57] In any event, although there have probably been close to one hundred armed conflicts of various sorts and sizes since the end of World War II, the institution of the Protecting Power has not once during that period been called into being.[58] While the Report advances a number of possible reasons for this failure,[59] it is believed that many of them are completely irrelevant and that, for the most part, the failure to secure the designation of such a Power has resulted from the fact that the States involved did not wish to have on their territory a neutral presence concerned with the problem of the

extent to which there was compliance with the provisions of the specifically humanitarian conventions governing the law of armed conflict.[60]

The failure of the Protecting Power as an institution and the need for some effective system of supervision appears to be very generally admitted. Thus in answer to the Secretary General's inquiry concerning the preparation of his Report, India stated that it believed that the solution to the problem "would perhaps be found more through the complete implementation of the existing conventions than through the search for new legal instruments."[61] And the response of the United States acknowledged "a strongly held conviction that steps are urgently needed to secure better application of existing humanitarian international conventions to armed conflicts."[62] Similarly, the Report states that

> "there would be pressing need for measures to improve and strengthen the present system of international supervision and assistance to parties to armed conflicts in their observance of humanitarian norms of international law. . . ."[63]

And another organization concerned with preserving humanitarian rights said, with respect to the Protecting Power:

> "Certainly it is time that this valuable international custom was revived in the modern context of armed conflicts. An initiative of this kind by the United Nations would set a precedent as a means of lessening the brutality of conflicts, and would accord with the aim expressed in the Charter. . . ."[64]

And, finally, Resolution XI of the XXIst International Conference of the Red Cross "calls upon all parties to allow the Protecting Power or the International Committee of the Red Cross free access to prisoners of war and to all places of their detention."[65] Further, it should be borne in mind that nowhere in either customary or conventional international law is there any rule which would authorize the Protecting Power, even if it were designated and functioning, to supervise the compliance of a belligerent with that area of the law of armed conflict governing the conduct of hostilities.[66]

Although, as has been stated, no Protecting Power has been designated in any armed conflict which has occurred since World War II, on a number of occasions the ICRC has been permitted to perform its humanitarian functions.[67] Perhaps because of this, the Report calls it the most effective private organization concerned with respect for human rights in armed conflict, ascribes this to "its history, past experience, and its established and well deserved reputation of impartiality," and recommends its strengthening.[68] But not even the ICRC has been uniformly successful in having its services accepted. Thus, while it was permitted to perform humanitarian functions in the prisoner-of-war camps maintained in South Korea during the period of hostilities in that country

(1950-53), it was never permitted in North Korea where, as a result, there was no "guardian" of the Conventions;[69] similarly, while it has functioned in South Vietnam over a considerable period of time, it has never been permitted in North Vietnam;[70] and its trials and tribulations in Biafra and Nigeria are too recent to require elaboration.[71]

There is, then, a double need in this area: (1) a need to devise a method which will ensure the existence of a "third" presence, either a Protecting Power or some substitute therefor, on the territory of each State party to an armed conflict; and (2) a need to grant to that Protecting Power, or the substitute therefor, adequate authority to ensure compliance with all of the law of armed conflict, including that relating to the conduct of hostilities.[72] The provisions of the 1949 Geneva Conventions for the designation of Protecting Powers have not been at all effective[73] and those relating to substitutes for Protecting Powers have been only partially successful. It is apparent, then, that the only real solution would be, once again, to have a provision in a convention which would, in appropriate cases, automatically trigger action by ICEHRAC.[74] Thus the convention creating that institution could provide that, when the existence of a state of armed conflict is acknowledged by the States involved, or when a decision to that effect has been reached by ICEHRAC in accordance with the other provisions of the convention, and no Protecting Powers have been designated in accordance with customary international law[75] within one week thereafter, ICEHRAC would automatically begin to function in the capacity of a substitute for the Protecting Power, with all the rights and duties which have been, or which may be, granted to such Powers.[76] And such rights and duties should include the supervision of the application of *all* of the law of armed conflict and should not be restricted to the protections afforded under the 1949 Geneva Conventions. After all, a human being, combatant or noncombatant, suffers just as much, or is just as dead, be his improper treatment due to a violation of those conventions or to the use of dum-dum bullets (in violation of the 1899 Hague Declaration), or the use of poison (in violation of the 1907 Hague Regulations), or the use of gas (in violation of the 1925 Geneva Protocol), etc.[77]

In many respects the foregoing proposal parallels suggestions contained in the Report.[78] Nor is it believed that the U.S.S.R. and the other Communist countries would necessarily oppose such a solution merely because they made reservations to Article 10/10/10/11,[79] and because the Soviet Union made a statement indicating that it did not consider Resolution 2 of the 1949 Diplomatic Conference necessary.[80] Events subsequent to 1949 have demonstrated the need for an institution capable of performing the functions of the Protecting Power and competent to take such functions upon itself immediately when the need therefor becomes apparent.[81] It is believed that only in this fashion will the world community of nations provide a satisfactory and effective method of ensuring

in every case of armed conflict the presence of an impartial agency with the function of making certain that the law of armed conflict is fully and properly applied.[82]

3. *The non-existence of and the need for a complete and total prohibition of the use in armed conflict of any and all categories of chemical and biological agents.*

A third major inadequacy in the existing law relating to the protection of individuals during armed conflict is the lack of a comprehensive and generally accepted ban on the use as weapons of all types and categories of both chemical and biological agents.

While there is probably no real equal to the disaster that would descend upon this earth should an all-out nuclear war occur, potentially the use of other uncontrollable methods of mass destruction could be almost equally disastrous for mankind.[83] Dozens of chemical agents, and numerous biological agents,[84] all with varying degrees of lethality, that have been determined to be the most "useful" are now included in the arsenals of a number of nations for possible use in the event of armed conflict.[85] Hundreds of books and articles have been written[86] and millions of words have been spoken[87] on the subject. For the most part they have been concerned with the questions of whether there is today any customary rule of international law which prohibits the use of chemical agents in armed conflict and whether biological agents fall within the well-established prohibitions against the use of "poisons" and against the use of weapons which cause "unnecessary suffering"; but also, in more recent days, with the inhumanity of these weapons and the highlighting of the moral and ethical basis for the universal acceptance by nations of a strict and all-inclusive ban on the use in armed conflict of any and all types of both chemical and biological agents.[88]

A very brief history of the attempts to ban the use of chemical (and bacteriological) agents as weapons will probably serve to clarify the current problem as well as the suggestion for solving it. Chemical warfare of differing varieties has existed for centuries.[89] Although the 1868 Declaration of St. Petersburg[90] actually dealt with explosive bullets, it is often cited as the beginning of the attempt to ban the use of chemical agents in armed conflict because of a preambular clause which deplored "the employment of arms which uselessly aggravate the suffering of disabled men, or render their death inevitable." Chemical agents, it is contended, fall within this classification.

The 1899 Hague Peace Conference adopted a number of provisions which are said to have indirectly, or which did directly, ban the use of chemical agents. Thus the Regulations attached to the Second Hague Convention[91] drafted by that Conference stated that the right of belligerents to adopt means of injuring

the enemy was not unlimited (Art. 22) and they especially prohibited the employment of poison or poisoned weapons (Art. 23*a*) and of arms, projectiles, or material of a nature to cause unnecessary suffering (Art. 23*e*). In addition, a Declaration concerning the Prohibition of Using Projectiles the Sole Object of which is the Diffusion of Asphyxiating or Deleterious Gases was drafted.[92] While this Declaration was not repeated at the 1907 Hague Peace Conference, the provisions of the Regulations attached to the Fourth Hague Convention of 1907[93] were identical with those cited from its 1899 predecessor.

World War I saw the use of gas introduced by Germany, followed thereafter by its use by the Allies. The Treaty of Versailles contained an article which stated that the "use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices being prohibited, their manufacture and importation are strictly forbidden in Germany."[94] Nevertheless, it would be an exaggeration to say that when the Treaty of Versailles was signed in 1919 there was in existence any generally accepted rule of international law prohibiting the use of chemical agents in armed conflict. In 1922 the five great maritime nations of that time (France, Italy, Japan, the United Kingdom, and the United States) drafted and signed the Treaty of Washington relating to the use of submarines and noxious gases which contained a provision that, the use of "asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world and a prohibition of such use having been declared in treaties to which a majority of the civilized Powers are parties," the signatories "declare their assent to such prohibition."[95] While this treaty never became effective (France failed to ratify it because of the provisions relating to submarines), it constituted an important landmark in the law of armed conflict. And three years later, at the Conference which met in Geneva to establish controls on international trade in munitions,[96] a Protocol was drafted which contained wording lifted bodily from the Treaty of Washington and, in addition, contained an agreement "to extend this prohibition to the use of bacteriological methods of warfare."[97] As of October 30, 1969, there were 68 States parties to this 1925 Geneva Protocol.[98] The great majority, however, have ratified it with reservations which make it applicable only as regards other States which are also Parties to it; and which make it inapplicable in the event it is violated by the enemy.[99]

Gas was subsequently used by Italy against Ethiopia in the 1935-36 war.[100] Italy admitted this use in the League of Nations and unsuccessfully attempted to justify it as a reprisal for other alleged violations of international law by Ethiopia. Japan used gas against China in their hostilities of the late 1930s; and the Soviet Union contended that Japan used bacteriological agents against China in the 1930s. This was never established by acceptable evidence and, so far as appears, there was no use in armed conflict of either chemical or bacteriological weapons

by any belligerent during World War II.[101] During the Korean hostilities the Soviet Union, Communist China, and North Korea all contended that the United States forces in the United Nations Command had used bacteriological weapons.[102] The United States denied this and demanded an investigation which was refused. It is interesting to note that in an official book published in Moscow in 1967 no mention is made of these allegations, although the charge against the Japanese is reiterated and the use of defoliants in Vietnam is strongly criticized.[103] The charge was also made, and apparently verified by the ICRC, that Egypt used a chemical agent against the Royalists in the Yemen.[104] Egypt denied the charge and invited an investigation. As in the case of the similar demand made by the United States in Korea, no such investigation ever took place.

The ICRC Draft Rules contain a blunt and broad prohibition against the use of "incendiary, chemical, bacteriological, radioactive or other agents";[105] on a number of occasions the General Assembly has adopted resolutions calling for strict observance of the "principles and objectives" of the 1925 Geneva Protocol and inviting non-Parties to accede to it;[106] and on at least one occasion it has declared the use of chemical and biological agents of warfare "as contrary to the generally recognized rules of international law, as embodied in the Protocol."[107] Some writers also urge that the use of these weapons is prohibited by customary international law.[108] It appears however that, particularly in the light of recent developments, this is a sterile approach to the problem.

When the 1925 Geneva Protocol was sent to the United States Senate for its advice and consent to ratification, this was refused; and accordingly, the United States is not presently a Party to the Protocol.[109] As a result, the United States has long taken the position that, while it will not be the first user of the weapons prohibited by that international agreement, it "is not a party to any treaty, now in force, that prohibits or restricts the use in warfare of toxic or nontoxic gases, of smoke or incendiary materials, or of bacteriological warfare."[110] Although the United States has not used any toxic chemical, or any bacteriological agent, since the Protocol became effective as between the Parties to it, the fact that it refused to ratify the Protocol has not only caused it to have problems in the diplomatic field,[111] but has also undoubtedly deterred a number of other States from becoming Parties to it.

On November 25, 1969, President Nixon made an announcement of major importance concerning this subject.[112] This announcement included:

1. A reaffirmation of the renunciation by the United States of the first use of lethal chemical weapons;

2. An extension of this renunciation to the first use of incapacitating chemicals;

3. An intention to resubmit the 1925 Geneva Protocol to the Senate for its advice and consent to ratification;

4. Renunciation by the United States of the use of lethal biological agents and weapons;

5. Confining biological research to defense measures;

6. Disposing of all stocks of bacteriological weapons; and

7. Associating the United States with the principles and objectives of the United Kingdom Draft Convention on biological weapons.[113]

It is assumed that this action by the United States, its prospective ratification of the 1925 Geneva Protocol, and its expressed willingness to become a party to a convention banning biologicals will lead the way to the goal which the United Nations General Assembly has long sought to reach—universal acceptance of prohibitions on chemical and biological agents and weapons.[114] Unfortunately, it appears that there is still one major problem which requires solution—the status of the use of certain types of chemical agents. For while diplomats, scientists, and international lawyers are, for the most part, in general agreement that lethal gases and all biologicals either are, or should be, prohibited by the law of armed conflict, there is no such concordance with respect to: the so-called non-lethal gases, such as tear gas (CS); incendiaries, such as napalm; and defoliants. Moreover, the use of all of these weapons by the United States in Vietnam has considerably exacerbated this problem.

The difference of opinion with respect to both the legal and the moral aspects of the problem of the use of non-lethal or incapacitating chemicals such as tear gas (lachrymatories) is evidenced by the division among the group of experts convened by the ICRC:

> ". . . Some [experts] . . . wondered whether the employment against the enemy of chemical agents involving no serious danger for health might not in the final issue be of a more humanitarian character than many other means of warfare. The employment of means such as police gases (lachrymatory and others) is admitted on the national level: why could they not a fortiori be admitted against the enemy?"
>
> "Other experts, on the contrary, considered that the prohibition in the 1925 Geneva Protocol should be taken as covering *all gases,* including those not directly poisonous, in virtue of the deliberately broad terms of this prohibition in the Protocol . . ."[115]

In 1930 the United Kingdom took the position that the use of smoke did not violate the Protocol but that the use of tear gas did; but recently a spokesman for that country stated that today's tear gas is less harmful to man than was the 1930 smoke; that it is used widely for domestic purposes for riot control; and that its use is not prohibited by any international convention.[116]

Apart from the fact that even a non-lethal, incapacitating gas will occasionally cause a fatality, there are two major objections voiced against their use in armed conflict: first, that as a practical matter the legality of their use becomes extremely debatable when its purpose is "to enhance the effectiveness of conventional weapons,"[117] "to force persons from protective covering to face attack by fragmentation bombs ";[118] and second, and more important, that the use of any chemical, albeit non-lethal, results inevitably in escalation: "except perhaps when they are first used, non-lethal chemical weapons are unlikely to have much effect except to set the stage for more deadly CBW operations."[119]

The second chemical weapon in the controversial area is napalm—an extremely effective weapon and hence one which is much feared,[120] and much denounced.[121] Once again there is no general agreement as to whether this chemical weapon is prohibited by the Protocol.[122] And because the answer to this question is even more difficult to ascertain than is that with respect to lachrymatories, the position has been taken that it may be used, but only in a discriminating manner.[123] The suggestion is made in A/7720 that in measures of control and disarmament incendiary weapons such as napalm should be considered separately from chemical and biological weapons and that a new convention is needed to clarify the situation;[124] a suggestion which is probably an admission that this is presently a gray area of the law.

Prior to Vietnam defoliants had never been used in warfare. As a result, there is no real experience upon which scientists can base their opinions as to the ecological effects of their use.[125] Here, as in the case of napalm, the suggestion has been made that the legality of their use depends upon the purpose or target: while it might be permissible to use them on a forest area used by combat troops, it would not be permissible to use them on farm lands raising crops to feed the civilian population. Apart from the fact that it would frequently be all but impossible to make the correct determinations, if the use of defoliants does change the ecology, then it would appear that the purpose or target should not be the determining factor in reaching a decision on their use.[126]

Because the use of non-lethal, or incapacitating, chemical agents will inevitably lead to the use of other, more lethal, chemical agents; because napalm can cause both asphyxiation and unnecessary suffering; because defoliants may well change the entire ecology of an area and could lead to the starvartion of the civilian population; because of these and many other reasons, it is believed that to be successful any prohibition on the use of chemical weapons in armed

conflict must comprise *all* types of chemical agents, including those just mentioned. It is on this basis that it is urged that there is a vital humanitarian need for a universally accepted understanding that the prohibition of the use in armed conflict of chemical agents includes any and all categories of such agents, not excluding incapacitating gases, incendiaries, and defoliants.[127]

There is comparatively little dispute on the need for a far-reaching prohibition on the use of biologicals in armed conflict. As has been noted, there is general agreement that, like a nuclear war, a biological war would constitute a disaster to all mankind, belligerent and neutral, combatant and noncombatant.[128] One grave problem in this area is that even a small, comparatively undeveloped nation could conceivably mass the necessary resources to enter this field—and there is considerable dispute as to whether an inspection system, even if adopted, could function effectively.[129] The United Kingdom Draft Convention on the subject of biological weapons does not provide for inspections except in the context of a specific complaint.[130] But, while every effort should most certainly be made to devise means of ensuring against the illegal production and storage of biological agents of military relevance by any nation, large or small, industrial or undeveloped, this should not be permitted to unduly delay agreement on a treaty completely outlawing the use in armed conflict of any and all biological agents.

4. *The non-existence of and the need for a complete code governing the use of air power in armed conflict with emphasis on the outright prohibition of any type of bombing which has as its basic target the civilian population.*

The airplane was first successfully flown in 1903, just shortly prior to the Second Hague Conference of 1907; it developed into a military weapon of sizable proportions during World War I; during the between-wars period it became obvious that it was a major military weapon; during and since World War II technological advances in this field have been such that its importance in the military arsenal is now unequalled (except for the nuclear ballistic missile); and yet its use in armed conflict remains essentially unregulated!

In 1917, while the airplane was still in swaddling clothes, exponents of the use of air power had already evolved the theory that

> "the day may not be far off when aerial operations with their devastation of enemy lands and destruction of industrial and populous centres on a vast scale may become the principal operations of war."[131]

While strategic bombing was probably not the "principal operation" of World War II, it certainly played a most important role in that war and will do so again

in any future non-nuclear armed conflict—and perhaps even in one involving the use of nuclear weapons.[132]

As in the case of the discussion of chemical and biological weapons, while it is unproductive to argue about whether or not the strategic bombing of World War II violated international law,[133] a brief survey of what has transpired in the past will prove helpful in approaching the problem from the point of view of the future. When the Second Hague Peace Conference met in 1907 the balloon was more than a century old and had already been used for military purposes, while the airplane had been successfully flown for the first time only four years before. The Conference adopted a Declaration prohibiting bombing "from balloons or by other new methods of a similar nature"[134] and Conventions which included restrictions on land bombardment and naval bombardment. Article 25 of the Regulations on the Laws and Customs of War[135] provided:

> "The attack or bombardment *by whatever means,* of towns, villages, dwellings, or buildings which are undefended is prohibited." (Emphasis added.)

The records of the Conference indicate that the words "by whatever means" were included in the article in order to cover air bombardment.[136] And Article 2 of the Convention on Naval Bombardment[137] excluded from the prohibition against the bombing of undefended places "military works, military or naval establishments, depots of arms or war materiel, workshops or plants which could be utilized for the needs of the hostile fleet or army." The argument has been advanced, not without justification, that this provision provides a basis for the air bombardment in the "hinterland" of objectives such as those enumerated.

This was the extent of the efforts which had been made to control the use of air power when World War I began; and during its course the airplane became a full-fledged weapon. However, apart from a few incidents its use was restricted to the battlefield and, usually, to air-to-air duels.[138] In view of the technological progress made and foreseen, it is indeed strange that although a number of efforts were made in the between-wars period to obtain an international agreement on such matters as air bombardment none was successful.[139] The most authoritative of these failures was the drafting of the 1923 Hague Rules of Air Warfare.[140] Two articles of those Rules are particularly relevant: Article 22, which would have prohibited aerial bombardment which was "for the purpose of terrorizing the civilian population . . . or of injuring noncombatants"; and Article 24, which would have limited it to specified military objectives in the vicinity of the zone of land operations and then only if it would result in a distinct military advantage and if it could be accomplished without "indiscriminate" bombing of the civilian population. These two articles were intended: (1) to preserve the traditional distinction between combatant and noncombatant; and (2) to limit the allowable

military objectives to those in the area of the combat zone—the so-called "occupation bombardment" because it is normally preliminary to physical occupation.

In a discussion of air bombardment in the House of Commons on June 21, 1938, Prime Minister Chamberlain made the following statement:

> "I think we may say that there are, at any rate, three rules of international law or three principles of international law which are as applicable to warfare from the air as they are to war at sea or on land. In the first place, it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law. In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking these military objectives so that by carelessness a civilian population in the neighborhood is not bombed."[141]

When World War II erupted in September 1939, President Roosevelt immediately sent the belligerents a plea against the bombing of civilian populations. The British, French, and Germans all replied that their planes were instructed to attack military objectives only.[142] In March 1940 the ICRC made an appeal to the belligerents "to confirm general immunity for peaceful populations, to define their military objectives, and to refrain from indiscriminate bombardments and reprisals." Once again the belligerents responded affirmatively—but continued to act as they felt necessary.[143] The estimate has been made that while World War I caused 10 million deaths, of which 500,000 were civilians, World War II caused 50 million, of which 24 million were civilians; and that half of the civilian deaths (12 million) were caused by air raids![144] It is worthy of note, too, that such air attacks were not specifically included in the definition of war crimes in the Charter of the International Military Tribunal and that there were no post-war trials based on a charge of indiscriminate bombardment of the civilian population.[145] Nevertheless, Spaight takes the position that "nothing that has happened in the second world war has shaken the legal objection to indiscriminate bombing."[146]

It is apparent from the foregoing that the attempt to control aerial bombardment juridically has been based on analogy to two classical principles of land and sea warfare: (1) the distinction between combatant and noncombatant; and (2) the restricting of lawful targets to military objectives.[147]

Much of the humanitarian law regulating armed conflict which has been accepted during the past century has been based upon the distinction between combatant and noncombatant. The airman who has crashed and been hospitalized, the sailor who has been rescued from the sea by the enemy after his ship has been sunk, the soldier who has been captured on the field of

battle—all of these have been removed from combatant status and are therefore entitled to the humanitarian protection afforded by international law. But they are but a comparatively small percentage of the overall group of noncombatants, the vast majority of whom are simply civilians, persons who are not a part of the armed forces of a belligerent. It is with these latter that we are presently concerned. The distinction between combatant and civilian has been termed, and properly so, "the fundamental principle of the law of war."[148] But air warfare in general, and strategic bombing in particular, has tended to blur that distinction[149] and its validity has been questioned.[150]

Let us take three examples. First, a city of 500,000 population located in the "hinterland" (deep inside the country and far from the scene of actual land combat) has no factories making any product in support of the country's war effort. Is the city a proper target for air bombardment? Second, suppose that this same city has in its midst a factory employing 1000 workers making a very important instrument of war. Is the factory, or the city, a proper target for air bombardment? And third, suppose that the same city has within its area a number of factories making important instruments of war, and employing the entire work force of the city. Are the factories, or is the city, a proper target for air bombardment?

Under the classical rules discussed and enumerated above, to bomb the city with no war production factories would be terror bombing, pure and simple, and would be a violation of the law of armed conflict. It would be an attack on a non-military objective which could be of no military advantage to the attacker except the possible demoralization of the enemy civilian population. With respect to this type of activity Lauterpacht has said:

> ". . . it is in that prohibition, which is a clear rule of law, of intentional terrorization—or destruction—of the civilian population as an avowed or obvious object of attack that lies the last vestige of the claim that war can be legally regulated at all. Without that irreducible principle of restraint there is no limit to the license and depravity of force. . . ."[151]

Even the proponents of more "liberal" rules of air bombardment do not assert the legality of bombing of this type.[152]

What of the large city with only one small factory in which is made a product of value to its country's war-effort? Certainly the bombing and destruction of such a factory would meet the test of resulting in a distinct military advantage to the attacker. It would not meet the test of being located in the zone of operations—but is that test, originally established when only cities in the zone of land operations could be reached by artillery bombardment, a valid test to be applied to air bombardment which can reach anywhere in the world? Moreover, it would meet the test of the requirements for naval bombardment. It would

probably not meet the test of being located where the bombing can take place without danger to the civilian population. However, it appears that practice during and since World War II would permit the factory to be subjected to air attack. As the Report points out, in recent armed conflicts belligerents have frequently made accusations of attacks upon non-military objectives and the enemy belligerent has denied the fact without either side questioning the propriety of the distinction as to types of objectives.[153]

Finally, what of the large city with many factories and most of the work force engaged in the war effort? Let us assume that in time of armed conflict 40% of the population constitute the work force—but that still means that 60% of the civilian population, 300,000 people of this city, is made up of women, children, aged, sick, etc. Must the attacker pick out individual targets, the real military objectives? Or may he blanket the entire city with bombs, thus ensuring that all of the plants are destroyed—but also ensuring that a large part of the population, worker and nonworker, is likewise destroyed? Spaight would answer this latter question in the affirmative. He says:

> "... There are in any given enemy city thousands of civilians, of 'noncombatants' in the old sense, but there are also thousands who cannot be called 'noncombatants' in any true meaning of the term. The former suffer inevitably because the latter have, quite properly, to be prevented from pursuing their lethal activities. It is a tragedy of juxtaposition which is not entirely without precedent. Noncombatants have often suffered in bombardments by land and naval forces, but their suffering has never been held to make the bombardment illegal. . . ."[154]

And he repeatedly asserts that so-called "target-area bombing" is an "established usage" and that it "cannot be considered to offend against the principles of the international law of war."[155] The problem which then confronts us is that we have returned to the doctrine of "total war,"[156] war as fought centuries ago: when the besieged city fell, all of its inhabitants were slaughtered and the city itself was put to the torch.

The Report makes the suggestion with respect to strategic bombing conducted on a target-area basis that "(it) would seem that measures to examine the effects of this kind of military operations within their legal context may now be desirable, and the question of defining limits might be usefully studied."[157] With this modest proposal there can be no possible dispute. The question which then presents itself is, what are possible solutions to the problem? And, which of these possible solutions offers the greatest amount of protection to the civilian population?[158]

Air bombardment could, of course, be limited to areas where combat is actually taking place—the old concept of the "zone of operations." This, in effect, means tactical bombing, and would preclude strategic bombing. While

this would, in large part, solve the problem, it is extremely doubtful that it would be possible to secure the agreement of Governments to such a stringent rule. Moreover, even if the agreement of Governments were obtained, it is doubtful that there would be compliance with such a rule in practice.

The Report proposes the establishment of safety zones,[159] apparently similar to, but much larger than, the hospital zones referred to in Annex I to the First and Fourth Geneva Conventions of 1949.[160] Presumably there would be no bombing whatsoever permitted within the safety zones and no restrictions on bombing elsewhere. While this might work for small groups and in small areas, it appears to be totally impractical for the protection of tens or hundreds of millions of civilians. The logistic problem alone would be insurmountable; and with thousands of square miles within a safety zone, the unlawful use of such areas for the protection of important military matters would probably be inevitable.

The Draft Rules prepared by the ICRC and submitted to the XIXth International Conference of the Red Cross at New Delhi in 1957[161] contain a number of provisions intended to provide maximum protection for the civilian population. An examination of the various provisions of these Draft Rules makes it clear why they were received by the Governments with a "crushing silence." While they are, as would be expected, as humanitarian as it would be possible to draft such rules, they are also impractical to the point where it is extremely doubtful that any armed force would be able to comply with them in time of armed conflict. While this, as we shall see, is not true of all of these Draft Rules, a much more practical set of general principles was drafted by the ICRC for consideration by its group of experts in 1968. These principles would limit air bombardment to identified military objectives; would place upon the attacker the duty to use care in attacking the identified military objective; and would apply the principle of proportionality as between the identified military objective and any possible harm to the civilian population.[162] These principles would clearly prohibit target-area bombing; but there does not appear to be any reason why such an important rule should not be specifically set out.

It is clear now, as it has been in the past, that no rule has as yet been conceived which will give full protection to the civilian population and yet will be acceptable to Governments. However, if man can devise instruments to send a spaceship to the moon and have it land within a matter of yards from its target, man can certainly devise, if he has not already done so, instruments which will put a bomb exactly on target. On the basis of this premise, the following rules on aerial bombardment are suggested:

1. *Terror Bombing Prohibited.* Attacks directed against the civilian population, as such, whether with the object of terrorizing it, or for any other reason, are prohibited.[163]

2. *Target-Area Bombing Prohibited.* It is forbidden to attack, as a single objective, an area including several military objectives at a distance from one another where members of the civilian population are located between such military objectives.[164]

3. *Military Objectives.*

(a) Before bombing a military objective, the attacking force must have sufficiently identified it as such.[165]

(b) In bombardments against military objectives, the attacking force must take every possible precaution in order to avoid inflicting damage on the civilian population.[166]

(c) To constitute a military objective a target must fall within one of the categories listed in the annex hereto.[167]

It is believed that these rules will, under present and foreseeable technological standards, provide a maximum of protection to the civilian population, while placing acceptable limitations on the scope of strategic bombing.

Conclusion

Armed conflict is, by its very nature, unhumanitarian. However, humanitarian rules, properly applied, can do much to mitigate this situation. It is believed that were the proposals made herein to be adopted as part of the law of armed conflict, they would go far to provide additional needed protection for both combatant and civilian noncombatant.

As has been stated, this paper represents an attempt to deal with only *some* of the present major inadequacies of the law of armed conflict; and their selection and priority must be ascribed to the personal predilections of the author. There are a number of other areas which might well have been included and which may well be considered by some to have equal, or even greater, importance. These might include: enforcement of the law of armed conflict; combat at sea, particularly submarine warfare; the status of guerrillas and partisans; the use of starvation as a weapon; etc. The selection made of the subjects to be discussed should certainly not be considered as in any way denigrating the importance to the cause of humanitarianism in armed conflict of many other such subjects.

APPENDIX 1

Twenty-third session
Agenda item 62

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY

[on the report of the Third Committee (A/7433)]

2444 (XXIII). *Respect for human rights in armed conflicts*

The General Assembly,

Recognizing the necessity of applying basic humanitarian principles in all armed conflicts,

Taking note of resolution XXIII on human rights in armed conflicts, adopted on 12 May 1968 by the International Conference on Human Rights,[1]

Affirming that the provisions of that resolution need to be implemented as soon as possible,

1. *Affirms* resolution XXVIII of the XXth International Conference of the Red Cross held at Vienna in 1965, which laid down, *inter alia*, the following principles for observance by all governmental and other authorities responsible for action in armed conflicts:

(a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;

(b) That it is prohibited to launch attacks against the civilian population as such;

(c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible;

2. *Invites* the Secretary-General, in consultation with the International Committee of the Red Cross and other appropriate international organizations, to study:

(a) Steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts;

(b) The need for additional humanitarian international conventions or for other appropriate legal instruments to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare;

3. *Requests* the Secretary-General to take all other necessary steps to give effect to the provisions of the present resolution and to report to the General Assembly at its twenty-fourth session on the steps he has taken;

4. *Further requests* Member States to extend all possible assistance to the Secretary-General in the preparation of the study requested in paragraph 2 above;

5. *Calls upon* all States which have not done so to become parties to the Hague Convention of 1899 and 1907,[2] the Geneva Protocol of 1925[3] and the Geneva Conventions of 1949.[4]

1748th plenary meeting,
19 December 1968.

FOOTNOTES

1. See *Final Act of the International Conference on Human Rights* (United Nations publication, Sales No.: E. 68. XIV.2), p. 18.
2. Carnegie Endowment for International Peace, *The Hague Convention and Declarations 1899-1907* (New York: Oxford University Press, 1918).
3. League of Nations, *Treaty Series*, vol. XCIV (1929), No. 2138.
4. United Nations, *Treaty Series*, vol. 75 (1950), Nos. 970-973.

Notes

1. Stone, Legal Controls of International Conflict 335 (1954, reprinted 1959). The statement that the codified law of war still exceeds the law of peace is probably now no longer true in view of the perhaps unanticipated success of the International Law Commission in securing the acceptance of a number of its draft conventions such as those on the Law of the Sea, Diplomatic Immunities, Consular Relations, and Treaties.

2. See note 84 *infra*. To a limited extent it might be considered that the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (249 U.N.T.S. 215) also falls in this category; but, of course, it attempts to protect property, not people.

3. International Committee of the Red Cross, Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflict 6 (1969) [hereinafter cited as ICRC, Reaffirmation]. This document is a report submitted to the XXIst International Conference of the Red Cross, held in Istanbul in September 1969.

4. It has at times been suggested that the condition for the termination of the 1907 Hague Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons (36 Stat. 2439, 2 Am. J. Int'l L. Supp.216 (1908)) has never occurred and that, therefore, the Declaration is still in force. In view of the practice of nations prior to, during, and since World War II, there would appear to be little merit to such an argument. Moreover, the United States and the United Kingdom are the only major powers which ratified it.

5. "The League of Nations and the Laws of War," 1920-21 Brit. Ybk. Int'l L. 109, 114-15.

6. Ray, Commentaire du Pacte de la Société des Nations 528 (1930).

7. Constantopoulos, "Les raisons de la crise du droit de la guerre," 7 Jahrbuch für Internationales Recht 22, 25 (1957). In this regard, see note 11 *infra*.

8. Writing in 1931 one author pointed out that neither the Pact of the League of Nations, nor the Kellogg-Briand Pact of 1928, could *guarantee* that there would be no future wars. Rasmussen, Code des Prisonniers de Guerre 72 (1931). And commenting on the 1934 Monaco Conference, de la Pradelle said:

"... Doctors and lawyers denounced the conspiracy of silence which, lest public opinion be frightened, had been adopted in official circles and which consisted of not speaking about the laws of war." (Translation mine.)

La Conférence Diplomatique et les Nouvelles Conventions de Geneve du 12 aout 1949, at 13 (1951).

9. 36 Stat. 2277; 2 Am. J. Int'l L. Supp. 90 (1908).

10. It is true that occasional attempts to further codify some limited aspects of the law of war were made, despite the inhospitable atmosphere. Thus, naval conferences were held in Washington in 1922 and in London in 1930 and 1936. However, these conferences, which were not even always successful in producing an effective result, merely scratched the surface of the work which needed to be done.

11. It is essential to bear in mind that to a considerable extent the existing law of war was observed during World War II. True, there were many well publicized violations of that law, the so-called "conventional war crimes." But see Baxter, "The Role of Law in Modern War," 1953 Proc. Am. Soc. Int'l L. 90, 92 where the following appears:

"Those who are most scornful of the attempts which the law of war makes to mitigate human suffering in war inevitably point to the barbarities which were practiced in the second World War. These accusations overlook the extent to which states did comply with the law of war, the advantage of a fixed standard against which to measure the conduct of those who were the most flagrant in the violation of all international law, and the subsequent vindication of the validity of the norms of international law through the imposition of sanctions in the war crimes proceedings. . . ."

12. Report of the International Law Commission to the General Assembly on the Work of the First Session, 1949 Ybk. Int'l L. Comm'n 281. And the International Law Commission did not stand alone. See, for example, the position of Scelle, set forth in Francois, "Réconsideration des principes du droit de la guerre," 47 (I) Annuaire de l'Institut de Droit International 491, 493 (1957); and Fenwick's comment on Baxter, "Forces for Compliance with the Law of War," 1964 Proc. Am. Soc. Int'l L. 82, 97.

13. See, for example, Kunz, "The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision," 45 Am. J. Int'l L. 37 (1951); Lauterpacht, "The Problem of the Revision of the Law of War," 29 Brit. Ybk. Int'l L. 360 (1952); Coudert, Francois and Lauterpacht, "La revision du droit de la guerre," 45 (I) Annuaire de l'Institut de Droit International 555 (1954); Jessup, "Political and Humanitarian Approaches to Limitation of Warfare," 51 Am. J. Int'l L. 757, 759 (1957); Accioly, "Guerre et neutralité en face du droit des gens contemporain" in Mélange Basdevant 1-2, 7 (1960); and Pictet, "The Need to Restore the Laws and Customs Relating to Armed Conflict," Rev. Int'l Comm'n Jur., No. 1 (March 1969), 22, 37.

14. Actually, the 1907 Hague Regulations (note 9 *supra*) were in large part a comparatively minor revision of the Regulations attached to the 1899 Second Hague Convention, 32 Stat. 1803; 1 Am. J. Int'l L. Supp. 129 (1907).

15. The following very apt statement appears in Pictet, "The XXth International Conference of the Red Cross: Results in the Legal Field," 7 J. Int'l Comm'n Jur., 3, 11 (1966):

". . . whereas the ruined cities [of World War II] have been rebuilt, the States have done nothing to restore the Hague Rules, which vanished under the same ruins . . . While the techniques of offensive action have taken giant strides forward, the only rules which can be invoked date from 1907. Such a situation is flagrant in its absurdity."

The Secretary-General's Report on Respect for Human Rights in Armed Conflict, A/7720, para. 131, is to the same effect, stating that military-technical developments "have brought major changes which the authors of existing international instruments could not envisage." And that many governments share the belief that affirmative action is needed in this area is demonstrated by a number of the answers received by the Secretary-General in response to his inquiry regarding the preparation of A/7720. See the replies of Finland (at 76 of the original United Nations document); Hungary (at 77); Morocco (at 82); Norway (at 82); and Romania (at 85). This Report is, of course, the basis for this paper and for the Fourteenth Hammarskjold Forum of the Association of the Bar of the City of New York. It will be referred to simply as "the Report" or as A/7720, and will be cited as A/7720.

16. This reluctance on its part, and a similar reluctance on the part of the various subsidiary organs of the United Nations, is noted in A/7720, para. 19.

17. Resolution XXIII of the International Conference on Human Rights, Teheran, April-May 1968 (United Nations publication, Sales No.: E. 68. XIV 2), at 18.

18. See Appendix 1 hereto.

19. See note 15 *supra.*

20. It will be noted that operative paragraph 1 has now been given a somewhat different emphasis, an emphasis of a type which has tended to permeate all United Nations actions in recent years. It is to be hoped that this will not be to the detriment of a revision and modernization of the general law of war which, of course, is, or should be, largely applicable in both international and internal conflicts.

21. "Powerful" in the sense that it has strong support from people all over the world who are acquainted with and who welcome its methods and objectives. Apart from its dedication to humanitarian endeavors, the ICRC has found that "belligerents necessarily consider this law [of war] as a single whole, and the inadequacy of the rules relating to the conduct of hostilities has a negative impact on the observance of the Geneva Conventions." ICRC, Reaffirmation 8.

22. It has been the practice to refer to the rules governing the conduct of hostilities as "Hague" law and to the rules governing the treatment of people (wounded and sick, prisoners of war, civilians) as "Geneva" law. See, for example, Pictet, note 13 *supra,* at 23. There is no merit to such a distinction. The 1899 and the 1907 Hague Regulations dealt with, *inter alia,* prisoners of war and military occupation. Those subjects are now covered in whole or in part by the Third and Fourth 1949 Geneva Conventions, respectively (see note 25 *infra).* And the 1925 Geneva Gas Protocol (see note 84 *infra)* as well as the ICRC's Draft Rules (see note 26 *infra)* are both concerned with permissible weapons, methods of attacks, etc., subjects which are basic to the Hague Regulations. Were it not for the 1954 Hague Cultural Convention (see note 2 *supra),* it might well be assumed that, the Netherlands no longer having the neutral status which it enjoyed prior to World War II, the nations of the world prefer to discuss subjects dealing with hostilities in still-neutral Switzerland. In any event, whether it is "Hague" law governing the conduct of hostilities or "Geneva" law governing the treatment of persons, its ultimate objective is humanitarian in nature.

23. This new version was the 1929 Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armies in the Field, 47 Stat. 2074; 118 L.N.T.S. 303; 27 Am. J. Int'l L. Supp. 43 (1933).

24. The 1929 Geneva Convention Relative to the Treatment of Prisoners of War, 47 Stat. 2021; 118 L.N.T.S. 343, 27 Am. J. Int'l L. Supp. 59 (1933).

25. The 1949 Geneva Convention for the Amelioration of the Conditon of the Wounded and Sick in Armed Forces in the Field (the "First" Convention), 6 U.S.T. 3114; 75 U.N.T.S. 31; the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (the "Second" Convention), 6 U.S.T. 3217; 75 U.N.T.S. 85; the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (the "Third" Convention), 6 U.S.T. 3316; 75 U.N.T.S. 135; 47 Am. J. Int'l L. Supp. 119 (1953); and the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (the "Fourth" Convention), 6 U.S.T. 3516; 75 U.N.T.S. 287; 50 Am. J. Int'l L. Supp. 724 (1956). Regarding this achievement Spaight is reported to have said:

"The historians of the future will be puzzled by the conclusion of three *[sic]* new Geneva Conventions in 1949, and the failure of the powers who agreed to them to do anything to regulate those methods of war which, if continued, will make the humanitarian provisions of those Conventions read like hypocritical nonsense."

Quoted in Dunbar, "The Legal Regulation of Modern Warfare," 40 Trans. Grot. Soc. 83, 91 (1955).

26. This is the Fourth Convention, note 25 *supra*. Of course, even the ICRC is not always immediately successful in its humanitarian efforts. In 1957 it presented to the XIXth International Conference of the Red Cross, meeting in New Delhi, its Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War. The Conference adopted a resolution requesting the ICRC to transmit the Draft Rules to the Governments. To quote the ICRC Director-General:

"[T]heir replies took the form of a crushing silence, with the exception of a few well-disposed countries. The great powers, in particular, remained silent . . ."

Pictet, note 15 *supra*, at 12.

27. Operative subparagraphs 1 (a), (b), and (c) of A/RES/2444 (XXIII) were taken verbatim from the Red Cross resolution which is itself cited in the opening part of operative paragraph 1 of the United Nations resolution. The General Assembly omitted a fourth paragraph of the Red Cross resolution which stated "that the general principles of the Law of War apply to nuclear and similar weapons."

28. See Resolutions X, XI, XII, XIII, XIV, XVII, and XVIII, 9 Int'l Rev. Red Cross 613-19 (1969). Of particular relevance is the following extract from Resolution XIII, in which the Conference

"requests the ICRC on the basis of its report [ICRC, Reaffirmation] to pursue actively its efforts in this regard with a view to:

1. proposing, as soon as possible, concrete rules which would supplement the existing humanitarian law,
2. inviting governmental, Red Cross and other experts representing the principal legal and social systems in the world to meet for consultations with the ICRC on these proposals,
3. submitting such proposals to Governments for their comments, and
4. if it is deemed advisable, recommending the appropriate authorities to convene one or more diplomatic conferences of States parties to the Geneva Conventions and other interested States, in order to elaborate international legal instruments incorporating those proposals."

29. As of October 15, 1969, just over 20 years from the date on which they were signed, the four 1949 Geneva Conventions had 125 ratifications and accessions. 9 Int'l Rev. Red Cross 646 (1969). (The data contained in note 49 of A/7720 is incorrect. That contained in Annex IIB of A/7720 is correct.) It should be observed that all of the great powers are Parties to these Conventions. It is interesting to note that the practice of Governments is apparently contrary to the decision of the International Law Commission discussed in the text in connection with note 12 *supra*. Ratifications and accessions to these "war" conventions far exceed those to any of the conventions drafted by the Commission, as important as these latter are.

30. See text in connection with note 12 *supra*.

31. ICRC, Reaffirmation 11

32. Para. 21.

33. As further evidence of the post-World War II antipathy to the use of the word "war," it might be noted that, apart from Article 107 referring to World War II, it is not used anywhere in the Charter of the United Nations; instead we find such terms as "international disputes," "breaches of peace," "acts of aggression," etc. Universal adoption of the term "armed conflict," a term already familiar to those acquainted with the four 1949 Geneva Conventions and the 1954 Hague Cultural Convention, will certainly result in uniformity of language—even if some who are less able to accept new ideas will, for a time, have to think twice and then say "Oh, you mean the law of war!"

34. This problem is, of course, also of major importance with respect to internal conflict (civil war) and the question of the application of one of the so-called "common" articles (Article 3) of the 1949 Geneva Conventions.

35. 36 Stat. 2259; 2 Am. J. Int'l L. Supp. 85 (1908).

36. ". . . Thus the wars of Italy with Abyssinia in 1935, of Japan with China in 1937, of Germany with Poland in 1939, of Russia with Finland in the same year, and of Japan with the United States in 1941, opened without a formal declaration of war."

2 Lauterpacht-Oppenheim, International Law 292-93 (7th ed., 1952). But there were a number of cases of compliance during both World War I (*ibid.*, at 294, footnote 2) and World War II (*ibid.*, at 295, footnote 3).

37. Pictet (ed.), Commentary on the 1949 Geneva Convention Relative to the Treatment of Prisoners of War 19-20 (1960) [hereinafter cited as Pictet, Third Commentary].

38. I Final Record of the Diplomatic Conference of Geneva of 1949, at 47 [hereinafter cited as Final Record]. This is the first paragraph of common Article 2 and is, therefore, identical in Article 2 of each of the four 1949 Geneva Conventions. It is also employed in Article 18 (l) of the 1954 Hague Cultural Convention, *supra* note 2.

39. Pictet, Third Commentary 22-23.

40. Levie, "Maltreatment of Prisoners of War in Vietnam," 48 B.U.L. Rev. 323, 330 (1968); Note, "The Geneva Convention and the Treatment of Prisoners of War in Vietnam," 80 Harv. L. Rev. 851, 858-59 (1967).

41. ICRC, Reaffirmation 94.

42. It is obvious that this proposal jumps squarely into the problem of the enforcement of the law of armed conflict which is, without question, another area requiring major action.

43. IIB Final Record 11 and 16. Further amplification of the proposal, which was clearly required, was not forthcoming and its adoption was not pressed.

44. Annex 21, III Final Record 30.

45. Resolution 2, I Final Record 361. So far as is known, this resolution has never been implemented.

46. 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 a cessation of the armed conflict so found to exist (e.g, S/RES/233 (1967), adopted June 6, 1967, in which the Security Council states its concern "at the outbreak of fighting" in the Middle East and calls for "a cessation of all military activities in the area"); and that it has not, and probably will not, ever exercise such power in the context of the proposal under discussion as to do so would be an admission of its inability to eliminate completely the breach of the peace involved.

47. To gain support at the outset and to ensure complete impartiality, it might be denied jurisdiction over fact situations existing at the time of its creation.

48. The General Assembly has, on a number of occasions, called upon its Members "to make effective use of existing facilities for fact-finding" (e.g., A/RES/2330 (XXII)). 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 Commission of Inquiry originally created by the First Hague Convention of 1899 (32 Stat. 1779; 1 Am. J. Int'l L. Supp. 107 (1907) and applied for the first time in the Dogger Bank Incident (Scott, Hague Court Reports 403 (1916)).

49. Of course, many additional details of creation and operation would necessarily be included in any convention establishing such a body; but these appear to be unnecessary for the purposes of this paper. However, it should be mentioned that, as in the case of the Protecting Power in the 1949 Geneva Conventions, provision would have to be made for the ICEHRAC to use, when needed, an operational staff.

50. While it is true that the provision for automatic economic and communications sanctions goes even somewhat beyond the comparable provisions of the Charter of the United Nations, it is suggested that the majority of law-abiding States have come to realize that there will always be a few delinquents among them and that only the absolute knowledge of automatic, effective, and universal sanctions will tend to keep the delinquent States in line. (The sanctions against Rhodesia can scarcely be described with those adjectives!)

51. Certainly, the 125 ratifications of 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 Parties to it; 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 humanitarian expressions.

52. Can there be any great doubt that President Nixon's announcement concerning his intended actions with respect to chemical and biological warfare (see section 3 *infra)* was motivated not only by humanitarian considerations but also by the increasing feeling of isolation which the United States was being compelled to endure in this respect, as well as diplomatic pressure from friends, resolutions of the General Assembly, resolutions of the ICRC, etc.?

53. Levie, "Prisoners of War and the Protecting Power," 55 Am J. Int'l L. 374, 376 (1961).

54. *Ibid.*, 377-78.

55. See note 24 *supra.*

56. The basic article relating to the Protecting Power is one of the common articles, Article 8/8/8/9. References to this institution appear throughout the Conventions. See Levie, note 53 *supra,* at 380-81, where there is a list of 36 articles in the Prisoner-of-War Convention containing references to the Protecting Power.

57. Common Article 10/10/10/11 covers this latter subject. The U.S.S.R. and the other Communist countries all reserved to these articles.

58. A/7720, para. 213.

59. *Ibid.*

60. It is probable that the United States has not even attempted to secure the designation of a Protecting Power in Vietnam because such action would appear to constitute a legal recognition not only of North Vietnam as a State, but also, and perhaps more important, of the existence of a state of war.

61. A/7720, at 78 of the original United Nations document.

62. *Ibid.*, at 91.

63. *Ibid.*, para. 215. See also para. 203.

64. "Nigeria/Biafra: Armed Conflict with a Vengeance," Rev. Int'l Comm'n Jur., No. 2 (June 1969) 10, 13.

65. See note 28 *supra*. In view of the fact that the 1949 Geneva Conventions clearly indicate that the activities of the Protecting Power and of the ICRC are complementary and not alternative (see Levie, note 53 *supra*, at 394-96), it is difficult to understand why the resolution was phrased in the disjunctive.

66. ICRC, Reaffirmation, at 7, where the following appears:

"... Thus the wars of Italy with Abyssinia in 1935, of Japan with China in 1937, of Germany with Poland in 1939, of Russia with Finland in the same year, and of Japan with the United States in 1941, opened without a formal declaration of war."

To the same effect see *ibid.*, 87-88.

67. Common Article 9/9/9/10 is the basic provision of the four 1949 Geneva Conventions relating to the activities of the ICRC. Paragraph 3 of common Article 10/10/10/11, concerning replacements and substitutes for Protecting Powers, permits the ICRC to offer its services to perform the humanitarian functions of the Protecting Power when there is no Protecting Power. This is probably the basis upon which the ICRC has acted in the post-1949 Geneva Conventions era. One of its more successful recent efforts was in connection with the Honduras-Salvador conflict. 9 Int'l Rev. Red Cross 493-96 (1969), 10 *ibid.*, 95-105 (1970).

68. A/7720, para. 226. Italy suggested considering the possibility of "delegating authority to the International Red Cross, so that that body may, in the case of armed conflict, ensure that its own representatives are continually present in the belligerent countries throughout the duration of the conflict." *Ibid.*, at 79 of the original United Nations document. A somewhat similar suggestion was made by the group of experts convened by the ICRC. ICRC, Reaffirmation 107.

69. Le Comité International de la Croix-Rouge et le Conflit de Corée: Recueil des Documents, *passim* (2 vols., 1952); British Ministry of Defence, Treatment of British Prisoners of War in Korea 33-34 (1955).

70. "The International Committee and the Vietnam Conflict," 6 Int'l Rev. Red Cross 399, 402-03 (1966); St. Louis Post-Dispatch, Feb. 5, 1970, p. 2B, col. 1.

71. Strangely enough, it has apparently been permitted to function with virtually no restrictions in Israel for the protection of both prisoners of war and of civilians in the occupied territory. See, for example, 8 Int'l Rev. Red Cross 18-19 (1968); 9 *ibid.*, 173-76, 417-19, 488, and 640. On the other hand, the United Nations has encountered some difficulty in making an investigation of the treatment of civilians in the occupied territory because of the Israeli position that the resolution calling for it was biased and one-sided. However, even the International Conference of the Red Cross found it necessary to express concern about the plight of these people. 9 Int'l Rev. Red Cross 613 (1969).

72. The Report also makes a suggestion to this latter effect. A/7720, para. 217. It is entirely possible, however, that some States, notably Switzerland and Sweden, which did yeoman work as Protecting Powers during both World Wars, would not wish to shoulder these additional, and potentially controversial, problems. This would make the solution herein suggested all the more necessary. It might be appropriate to cover this eventuality by providing for a possible division of functions, where desired, the Protecting Power, if there be one, performing the traditional functions with respect to wounded and sick, prisoners of war, and civilians, and the substitute performing the function with respect to the conduct of hostilities.

73. In ICRC, Reaffirmation 89-90, this is ascribed to the fact that many of the conflicts since 1949 have been of an internal nature; but what of Korea, the Yemen, Vietnam, the Middle East, etc.? In none of these conflicts has there been a Protecting Power.

74. In A/7720, para. 216, it is suggested that a new organ be created which could "offer its services in case the Parties do not exercise their choice." For the reasons already advanced, it is not belived that any system other than one which operates automatically will constitute a solution to the problem.

75. This calls for selection by one State, acceptance by the State so selected, and approval by the State on whose territory the Protecting Power is to operate. See Levie, note 53 *supra*, at 383.

76. The Report (A/7720, para. 218) makes two suggestions with respect to the legal effect of the designation of a Protecting Power or of an international organ as a substitute therefor: (1) that the Protecting Power, or the substitute, should be considered as an agent of the international community and not merely of one belligerent State; and (2) that the designation, being solely humanitarian in purpose, should have no legal consequences. The first comment is already true under the 1949 Geneva Conventions, although the term "Parties to the Convention" is deemed appropriate rather than "international community" (see Levie, note 53 *supra*, at 382-83); and the second comment might well be accomplished by the use of a provision such as that appearing in the last paragraph of common Article 3 of the 1949 Conventions: "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict." This provision was eventually applied during the French-Algerian conflict of the late 1950s and early 1960s.

77. The ICRC experts were also of this opinion. ICRC, Reaffirmation 89 and 91. Had such an international body heretofore existed with such powers and duties, there could have been immediate investigations of allegations of such charges as the use of gas in the Yemen by the United Arab Republic, of bacteriological agents in Korea by the United Nations Command, etc. In this regard, see Joyce, Red Cross

International 201 (1959). In fact, it is probably safe to say that under these circumstances many such allegations would never be made in the first place!

78. The subject is there discussed at length. A/7720, paras. 216–225. Despite the cautious defense of the use of a political organization as a Protecting Power, made in the last paragraph cited, it would appear that, for the reasons heretofore stated (see text in connection with note 46 *supra),* the creation of a new, non-political body is basically the position taken by the Report.

79. See note 57 *supra.* The reservations were justified. The article, in effect, authorizes the Detaining Power to unilaterally select a substitute for the Protecting Power. The reservations would merely require agreement on the part of the Power of Origin, as in the case of the selection of the Protecting Power itself. See note 75 *supra.* Of course, were it a Party to the new convention which we are discussing, it would have agreed in advance to the filling of the void by the ICEHRAC.

80. I Final Record 201. Concerning this resolution, see the text in connection with note 45 *supra.*

81. Once again, of course, the ICEHRAC would need a fairly large operational staff, including many specialists, to serve as its eyes and ears to collect and sift evidence. But this is no more than an administrative problem which should present no insurmountable difficulty.

82. There is no reason whatsoever why, under appropriate legal safeguards (see note 76 *supra),* these provisions could not be made applicable to internal conflicts, and to conflicts of "national liberation," which are frequently much more sanguinary than are international conflicts. "Nigeria/Biafra: Armed Conflict with a Vengeance," *loc. cit.,* note 64 *supra.*

83. The question will undoubtedly be asked immediately why the present discussion concerning the elimination of chemical and biological weapons does not include nuclear weapons. That matter has been, and continues to be, one of the major subjects of discussion at the meetings of the nuclear powers themselves and at the meetings of the Conference of the Committee on Disarmament (formerly the Eighteen-Nation Committee on Disarmament). The status of these various discussions and the reason for the stalemate which has now existed for more than a decade is well known. It could not conceivably serve any useful purpose for this paper to make a proposal for the banning of nuclear weapons, with or without inspection. Probably only some scientific breakthrough will solve that problem. In the meantime we have what some call "the equilibrium of dissuasion." ICRC, Reaffirmation 50.

84. The Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, signed at Geneva on June 17, 1925 (94 L.N.T.S. 65; 25 Am. J. Int'l L. Supp. 94 (1931)), uses the term "bacteriological." Because scientific developments since 1925 have indicated the possible use in armed conflict of various living organisms (e.g, rickettsiae, viruses, and fungi), as well as bacteria, the more inclusive "biological" is now very generally used. In this regard see the Report of the Secretary-General based on the Report of the Group of Consultant Experts, United Nations Document A/7575/Rev. 1, Chemical and Bacteriological (Biological) Weapons and the Effect of Their Possible Use (United Nations publication, Sales No.: E. 69, I. 24), paras. 17–18 [hereinafter cited as UN, CB Weapons], and Article I of the British Draft Convention, note 130 *infra,* which refers to "microbial and other biological agents."

85. In the Foreword to the Report of the Secretary-General (see UN, CB Weapons, note 84 *supra,* at viii), U Thant quoted as follows from his 1968 Annual Report:

> ". . . The question of chemical and biological weapons has been overshadowed by the question of nuclear weapons, which have a destructive power several orders of magnitude greater than that of chemical and biological weapons. Nevertheless, these too are weapons of mass destruction regarded with universal horror. In some respects, they may be even more dangerous than nuclear weapons because they do not require the enormous expenditure of financial and scientific resources that are required for nuclear weapons. Almost all countries, including small ones and developing ones, may have access to these weapons, which can be manufactured quite cheaply, quickly and secretly in small laboratories or factories . . ."

86. A comparatively short list of some of the works in this area will be found in UN, CB Weapons, note 84 *supra,* at 99. To that list should certainly be added McCarthy, The Ultimate Folly: War by Pestilence, Asphyxiation, and Defoliation (1969).

87. Mention need be made of only two authoritative forums where numerous discussions of this subject have taken place: the United Nations, where it has been discussed at length both in the First Committee and in the General Assembly; and the United States Congress where Representative Richard D. McCarthy and others similarly concerned have not allowed the matter to pass unnoticed. See, for example, N.Y. Times, Nov. 19, 1969, p. 9, col 1.

88. One author makes the rather pessimistic evaluation that this recent concern "is perhaps an index of the growing role of such weapons in military preparations." Brownlie, "Legal Aspects of CBW" in Rose (ed.), CBW: Chemical and Biological Warfare 141, 150–51 (1968). [This collection hereinafter cited as Rose, CBW].

89. For a short but comprehensive history of the use or alleged use of chemicals in warfare, from the Peloponnesian Wars to Korea, see Kelly, "Gas Warfare in International Law," 9 Mil. L. Rev. 3-14 and *passim* (1960).

90. Declaration of St. Petersburg of 1868 Renouncing the Use, in Time of War, of Explosive Projectiles, 1 Am. J. Int'l L. Supp. 95 (1907).

91. See note 14 *supra.*

92. 1 Am. J. Int'l L. Supp. 157 (1907). The United States did not sign or ratify this Declaration.

93. See note 9 *supra.*

94. Article 171, Treaty of Versailles, 3 Malloy (Redmond), Treaties, 3331, 3402; 13 Am. J. Int'l L. Supp. 151, 230 (1919). While the United States did not ratify this Treaty, it did ratify the Treaty of Berlin (42 Stat. 1939; 16 Am. J. Int'l L. Supp. 10 (1922)), which incorporates by reference Article 171 of the Treaty of Versailles.

95. 3 Malloy (Redmond) Treaties 3116; 16 Am J. Int'l. Supp. 57 (1922).

96. A/7720, para. 53.

97. See note 84 *supra.*

98. A/7720, note 31 and Annex II, Tables I and II.

99. This latter reservation preserves the right to use chemical and bacteriological agents as a reprisal for their first use by the enemy. Some writers would not even permit this use; and there is no doubt that an alleged reprisal can be the excuse for a first strike.

100. Spaight, Air Power and War Rights 192-93 (3d ed., 1947).

101. Meselson, "Ethical Problems: Preventing CBW," in Rose, CBW 163.

102. As the former Assistant Secretary of Defense, Carter Burgess, later said:

"It has been reported that following the Korean conflict there were no flies in China. Allegedly, the 'germ warfare' propaganda of the Red Chinese was so effective that it incited a universal attack on these insects by the Chinese people."

"Foreword: Prisoners of War," 56 Col. L. Rev. 676 (1956).

103. Viney, "Research Policy: Soviet Union," in Rose, CBW 130,133.

104. Meselson, "CBW in Use: The Yemen," in Rose, CBW 99 and 101.

105. See note 26 *supra.*

106. See, for example, A/RES/2162B (XXI), 5 December 1966; A/RES/2454A (XXIII), 20 December 1968; and A/RES/2603B (XXIV), 16 December 1969.

107. A/RES/2603A (XXIV), 16 December 1969.

108. See, for example, Brownlie, note 88 *supra,* at 143-44, and O'Brien, "Biological/Chemical Warfare and the International Law of War," 51 Geo. L.J. 1, 36 (1962).

109. There are 68 Parties to the 1925 Geneva Protocol after 45 years, compared to 125 Parties to the 1949 Geneva Conventions after 20 years.

110. U.S. Army Field Manual 27-10, The Law of Land Warfare, para. 38 (1956). While there is no explicit denial of the existence of a customary prohibition, this appears inherent in the tenor of the phraseology used. For an elaboration of the United States position, see 10 Whiteman, Digest of International Law, 455-56 (1968).

111. See note 52 *supra.*

112. N.Y. Times, Nov. 26, 1969, p. 16, col. 1; 61 Dept. State Bull. 541 (1969).

113. On February 14, 1970, President Nixon ordered the destruction of all toxins which had been produced for weapons purposes. St. Louis Post-Dispatch, Feb. 15, 1970, p. 1, col. 1. These apparently had been overlooked in the original announcement.

114. It would almost seem as though, after years of exploiting the fact that the United States had not ratified the Protocol, the Soviet Union is now determined to place roadblocks in the announced intention of the United States to accept a prohibition on the use of biological weapons. In addition to its usual adamant objection to any treaty calling for verification procedures, it is now apparently insisting on a new agreement which would replace the 1925 Protocol and simultaneously ban both chemical and biological weapons, rather than retaining the old agreement and supplementing it with a new treaty prohibiting biological weapons as proposed by the British and accepted by the United States. St. Louis Post-Dispatch, Feb. 17, 1970, p. 2A, col. 1. This latter dispute appears to be one of procedure, rather than substance, and the Soviet approach might well afford the opportunity for the necessary clarifications discussed immediately below.

115. ICRC, Reaffirmation 58. See also A/7720, para. 201.

116. N.Y. Times, Feb. 3, 1970, p. 3, col. 6.

117. UN, CB Weapons, para. 20.

118. Meselson, "Ethical Problems: Preventing CBW," in Rose, CBW 163, 167.

119. *Ibid.* See also UN, CB Weapons, para. 374.

120. Sidel, "Napalm," in Rose, CBW 44, 46.

121. Ramundo, Peaceful Coexistence 138-39 (1967). It was recently reported that a suit had been filed against the Dow Chemical Co., formerly the chief manufacturer of napalm for the United States armed forces, alleging that Dow had supplied the United States with "various types of chemical, biological, bacteriological, incendiary and asphyxiatory weapons" and asking that it be designated a "war criminal." St. Louis Post-Dispatch, Feb. 3, 1970, p. 2A, col. 4. There is a certain resemblance to *The Zyklon B Case,* 1 L. Rep. Tr. War Crim. 93.

122. ICRC, Reaffirmation 61-62, A/7720, paras. 198-99.

123. ICRC, Reaffirmation 62-63; Brownlie, note 88 *supra,* at 150. The U.S. Army Field Manual 27-10, The Law of Land Warfare (1956) states (at para. 18) that while its use is not violative of international law, it should not be employed in such a way as to cause unnecessary suffering.

124. A/7720, para. 200. See also Sidel, note 120 *supra.*

125. Galston, "Defoliants," in Rose, CBW 62; UN, CB Weapons, para. 311. The scientific problem is not far removed from the current problem in the United States arising out of the use of DDT and other pesticides.

126. Nor has it been satisfactorily established that defoliants will not in time adversely affect human health.

127. ". . . The tremendous capabilities of modern weapons of mass destruction, however, make the objective of their effectively sanctioned abolition much more urgent than was weapons abolition at the time of the Hague Conference."

Mallison, "The Laws of War and the Juridical Control of Weapons of Mass Destruction in General and Limited Wars," 36 Geo. Wash. L. Rev. 308, 321 (1967).

128. UN, CB Weapons, para. 375; ICRC, Reaffirmation 57; Meselson, note 101 *supra,* at 169. See also the U Thant statement, note 85 *supra;* and Mallison, note 127 *supra* at 324.

129. Malek, "Biological Weapons," in Rose, CBW 48, 56; Humphrey, "Ethical Problems: Preventing CBW," *ibid.,* at 157, 159. The Stockholm International Peace Research Institute is currently engaged in a project to determine "whether it is technically possible to discover production of biological agents on a scale of military relevance."

130. Revised Draft Convention for the Prohibition of Biological Methods of Warfare," A/7720, at 87 of the original United Nations document; N.Y. Times, Nov. 26, 1969, p. 16, col. 5.

131. Memorandum presented to the British War Cabinet on August 17, 1917. Quoted in "Air Power," 1 Enc. Brit. 449, 450 (1970).

132. The possible use of nuclear weapons, whether delivered by ballistic missiles or by bombers, merely emphasizes the gravity of the problem under discussion.

133. Lauterpacht, note 13 *supra,* at 365-66.

134. See note 4 *supra.*

135. Regulations attached to the Fourth Hague Convention of 1907, note 9 *supra.*

136. Stone, note 1 *supra,* 621, footnote 91.

137. Ninth Hague Convention of 1907 Concerning Bombardment by Naval Forces in Time of War, 36 Stat. 2351; 2 Am. J. Int'l L. Supp. 146 (1908).

138. Tracer bullets were used, apparently without objection from either side, despite the 1868 Declaration of St. Petersburg (note 90 *supra)* which outlawed explosive and incendiary projectiles. Apparently it is generally accepted that this prohibition does not apply to aircraft. See Article 18 of the Hague Air Rules, note 140 *infra.*

139. Spaight, note 100 *supra,* at 41-42 and 244-50. The disillusioned will say that successful weapons are never outlawed and seldom restricted in their use.

140. 17 Am. J. Int'l L. Supp. 245 (1923); 32 Am. J. Int'l L. Supp. 12 (1938); Greenspan, The Modern Law of Land Warfare 650 (1959). These Rules were drafted by an eminent Commission of Jurists convened by resolution of the Conference at which the Treaty of Washington, note 95 *supra,* was drafted.

141. Quoted in Spaight, note 100 *supra,* at 257. These limitations on air bombardment were included in a resolution adopted by the Assembly of the League of Nations on September 28, 1938. *Ibid.,* at 258.

142. Actually, the Germans had already bombed Warsaw, obliterating much of it.

143. Pictet, note 13 *supra,* at 30. After the Germans had disregarded the principles of the military objective and of the protection of the civilian population in Norway, the Netherlands, and Belgium in April-May 1940, the British announced that they reserved to themselves "the right to take any action which they consider appropriate in the event of the bombing by the enemy of civilian populations." Spaight, note 100 *supra,* at 264-266.

144. Pictet, note 13 *supra* at 30.

145. Lauterpacht, note 13 *supra,* at 366, footnote 1. Of course, in a somewhat parallel situation, where both sides had followed substantially the same course of conduct, unrestricted submarine warfare, the International Military Tribunal refused to assess any punishment on this score against German Admiral Doentiz.

146. Spaight, note 100 *supra,* at 277. And he does not stand alone. Pictet, note 13 *supra,* at 39.

147. The former use of the term "undefended"as a basis for determining that an area is not subject to attack appears to have lost significance—and properly so.

148. Lauterpacht, note 13 *supra,* at 364.

149. A/7720, para. 131.

150. ICRC, Reaffirmation 39; Spaight, note 100 *supra,* at 43-44 and 47.

151. Lauterpacht, note 13 *supra,* at 369. See also Pictet, note 13 *supra,* at 38; and "Nigeria/Biafra: Armed Conflict with a Vengeance," note 64 *supra,* at 10-11. The Report, A/7720, para. 144, points out that terror bombing "is more frequently than not counterproductive."

152. See Spaight, note 100 *supra,* at 43.

153. A/7720, para. 140-141. Of course, for propaganda purposes, even if every bomb dropped by an attacking airplane landed in the middle of a tank park, the enemy will mention only the deaths of a woman and her two children—who had had the misfortune to pick that time to hawk bottled pop to the tank crews.

154. Spaight, note 100 *supra,* at 47. Other apt quotations from this authoritative, but frequently controversial, work are (at 43):

"The position was that, for the first time, belligerents had at their disposal an instrument enabling them to strike not only at the *user* of armaments but at the *makers* of armaments. The possession of such an instrument had the effect of calling in question the hitherto accepted distinction between armed forces and civilians, between combatants and noncombatants. . . ."

"It was a praiseworthy principle in the circumstances of the pre-air age of war, but it was not one which could survive the arrival of the bombing aircraft. For, objectively considered, it was not a logical principle. . . ."

155. *Ibid.* 254, 270, 271.

156. Meyrowitz "Reflections on the Centenary of the Declaration of St. Petersburg," 8 Int'l Rev. Red Cross 611, 620-21 (1968).

157. A/7720, para. 143.

158. Unfortunately, as stated by one author, "(i)t is far easier to moralize about air attacks on civilians, and to offer soothing verbal solutions, and to dismiss target area bombing as probably unlawful, than to frame rules for mitigation of human suffering with some hope of belligerent observance amid the realities of war." Stone, note 1 *supra,* at 627.

159. A/7720, paras. 145-150.

160. Note 25 *supra.*

161. Note 26 *supra.*

162. ICRC, Reaffirmation 73.

163. Based on Article 6 of the ICRC Draft Rules and Article 22 of the Hague Air Rules.

164. Based on Article 10 of the ICRC Draft Rules.

165. Based on one of the ICRC principles.

166. Based on one of the ICRC principles.

167. Based on Article 7 of the ICRC Draft Rules and on a proposal of the Institut de Droit International.

Some Major Inadequacies in the Existing Law Relating to the Protection of Individuals During Armed Conflict

Addendum

This Working Paper for the 14th Hammarskjold Forum conducted by the Association of the Bar of the City of New York was written in 1970. Since that time there has been no change in the status of the first problem mentioned, the absence of "a method for the automatic determination that a particular State relationship requires the application of the law of armed conflict." Article 1 of the *1907 Convention (II) Relative to the Opening of Hostilities* requires a "previous and explicit warning, in the form either of a declaration of war, giving reasons,

or an ultimatum with conditional declaration of war." This provision has become a nullity. Article 2 of the four *1949 Geneva Conventions for the Protection of War Victims* provides that these Conventions become applicable "in all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." The lack of value of this provision was demonstrated during the hostilities in Vietnam where the North Vietnamese disregarded it by merely asserting that all captured American personnel were war criminals captured *in flagrante delicto*. There have been innumerable international armed conflicts since 1970 but in not one instance has there been a formal declaration of war or any other affirmative action indicating that the international law of war was deemed applicable. The last known compliance with the cited provision was when the Soviet Union declared war on Japan on 8 August 1945 during World War II.

The second item discussed was "the need for a method which will ensure the presence in the territory of each State party to an armed conflict of a Protecting Power or an international body with adequate authority to police compliance with that law." The international community had an opportunity to correct this defect but failed miserably, The Diplomatic Conference which met in Geneva from 1974 to 1977 before completing the *1977 Protocol Additional to the Geneva Conventions of 8 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)* drafted provisions (Article 5 thereof) which once again mean that there will usually be no Protecting Power and no substitute for a Protecting Power. (The United States has not as yet ratified that *Protocol.*) In the conflict in Korea there were no Protecting Powers. The International Committee of the Red Cross (ICRC) offered its services to both sides. The United Nations Command (UNC) accepted the offer and the ICRC made over 100 inspections of UNC prisoner of war facilities. The North Koreans and the Chinese Communists never even deigned to answer the ICRC's offers. There is nothing in the *1977 Protocol I* which will change that situation as every action is dependent upon the willingness of the Party to the conflict. Thus, if the system for designating a Protecting Power fails, as it probably will, a sort of lottery system may be instituted, but its value is dubious; and the ICRC may offer its services as a substitute, but the functioning of the ICRC as such a substitute "is subject to the consent of the Parties to the conflict"—a consent which countries like North Korea and the People's Republic of China, and a number of other nations, will not give.

The third item discussed was "the need for a complete and total prohibition of the use in armed conflict of any and all categories of chemical and biological weapons." An *addendum* to the article entitled *Nuclear, Chemical and Biological Weapons* in this collection updates the subject.

The final item discussed in that paper was "the need for a complete code governing the use of air power in armed conflict with emphasis on the outright prohibition of any type of bombing which has as its basic target the civilian population." Some progress has been made in this area. Article 51(2) of the *1977 Additional Protocol I* prohibits making the civilian population the object of attack, Articles 54(2) and 56 thereof contain provisions aimed at protecting the civilian population from attack. Article 2(1) of the *Protocol on Prohibitions or Restrictions on the Use if Incendiary Weapons (Protocol III to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects)* specifically prohibits attacks on the civilian population by incendiary weapons; and Article 2(2) thereof prohibits attacks on a military objective located within a concentration of civilians by air delivered incendiary weapons. (The United States has not as yet ratified this *Protocol*, although it has ratified the. convention and *Protocols I and II* thereof.)

VII

Civilian Sanctuaries: An Impractical Proposal

1 Israel Year Book of Human Rights 335 (1971)

Certainly, one should always take a positive stance with respect to any practical and workable proposal aimed at increasing the protections afforded the civilian population in time of armed conflict. Despite that premise, which is basic to any consideration of the law of armed conflict, or perhaps because of the restrictive adjectives "practical and workable" which have been, and must be, used, it appears necessary to cast a negative vote with respect to a well-intentioned, but impractical, proposal first made by the Secretary-General of the United Nations in 1969 and greatly elaborated upon by him in 1970.

On December 19, 1968, by Resolution 2444 (XXIII), the General Assembly of the United Nations requested the Secretary-General to study and prepare a report on the subject of "Respect for Human Rights in Armed Conflict." He did so, his staff producing A/7720, November 20, 1969 (hereinafter referred to as the "1969 Report"). On December 16, 1969, by Resolution 2597 (XXIV), the General Assembly requested the Secretary-General to continue his study and to submit a further report on the same subject. Once again he did so, his staff producing A/8052, September 18, 1970 (hereinafter referred to as the "1970 Report").

In the 1969 Report eight paragraphs (145-52) were devoted to the subject of "civilian refuges or sanctuaries." In March, 1970, during the course of a Panel which included the United Nations official actually responsible for the preparation of that Report—the Director of Human Rights Division of the United Nations Secretariat, the present writer, in passing, questioned the practicality of the proposal for large-scale civilian sanctuaries.[1] This adverse comment, which really did not rise to the category of criticism, may well have inadvertently contributed to the fact that the 1970 Report expanded the coverage on the subject from eight to forty-three paragraphs (45-87). It is the purpose of this paper to demonstrate the impracticality of the proposal for such civilian sanctuaries and the actual lack of need for such a device if there is compliance with already well-established norms of the law of armed conflict, perhaps amplified in the light of currently available and foreseeable methods of conducting such conflict.

Some discussion in depth of the proposal contained in the two Reports is essential for an understanding of the problem. The basic proposal was originally advanced in the following language:

> The difficulties which are attendant on arriving at a practically useful definition of what constitutes a legitimate military objective have led to the consideration of other solutions which might effectively increase the protection afforded to civilians in armed conflicts. One method might be to gather and place under shelter as large a part of the civilian population as possible, especially women, children, the elderly, the sick and those who do not participate in the armed conflict, nor contribute in any way to the pursuit of military operations. This might be achieved by adopting and developing, on a larger scale than provided at present, a system of safety zones which would offer special protection and even immunity from attack.[2]

The purpose of the proposal for large-scale civilian sanctuaries was subsequently more clearly drawn when the 1970 Report stated:

> The civilian sanctuaries would therefore be established to draw the attention of the belligerents to the presence in a given area of persons whom they are already obligated to respect, protect or refrain from injuring. In effect, refuges or sanctuaries might assist in facilitating the observance by the belligerents of the obligations incumbent upon them.[3]

Both of the Reports recognized the need for numerous safeguards in order to ensure the successful operation of the civilian sanctuaries and to prevent their misuse. These safeguards were gathered together into the following four propositions:

1. The necessity for the designation and recognition of civilian sanctuaries in peacetime before hostilities have aroused animosity and suspicion;[4]

2. Restrictions on the selection and use of such sanctuaries;[5]

3. Special identification markings for the sanctuaries and the personnel serving in them;[6] and

4. A system of control and verification.[7]

It appears to the present writer that the mere enumeration of these few requirements, which is far from exhaustive, demonstrates the lack of feasibility of the proposal.

The idea of civilian sanctuaries did not emerge full-blown from the Secretary-General's brow.[8] It is not even the application of existing ideas and norms to a totally new concept. It is merely the elaboration and extension of an existing system of protection, which was designed for comparatively small groups of individuals and for comparatively small areas of real estate, to potentially very large segments of the population and potentially enormous portions of the land mass of a belligerent nation. As the 1969 Report points out,[9] the doctrine of the "open city," which has been elsewhere defined as "an undefended city, open to occupation by enemy forces without harm to the inhabitants,"[10] originated in the customary law of war and was codified in the Fourth Hague Convention of 1907.[11] Thus, the entry of the Germans into Paris in June, 1940, during World War II, has been termed "a classical example of the application of the [1907] Hague Rules of Land Warfare."[12] During that same War, the "open city" doctrine failed to provide protection to the civilian populations in the cases of Belgrade, Zagreb, and Ljubliana in 1941 and in the case of Rome in 1943.[13] Three very small neutralized zones were apparently established in Jerusalem in 1948, but these probably did not result from an application of the "open city" doctrine.[14]

Elaborating on earlier Geneva Conventions, each of the four 1949 Conventions provides for protected areas of one character or another: hospital zones;[15] prisoner of war camps;[16] neutralized zones;[17] and internment camps.[18] The 1954 Hague Convention[19] contains provisions setting up an elaborate system for the protection of areas containing cultural monuments. And, finally, the so-called *Draft Rules* disseminated by the International Committee of the Red Cross in 1956[20] have a number of provisions on the subject of sanctuaries.

In summary, various types of protected zones for different categories of noncombatants, emerging from the "open city" doctrine, have existed for a considerable period of time. All of these protected zones have been restricted to comparatively small land areas, perhaps a few thousand square yards or meters, at most a few square miles or kilometers, intended to afford protection to a city and its civilian population, to a hospital, its patients, and staff, to a prisoner of war or internment camp and its inmates, to a museum and its attendants. The Secretary-General's proposal would greatly enlarge this concept. It proposes protected zones on a grand scale: not thousands of square yards or meters, but thousands and hundreds of thousands of square miles or kilometers; not the noncombatant personnel of a hospital, or of an internment camp, or of a museum, or even of a city, but a very large part of the population of the nations engaged in hostilities.[21] Laudable and idealistic as the proposal obviously is, it unfortunately appears to be completely impractical in the world in which we live.

The problems involved in obtaining acceptance of and in implementing the proposal appear to this writer to be insurmountable. Can anyone believe that today's nations and their governments could reach agreement, even in peacetime, either on a bilateral or on a multilateral basis, exempting large portions of their respective territories from all types of attack in the event of war?[22] Can anyone believe that such nations would remove from, and prohibit the subsequent introduction into, the zones so designated of every type of industry and activity which could in any way contribute to a war effort?[23] Can anyone believe that in this age of nuclear weapons and "quick" wars, a nation would, at the outset of hostilities, be in a position to devote the necessary energy, manpower, and equipment to the task of moving millions of its civilians into the neutralized zones?[24] Can anyone believe that nations at war would be in a position to devote the necessary energy, manpower, and equipment to the task of providing logistic support for millions of its citizens who would necessarily be nonproductive insofar as the war effort is concerned?[25] Can anyone believe that, human nature being what it is, the worker who stays on his job in support of the war effort can be successfully separated from his wife and children?[26] Can anyone believe that any nation at war will voluntarily and actually deprive itself of an urgently needed resource by moving into a neutralized zone a great mass of potential labor, even though it be women, children, and the elderly?[27] Can anyone believe that today's nations will accept "a system of control and verification" in the persons of foreign observers stationed within their territory in time of war?[28] Can anyone believe that the huge areas involved, the impossibility of really effective control and verification, and the pressures of wartime requirements, would not result in massive evasions of the restrictions and improper usage of the neutralized zones?[29] Can anyone believe that the nations of today would accept any such proposal without an escape clause such as the "imperative military necessity" clause of the 1949 Geneva Conventions?[30] Can anyone believe that a nuclear nation, envisioning the eventuality of defeat, would not use the neutralized zones as a basis for blackmail? These are but a few of the many questions raised by the Secretary-General's proposal, to each and every one of which this writer would give a negative answer.

Is there an alternative to the Secretary-General's proposal for large-scale civilian sanctuaries for the protection of the civilian population? There most certainly is, and it is not only more feasible, but it is much more likely to be acceptable to the community of nations. That alternative is as follows:

First, full-scale application of and compliance with the already existing restrictions on allowable military objectives, modernized as necessary to meet present-day requirements. What is needed is not new norms, but compliance with existing norms. For example, target-area bombing certainly violated the

principle of the military objective, but it was used by both sides so generally during World War II that the principle practically ceased to exist. It must be revived. Again, and perhaps somewhat peripherally, the Protecting Power is already available to do all that the Secretary-General would have a Commissioner-General or Observer-General do during time of actual hostilities—but in not one of the scores of hostilities which have occurred since the end of World War II has this extremely valuable international institution been called into action.

Second, the law of air warfare, if any now exists, should be elaborated upon and codified[31] The extreme reluctance of nations to establish recognized and accepted international rules in this very vital area is really incredible. For example, all governments express horror at the mere suggestion that any other nation, then engaged in hostilities, has resorted to "terror bombing"—the bombing of nonmilitary objectives and of the civilian population in order to destroy enemy morale and to bring an adversary to its knees on the home front when it has not been possible to do so on the battlefront. The 1923 Hague Rules of Air Warfare[32] and the ICRC's 1956 Draft Rules specifically proposed such a prohibition,[33] but many years later that proposal is still in limbo. Here, too, World War II practices have, unfortunately, probably negated the principle of the military objective.

Third, the initiation of some system of effective sanctions against belligerents who violate the principle of the military objective. Such a system of sanctions has been drafted and accepted with respect to individual violators of the 1949 Geneva Conventions.[34] There is no reason why some such system cannot be devised for nation violators as well as individual violators of the principle of the military objective, once that principle has been resurrected.

In summary, it is suggested that the existing law of armed conflict, elaborated as may be necessary, particularly in the area of air warfare, if complied with (and with additional methods to be established for enforcing compliance), can provide the civilian population with the protection which it requires and to which it is already entitled under existing norms; and that it can do this much more readily than can the elaborate and impractical proposal advanced by the Secretary-General of the United Nations in his 1969 and 1970 Reports on "Respect for Human Rights in Armed Conflict."[35]

Notes

1. Levie, "Some Major Inadequacies in the Existing Law Relating to the Protection of Individuals during Armed Conflict," Working Paper for the Fourteenth Hammarskjold Forum, *When Battle Rages, How Can Law*

Protect? (Carey ed. 1971). The present writer's comments concerning the proposal are contained in the Working Paper (at page 27) and in the comments (at page 70).

2. Para. 145 of the 1969 Report. As already mentioned in the text, and as will be enlarged upon later in this paper, the writer considers that the difficulty is *not* in defining legitimate military objectives, but in securing compliance with existing prohibitions against attacks on what would generally be conceded (except, of course, by the attacker) to be nonmilitary objectives. Lists of legitimate military objectives, such as those contained in Hague Convention No. IX of 1907, art. 2, 2 *Am. J. Int'l L.* 146 (Suppl. 1908), could easily be brought up-to-date by a list such as that contained in the Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War (hereinafter referred to as *Draft Rules),* which were disseminated by the International Committee of the Red Cross (ICRC) in 1956.

3. Para. 56 of the 1970 Report. It has been suggested that civilian sanctuaries may actually be defined affirmatively (the identification of those areas which are free from attack) or negatively (the identification of those areas which are subject to attack, all nonlisted areas being protected). Stillman, "Civilian Sanctuary and Target Avoidance Policy in Thermonuclear War," 392 *The Annals* 116, 121-22 (1970). This is really but another way of stating the proposition set out in the preceding note.

4. Para. 149 of the 1969 Report; para. 53 of the 1970 Report.

5. Para. 150 of the 1969 Report; paras. 55 and 58 of the 1970 Report.

6. Para. 151 of the 1969 Report; para. 71 of the 1970 Report. This is not really a safeguard in the same sense as the others.

7. Para. 152 of the 1969 Report; paras. 80 and 82 of the 1970 Report.

8. Nor from the brow of the Director of the Human Rights Division!

9. Para. 146.

10. Stillman, *op. cit. supra* note 3, at 117.

11. Regulations Attached to the Hague Convention No. IV of 1907, art. 25, 2 *Am. J. Int'l L.* 90, 97 (Supp. 1908).

12. Stillman, *op. cit. supra* note 3, at 118.

13. *Ibid.* For some reason the author omits any reference to the declaration of Manila as an open city in 1942.

14. Desmet, *Les lieux de refuge comme moyen de protection des populations civiles contre les bombardements aeriens* 4 (unpublished ms., 1961). Similarly on at least two occasions prior to World War II arrangements were made restricting attacks against specific portions of urban areas: the northeast quarter of Madrid in November 1936 and the "Jacquimot Zone" in Shanghai in August 1937. *Id.* at 3-4. Castrén, *The Present Law of War and Neutrality* 176-77 (1954).

15. 1949 Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field, art. 23 and Annex I, 75 U.N.T.S. 31; 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 23, 75 U.N.T.S. 85; and 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 14 and Annex I, 50 *Am. J. Int'l L.* 724 (Suppl. 1956).

16. 1949 Geneva Convention Relative to the Treatment of Prisoners of War, art. 23, 47 *Am. J. Int'l L.* 119 (Suppl. 1953).

17. Art. 15, Civilians Convention, *op. cit. supra* note 15.

18. Art. 83, Civilians Convention, *op. cit. supra* note 15.

19. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 U.N.T.S. 240. This Convention and art. 15, Civilians Convention, *supra* note 15, supplied most of the ideas which are included in the Secretary-General's proposal. Understandably, the Report was compelled to concede the existence of substantial differences between the protection of cultural property and the protection of the civilian population. See para. 79 of the 1970 Report.

20. *Op cit. supra* note 2.

21. In its para. 54, the 1970 Report admits that, desirable as it would be to shelter *all* "those civilians taking no part in the hostilities and in no way contributing to the war effort," as a practical matter this would be impossible "due to limitation of accomodation and other circumstances."

22. Para. 150 of the Report points out that "the demarcation of certain territories as safety zones should not entail any military benefits, direct or indirect, for any of the parties to the conflict." It is difficult to conceive of any demarcation of protected territory which a putative enemy would not consider benefit-giving to its disadvantage.

23. To say the least, any such effort would result in a complete dislocation of the normal civilian economy.

24. Para. 150 of the 1969 Report would compound this problem as it states that "the safety zones . . . would not be centres of important means of communication or transport."

25. The comment contained in the previous note is equally applicable here.

26. Experience during World War II in such countries as the United Kingdom demonstrated the difficulty inherent in attempting to separate families.

27. In modern warfare labor is almost as essential as armaments; and every individual, male or female, young or old, capable of aiding in the overall productive effort is an asset whose productivity will be demanded and required by the warring nation.

28. Para. 82 of the 1970 Report refers to "the inspectors and experts with . . . immunity and access to the area concerned, . . . the right of communication, including the use of a special code whenever necessary . . ." In the light of the conspicuous lack of success encountered during the past two decades in attempting to negotiate even the simplest means of on-the-ground verification during peacetime, this proposal appears to be particularly naive and unrealistic. The frequent inability of the ICRC to function (North Korea and North Vietnam are but two pertinent examples) is an index of what could be expected if, indeed, such a provision could be successfully negotiated.

29. In an area of hundreds or thousands of square miles, it would certainly not be too difficult to establish many covert facilities which would actually produce war materials, entirely apart from the fact that many such items have valid nonmilitary uses. And who is to say that a civilian school for, say, garage mechanics is not producing trained personnel for the military forces?

30. Each of the 1949 Geneva Conventions, *op. cit. supra* notes 15 and 16, contains common Art. 8 which provides, in part:

> . . . They [the representatives of the Protecting Power] shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties. Their activities shall only be restricted as an exceptional and temporary measure when this is rendered necessary by imperative military necessities.

A similar restriction also appears in other provisions of these Conventions. The 1954 Hague Cultural Convention, *op. cit. supra* note 19, refers, in art. 11(2), to "exceptional cases of unavoidable military necessity."

31. On this subject, see the thought-provoking article of DeSaussure, "The Laws of Air Warfare: Are There Any?" 23 *Naval War College Rev.*, No. 6, at 35 (1971); reprinted in *5 The International Lawyer* 529 (1971). See also Levie, *op. cit. supra* note 1, at 21-29.

32. 17 *Am. J. Int'l L.* 245 (Suppl. 1923); 32 *id.* 12 (1938); Greenspan, *The Modern Law of Land Warfare* 650 (1959).

33. Art. 6, Draft Rules, *op. cit. supra* note 2.

34. Arts. 49, 50, 129, 146, 1949 Geneva Conventions, *op. cit. supra* notes 15 and 16.

35. The present writer is not alone in doubting the wisdom and practicality of civilian sanctuaries as proposed by the Secretary-General. See, for example, Stillman, *op. cit. supra* note 3, at 117, 121, and 123; Bindschedler-Robert, "A Reconsideration of the Law of Armed Conflict," *The Law of Armed Conflict* 20-21 (Carnegie End., 1971); and Rubin, "Informal Summary of Personal Reactions to U.N. Doc. A/8052" (ms., Am. Soc. Int'l L., 1971). In the discussion following the presentation of this paper at the Symposium, Colonel Draper indicated that the proposal had met with a rather tepid reception at the ICRC's Conference of Government Experts held in Geneva in May–June, 1971.

VIII

International Law Aspects of Repatriation of Prisoners of War During Hostilities: A Reply

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I

In the July 1973 issue of the *Journal*,[1] there appeared an article with the above title written by Professor Richard Falk, in which he, in effect, advanced the thesis that the release of prisoners of war for repatriation during the course of hostilities in Vietnam to an *ad hoc* and self-styled "humanitarian organization" (which admittedly consisted solely of individuals who were vocal opponents of the United States participation in those hostilities) either constituted a valid and forward-looking interpretation of the provisions of the Geneva Convention of 1949 relative to the Treatment of Prisoners of War[2] (hereinafter referred to as "the 1949 Convention") or indicated the need for revision of that instrument. The subject appears to be one which calls for an analysis in considerably greater depth than the treatment provided in the article by Professor Falk.

In this article, I shall discuss, independently of the facts alleged and the arguments advanced in the article by Professor Falk, the legal aspects involved in (1) the release and repatriation during the course of hostilities of prisoners of war who do not come within the mandatory provisions of Article 109 *et seq.* of the 1949 Convention (in other words, those who are not so "seriously wounded" or so "seriously sick" as to be entitled to release and repatriation as a matter of right); and (2) the use of an "impartial humanitarian organization" to accomplish this purpose. Thereafter, I shall point out some of the areas in which I agree or disagree with the proponent of this procedure.

II

Historically, there have been three major methods employed by Detaining Powers for the release and repatriation during the course of hostilities of able-bodied prisoners of war—ransom, exchange, and parole. The ransom of captured military personnel, which reached its peak in its application to chivalry

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in medieval times, had, for all practical purposes, disappeared by the end of the seventeenth century.[3] It was replaced by exchange when continental armies became national and professional and when obtaining the release of captured military personnel became accepted as the responsibility of the sovereign. Exchange was man-for-man and grade-for-grade (with tables of "equivalent values") so that, at least in theory, it would not result in any change in the relative military strengths of the two sides.[4] Exchange still existed as late as the American Civil War, but it ceased to be a really effective procedure during that conflict.[5]

Parole is the third method of effectuating the release and repatriation of prisoners of war during the course of hostilities. Under this procedure, the prisoner of war agrees to certain conditions that will govern his conduct upon his release from a confined status. It has proven relatively unimportant as a method of procuring the release and repatriation of prisoners of war during the course of a conflict. Historically, it developed primarily into a method of permitting the prisoner of war more freedom within the territory of the Detaining Power, rather than of procuring his release and repatriation.[6] Moreover, Article 21(2) of the 1949 Convention, like its predecessors, specifically contemplates that Powers of Origin may prohibit their captured military personnel from giving or accepting parole; a number of countries, including the United States, the United Kingdom, and France, have traditionally restricted the right of their military personnel to give or accept parole.[7]

Article 72 of the Geneva Convention of 1929 Relative to the Treatment of Prisoners of War[8] (hereinafter referred to as "the 1929 Convention") suggested the possibility of agreements between belligerents for the repatriation during hostilities of "able-bodied prisoners of war who have undergone a long period of captivity." A similar but somewhat more extensive provision was included in the 1949 Convention. Article 109(2) provides that the Parties may "conclude agreements with a view to the direct repatriation or internment in a neutral country of able-bodied prisoners of war who have undergone a long period of captivity."[9] This provision may be considered as an attempt to encourage the belligerents to adopt one of these procedures (and to give neutral states and others a basis for proposing them), rather than as a legal authorization to do so, inasmuch as no such authorization was needed in order to enable belligerents lawfully to enter into such agreements. Article 6(1) of the 1949 Convention specifically contemplates the conclusion of special agreements by the Parties concerning prisoner-of-war matters, subject only to the limitations that any such agreement may not "adversely affect" the prisoners of war to whom it purports to apply and that it may not "restrict the rights" elsewhere conferred upon them by the Convention. Paragraph 2 of the same article contemplates that a Party may unilaterally give prisoners of war more favorable treatment than is required by the 1949 Convention itself. Certainly, an agreement for the repatriation of

longtime, able-bodied prisoners of war during the course of hostilities would not fall within the ambit of either of the limitations mentioned above;[10] and it would in any event be more favorable treatment than required by the 1949 Convention.[11] Moreover, the Detaining Power could justifiably assert that individuals so repatriated would be barred from further participation in the hostilities against it.[12]

Unfortunately, despite the fact that World War II saw many prisoners of war held in captivity for periods in excess of five years, apparently no belligerent sought to implement Article 72 of the 1929 Convention.[13] And in none of the many armed conflicts which have occurred since the end of World War II (and since the 1949 Convention became effective) has there been an agreement for the repatriation of able-bodied prisoners of war prior to the cessation of hostilities.[14] However, it is not really difficult to understand why neither of the substantially similar provisions of the two Prisoner-of-War Conventions has ever been implemented by belligerents. Any bilateral agreement providing for the repatriation during hostilities of able-bodied prisoners of war would merely be a new name for the old procedure of exchange, a procedure which fell into disuse because, despite its man-for-man and grade-for-grade aspects, it inevitably turned out to be more advantageous for one side than for the other.[15] Indeed, this same factor has even militated against the repatriation during the course of hostilities of seriously wounded or sick prisoners of war.[16]

It being accepted that releases and repatriations during the course of hostilities of longtime, able-bodied prisoners of war are within the contemplation of existing international law, despite the failure of any belligerent state to do so as a matter of practice, let us move to the next problem. What are the qualifications required of a body for it to fall within the category of organizations empowered to perform the humanitarian functions which the 1949 Convention authorizes for the benefit of prisoners of war?

Article 8 of the 1949 Convention is the basic article establishing the Protecting Power with its manifold humanitarian and other functions.[17] However, Article 9 of that Convention specifically provides that humanitarian activities for the benefit of prisoners of war may also be performed by the International Committee of the Red Cross (the ICRC) or by "any other impartial humanitarian organization." The organization and operations of the ICRC are widely known and have received well-merited recognition throughout the 1949 Convention.[18] The precise nature of the organizations which fall within the meaning of the term "any other impartial humanitarian organization" is considerably less clear.

Article 88 of the 1929 Convention, which was the direct progenitor of Article 9 of the 1949 Convention, did not include the possibility of the intervention of any "humanitarian organization" other than the ICRC for the purpose of

furnishing assistance to prisoners of war. That possibility received recognition for the first time in a proposal made by the Italian representative during a meeting of a committee of the Diplomatic Conference which drafted the 1949 Convention.[19] The Italian proposal to add the words "or any other impartial humanitarian body" after the reference to the ICRC in the original draft of the article received the strong support of the Director-General of the International Refugee Organization (IRO) who pointed out that, in view of the existing collaboration between governments and the IRO, "it would seem opportune to extend the provisions of Article 8 [now Article 9 of the 1949 Prisoner-of-War Convention], to enable governments to avail themselves of its services in case of necessity."[20] The proposal was adopted by the Joint Committee of the Diplomatic Conference after a debate in which the representative of the United States had supported the use for humanitarian purposes of "welfare organizations of a non-international character" and the Committee had rejected a Burmese proposal to narrow the Italian proposal to "any other *internationally recognized* impartial humanitarian body."[21] It was approved at a Plenary Meeting of the Diplomatic Conference without debate.[22]

The foregoing is the substance of the *travaux préparatoires* concerning the addition of the words "or any other impartial humanitarian organization" to Article 9 of the 1949 Convention.[23] In attempting to elucidate the precise meaning of these words, it is therefore necessary to look elsewhere for help. The ICRC's discussion of the matter in a 1960 publication is extremely helpful.

> The humanitarian activities authorized must be undertaken by the International Committee of the Red Cross or by any other *impartial humanitarian* organization. The International Committee is mentioned in two capacities—firstly on its own account . . .; and secondly, as an example of what is meant by "impartial humanitarian organization. . . ."
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> The organization must be *humanitarian;* in other words it must be concerned with the condition of man, considered solely as a human being, regardless of his value as a military, political, professional or other unit. It must also be *impartial.* Article 9 does not require it to be international.... Furthermore, the Convention does not require the organization to be neutral, but it is obvious that impartiality benefits greatly from neutrality.
>
> In order to be authorized, the organization's activities must be purely humanitarian in character; that is to say they must be concerned with human beings as such, and must not be affected by any political or military consideration. Within those limits, any subsidiary activity which helps to implement the principles of the Convention is not only authorized but desirable under Article 9. . . .[24]

There are, then, three basic requirements for an organization's qualifying as "any other impartial humanitarian organization" within the meaning of Article 9 of the 1949 Convention: first, it must be *impartial* in its operations; second, it must be *humanitarian* in concept and function; and third, it must have some institutional, operational, and functional *resemblance to the ICRC.*[25] Negatively, it need not be international in creation and it need not be neutral in origin.

What is meant by "impartial"? An "impartial" organization is one which, as an institution, is unbiased and unprejudiced, fair and equitable to both sides in its operations, one which neither by act nor by statement gives any indication that it prefers one side over the other.[26] The mere fact of being established and based in a neutral country does not of itself make an organization "impartial."[27] Conversely, the mere fact of being established and based in a belligerent country does not necessarily indicate a lack of "impartiality." While, as a practical matter, it will undoubtedly be most difficult to identify an organization which is not "neutral" in location but which is accepted as "impartial," this is neither a paradox nor an impossibility. Such an organization will usually be one which operates exclusively in the territory of its own nation, preparing material assistance for dispatch through neutral relief channels, such as the ICRC, to the prisoners of war of its own nationality held by the enemy; and, more relevantly, it will be one which is permitted to and does provide material assistance to enemy prisoners of war held in the territory of its own nation.[28] It is, however, almost inconceivable that an organization which is established and based in the territory of one belligerent will be permitted to function in the territory of an opposing belligerent, no matter how impartial and humanitarian its reputation and its operations.[29] Wartime public opinion alone would be a sufficiently powerful force to prevent an "enemy" organization from functioning freely in the territory of the other side—except under the most unusual circumstances.[30]

The meaning of the term "humanitarian" is considerably less controversial and its application presents far fewer problems. As stated by the ICRC in the excerpts quoted above, "humanitarian" denotes "concerned with the condition of man, considered solely as a human being." In the context of the prisoner of war, a "humanitarian organization" is one which has the objective of protecting and improving the welfare of the prisoner of war and the conditions under which he exists. Certainly, this is, and has long been, a major objective of the ICRC, and, as we have seen, the ICRC serves as a model for identifying the organizations which come within the meaning of Article 9 of the 1949 Convention.

Finally, the entity seeking to bring itself within that provision—or which one of the belligerents seeks to bring within that provision—must be an "organization" and as such it must have some institutional, operational, and functional resemblance to the ICRC. An individual does not qualify.[31] A small,

ad hoc loose-knit group consisting of individuals who have joined together for a specific and limited purpose and which is obviously destined to have a limited life span does not qualify. There must be some institutional basis, some operational experience and tradition, which clearly establishes it as an organization that is both impartial and humanitarian.[32] An established religious organization could probably qualify institutionally even though it had not been previously engaged in prisoner-of-war welfare activities. A national Red Cross Society could probably qualify institutionally as could an organization which has operated in the field of relief from natural disasters. An international organization, such as the United Nations or the Organization of American States,[33] or an agency thereof, such as the UN High Commissioner for Refugees or the OAS Council, could probably qualify institutionally. The possibilities are almost limitless.

One additional facet of the designation of "impartial humanitarian organizations" requires mention. Article 9 of the 1949 Convention makes the activities of the ICRC or of any other impartial humanitarian organization "subject to the consent of the Parties to the conflict concerned."[34] In the debate on the proposed amendment to the draft article which contemplated the activities of impartial humanitarian organizations other than the ICRC,[35] the representative of France pointed out that "the activities of humanitarian bodies were always subordinated to approval by Parties to the conflict."[36] The provision of the 1949 Convention has been interpreted, and properly so, as requiring the consent of all the Parties "upon which the possibility of carrying out the action contemplated depends."[37] This is why it is inconceivable that even a universally recognized humanitarian organization, if established and based in the territory of one belligerent, would be able to function in the territory of the other.[38]

An organization obviously *cannot* function if it does not have the permission and approval of the sovereign of the territory in which it proposes to operate (normally, this would be the Detaining Power); it legally cannot, and certainly *should not,* function if it does not also have the permission and approval of the other sovereign concerned (normally, this would be the Power of Origin).[39]

To summarize:

(1.) An adequate legal basis exists in international law for the release and repatriation of longtime, able-bodied prisoners of war during the course of hostilities (Article 109(2)).

(2.) While the legal basis for such action contemplates a consensual arrangement, the 1949 Convention not only permits but encourages unilateral action which is more favorable to the prisoners of war than is required by the Convention itself (Article 6(2)).

(3.) Bilateral release and repatriation of longtime, able-bodied prisoners of war during the course of hostilities, as provided in the 1949 Convention (Article

109(2)), is actually a return to the historic procedure of exchange with the added limitation against the further use of the repatriated prisoners of war "on active military service" (Article 117).

(4.) Either the International Committee of the Red Cross or "any other impartial humanitarian organization" may perform humanitarian activities for the welfare of prisoners of war provided that the appropriate Parties to the conflict give their consent (Article 9).

(5.) An "impartial humanitarian organization" within the meaning of Article 9 of the 1949 Convention is one which is unbiased and unprejudiced, fair and equitable to both Parties concerned, one which neither by act nor by statement gives any indication that it prefers one side over the other; one which has the humanitarian objective of protecting and improving the welfare of the prisoners of war and the conditions under which they exist in their status as captives; and one which is truly an "organization," a status measured, in the final analysis, by its institutional, operational, and functional resemblance to the ICRC.

III

From the foregoing general discussion of the legal aspects of the release and repartriation during hostilities of longtime, able-bodied prisoners of war through the intervention of humanitarian organizations, it is obvious that Professor Falk and I are in substantial agreement on the merit of such releases and repatriations from a humanitarian point of view. He suggests the need for "flexible" interpretation, or, alternatively, revision of the 1949 Convention in order to accomplish his basic purpose.[40] This is unnecessary because the provisions of Article 109(2) of the 1949 Convention specifically cover exactly the contingency with which he is concerned,[41] thereby making "flexible"" interpretation or revision unnecessary.

We part company completely when he attempts to enlarge the scope of the term "impartial humanitarian organization" so as to bring within its ambit a group such as the self-styled "Committee of Liaison with Families of Servicemen Detained in North Vietnam"[42] (hereinafter referred to as the "Committee of Liaison") the members of which were far more concerned with anti-war propaganda than with the welfare of prisoners of war.[43] The Committee of Liaison was anything but "impartial"; it was more strongly motivated by political than by humanitarian considerations; and its existence as an "organization" within the meaning of the 1949 Convention was, at the very least, debatable.

To put the matter in proper perspective, it will be helpful to summarize briefly the events which are the basis for the legal thesis with which we are dealing. The process really began in October-November 1967[44] when the Viet Cong released three captured American soldiers in Phnom Penh, Cambodia, to Thomas E. Hayden, an American identified by the press as being the

representative of "anti-war groups" in the United States.[45] Then in February 1968 the Democratic Republic of Vietnam (DRV) released three American pilots in Hanoi to the Rev. Daniel Berrigan and Howard Zinn, also identified by the press as representatives of "anti-war groups."[46] Some months later, in July-August 1968, the DRV released three more American pilots in Hanoi, this time to Mrs. Robert Scheer, Vernon Grizzard, and Stuart Meacham, once again identified by the press as representatives of "anti-war" groups.[47] In August 1969 the DRV released three American servicemen in Hanoi, this time to Rennard C. Davis and David Dellinger, who were identified as representing the "National Mobilization Committee to End the War in Vietnam."[48] Finally, in September 1972, there occurred the release of three American pilots in Hanoi to Mrs. Cora Weiss, David Dellinger, Professor Falk *et al.*[49] Thus, the DRV made the first release of three captured American servicemen in February 1968; the second in August 1968; the third in August 1969; and the fourth and last in October 1972. The first two of these releases were made to well-known anti-war individuals; the latter two were made to two different anti-war groups. Each was attended with great publicity over an extended period of time. Each involved the release of only a token number of prisoners of war. Each involved prisoners of war who could only have been selected for release for reasons other than their physical condition or length of confinement, the grounds mentioned in the 1949 Convention for releases and repatriations during the course of hostilities.[50]

The cablegram sent by the "escort group" to the President of the United States from Hanoi[51] (which was, perhaps not unexpectedly, immediately broadcast by Hanoi radio) displayed either remarkable presumption, remarkable ignorance, or remarkable naiveté.[52] The four "guidelines" laid down for the benefit of the U. S. Government by the Committee of Liaison warrant individual comment, particularly in the light of the claim being advanced that the Committee of Liaison was an "impartial humanitarian organization."

The first paragraph of the cablegram demanded that the three prisoners of war released by the DRV to the Committee of Liaison for repatriation to the United States "shall proceed home with us and representatives of their families in civilian aircraft." The DRV could have made a case for insisting upon the use of civilian aircraft up to the territorial limits of the United States; but that it would omit such a major requirement from its public statement, and then privately so advise the members of the escort groups seems, to say the least, rather odd.[53] On the other hand, if the use of civil aircraft and the designation of authorized fellow passengers was a condition asserted on the initiative of the escort group, the group demonstrated that it, and the Committee of Liaison which it represented, were anything but "impartial." Moreover, despite the obvious mental reservations displayed by members of the escort group,[54] it is a universal rule of military law that upon his departure from the territory and

control of the enemy (whether by release, escape, or any other method), a prisoner of war has the duty to report at once to the first available authorities of his country. Members of anti-war groups frequently display a singular inability to recognize that the relationship between a member of the military service and the military authorities has evolved over the centuries as a result of the dictates of necessity and differs considerably from the relationship between a civilian and the civilian authorities.

The second paragraph of the cablegram called for the granting of a 30-day "furlough" to the three prisoners of war being released and repatriated.[55] How such a completely internal, administrative matter could possibly have been deemed to be within the purview of either the DRV or of an "impartial humanitarian organization" is exceedingly difficult to perceive.[56] It was just about as much the business of either the DRV or the Committee of Liaison as it would have been to lay down a condition that the men were to receive automatic promotions or to be entitled to additional pay for the period during which they had been prisoners of war. The members of the escort group seem to have labored under the impression that their first contact (except for Dellinger) with the problem of returned prisoners of war offered a subtle occasion to educate the military services about the process of repatriation. They were apparently unmindful of the fact that thousands of prisoners of war had been repatriated by the armed forces after World War II and the Korean War.[57]

The third paragraph of the cablegram demanded a "complete medical checkup at the hospital of their choice, civilian or military." Once again the Committee of Liaison pronounced itself on an internal, administrative matter in an area in which the military services have had far more experience than the members of the escort group. The members of the Committee again demonstrated an unwillingness to accept the fact that the three prisoners of war continued to be members of the military service, subject to military control and discipline, and were not just civilian members of the general public and "protegés" of the Committee of Liaison. Moreover, despite the demand for a medical checkup in a hospital made in the cablegram, the escort group later apparently realized that this would completely remove their "protegés" from their control and, as they approached the United States, their medical judgment changed. "[I]t was clear to the escort group . . . that there was no immediate need for medical surveillance."[58] However, once they were back in the United States they had to concede that "the pilots preferred, or at least were unwilling to contest, the Government's insistence on a medical checkup under military auspices."[59]

The fourth paragraph of the cablegram prescribed that the three men being repatriated "shall do nothing further to promote the American war effort in Indochina." As we have seen, Article 117 of the 1949 Convention contains an

ambiguous prohibition against a repatriated prisoner of war's being "employed on active military service."[60] Like the United States, the ICRC interprets this to prohibit taking part "in armed operations against the former Detaining Power or its allies."[61] Certainly, any reasonable interpretation of Article 117 is far from the broad ban which the "impartial," anti-war Committee of Liaison sought to impose.[62]

The fact that the Committee of Liaison opposed U. S. participation in the hostilities in Vietnam is apparently considered one of the more decisive arguments in establishing both its "impartiality" and its "humanitarianism."[63] Conversely, it is at least implied that support of U. S. participation in the hostilities in Vietnam establishes a lack of "impartiality" and "humanitarianism." Thus, the "National League of Families of American Prisoners and Missing in Southeast Asia," an organization all of whose members were relatives of servicemen either known to be prisoners of war or missing in action and whose goal was "to achieve better treatment for Americans held captive and to learn the status of those missing in action,"[64] is dismissed as being one of the "groups that also proclaim their humanitarian purposes, despite their commitment to Mr. Nixon's war policies."[65] While there is merit to the conclusion that the "National League" did not qualify as an "impartial humanitarian organization" within the meaning of Article 9 of the 1949 Convention, this is not because of its failure to oppose U.S. participation in the Vietnamese conflict, but because, as in the case of the Committee of Liaison, there is no basis for concluding that it was the type of organization envisaged by the draftsmen of the 1949 Convention.

The failure of the U.S. Government to oppose Dellinger's application for leave to travel with the escort group when he was free on bail pending an appeal is construed as evidence of an implied consent by the United States to the activities of the Committee of Liaison.[66] The fact that the U.S. Government did not "interfere with its activities,"[67] or "make an objection" to the Committee,[68] and that "the North Vietnamese initiative was not repudiated,"[69] are also cited as evidence that the United States agreed to and concurred in the activities of the Committee of Liaison and that "it was a consensual process."[70] In other words, it is contended that the failure of the U.S. Government to interfere with and to prevent the repatriation in 1972, just as it had taken no action to interfere with or prevent the earlier repatriations, constituted a legal acceptance of the Committee of Liaison as an "impartial humanitarian organization."[71] That contention does not even appear to warrant discussion.

The argument advanced with respect to the proper interpretation of Articles 9 and 10 of the 1949 Convention is also without validity. Despite the fact that Article 9 is so specific in requiring the consent of both Parties to an armed conflict before the ICRC or an impartial humanitarian organization may undertake

activities for the protection or relief of prisoners of war,[72] the argument is made that the language of both Articles 9 and 10 is "ambiguous with regard to whether the belligerent [belligerents?] must agree to the designation of a humanitarian organization";[73] and the conclusion is reached that it is "most reasonable" to interpret Article 10(2) "as giving the Detaining Power, North Vietnam, the capacity to deal with an organization like the Committee of Liaison."[74]

The DRV is at least a de facto state and its "capacity to deal" with the Committee of Liaison, or any other group, cannot be doubted; but to use this circumstance to establish that the Committee of Liaison is, therefore, an "impartial humanitarian organization" which may be unilaterally designated by the DRV as a substitute for the Protecting Power is quite another matter. The attempt to attain this result is, in effect, based upon the following reasoning: Article 10(2) of the 1949 Convention provides that if there is no Protecting Power and if no organization offering all guarantees of impartiality and efficacy to perform the duties of the Protecting Power has been designated to perform those duties under Article 10(1), "the Detaining Power shall request a neutral State, or such an organization, to undertake the functions" of the Protecting Power. In acceding to the 1949 Convention, the DRV made a reservation to Article 10 stating that it would not "recognize as legal" such a request by the Detaining Power "unless the request has been approved by the State upon which the prisoners of war depend."[75] A substantially similar reservation to Article 10 had been made by the USSR and the Soviet bloc countries upon signing the Convention in 1949 and in their subsequent ratifications.[76] The reason given by the USSR for the reservation was the belief that "the Government of the country to which the protected persons belong [cannot be prevented] from taking part in the choice of the substitute for the Protecting Power."[77] In recommending that the Senate give its advice and consent to the ratification of the 1949 Convention by the United States, the Department of State advised the Senate of its opposition to the USSR and similar reservations.[78] This opposition, according to Falk,

> seems to confirm the United States view that the Detaining Power had the capacity, even the duty, to designate an impartial humanitarian organization and that such designation would be determinative at least in the absence of objection from the country whose men are detained that the organization is not "impartial" or not "humanitarian."[79]

Thus, based upon the DRV reservation to Article 10 of the 1949 Convention and the earlier stated objection of the Department of State to the DRV-type reservation to that article, the conclusion is reached that a Detaining Power may unilaterally designate an "impartial humanitarian organization" to perform functions with respect to prisoners of war.

In the first place, it must be borne in mind that Article 10 deals, not with the activities of the "impartial humanitarian organization" referred to in Article 9, but with the activities of Protecting Powers and of "substitutes" for Protecting Powers. It seems incredible that the contention would be made that the Committee of Liaison, a small group of completely inexperienced individuals, whose only common thread was opposition to U.S. participation in the hostilities in Vietnam, could possibly qualify as an organization "offering guarantees of impartiality and efficacy to perform the duties of the Protecting Power,"—which are the requirements set forth in Article 10(1) for an organization that may be designated under Article 10(2).

In the second place, the DRV, like the USSR and the Soviet bloc countries at the 1949 Diplomatic Conference, made its reservation to Article 10 because it considered that the article improperly reduced the right of the Power of Origin to participate in the selection of a substitute for the Protecting Power. Inasmuch as the DRV became a Party to the 1949 Convention only on the condition that no neutral state or humanitarian organization could be designated by a Detaining Power to act as a substitute for the Protecting Power without the consent of the Power of Origin, it is certainly inverse reasoning to claim that this established the right of the DRV acting as a Detaining Power, unilaterally so to designate the Committee of Liaison,[80] without the consent of the United States, the Power of Origin.

In the third place, instead of referring to the suggestion made in a letter written by Secretary Dulles to the Senate Foreign Relations Committee concerning the attitude which the United States should take with respect to the Soviet bloc reservations,[81] it would have been more appropriate to refer to the position actually and officially taken by the United States in connection with ratification of the 1949 Convention:

> Rejecting the reservations which States have made with respect to the Geneva Convention relative to the treatment of prisoners of war, the United States accepts treaty relations with all parties to that Convention, except as to the changes proposed by such reservations.[82]

In other words, while the United States has treaty relations with any state which has ratified or acceded to the 1949 Convention with a reservation to Article 10, those treaty relations are subject to the changes made by the reservation, which means that *neither the United States nor the reserving state,* when acting as a Detaining Power, may designate a neutral Power or a humanitarian organization as a substitute for the Protecting Power without the approval of the Power of Origin.[83]

One basic question remains. Why did they do it? Why did the North Vietnamese unilaterally release these randomly-selected, token-size groups of

prisoners of war for repatriation? Were the North Vietnamese more humanitarian-minded than the belligerents of World War I? Of World War II? Of Korea? Were they inspired to do what they did because of empathy for the men released and repatriated? All of these questions carry their own negative responses.[84]

The Vietnam War was unlike past conflicts. Previous wars had not seen the establishment and proliferation of anti-war groups which functioned openly, seeking publicity that was not always easy for them to obtain.[85] The release of token numbers of prisoners of war to these groups for repatriation at rather lengthy intervals served, on each occasion, as a major propaganda device, one which for a number of days gave the North Vietnamese and the particular anti-war group large-scale newspaper, television, and radio coverage.[86] Had the releases been purely humanitarian in nature, the prisoners of war selected for release would have been those who were the most seriously wounded or sick, or those who had been the longest in prisoner-of-war status; but neither of these valid criteria was used in the selection process.[87]

The significance for the future of what transpired in the concluding months of American participation in the war in Vietnam is not great. In an all-out armed conflict, one which is a "war" both under international law and in an American constitutional sense, private repatriations by civilians will probably not be practical, because the members of the antiwar group in any belligerent country participating in such an event would undoubtedly find themselves spending at least the balance of the period of hostilities in close confinement after having been tried and convicted of treason or of communicating with the enemy. Second, as a practical matter, with the limitations which would exist on wartime travel, particularly across international borders, it would probably be all but impossible for an "escort group" to accomplish its function. Third, and most important, with the close censorship of the news media which is maintained during wartime, there would be little or no propaganda value in releasing token-sized groups of prisoners of war for repatriation as the Power of Origin could completely control the amount of publicity, if any, which the event would be allowed within its territory, the place where the impact of the propaganda is actually desired. Without the publicity which releases and repatriations are designed to generate, the motive for such action by a belligerent withers on the vine.

In conclusion, while there are both legal and humanitarian bases for the release and repatriation, or internment in neutral countries, during the course of hostilities of longtime, able-bodied prisoners of war, this highly laudable purpose can best be accomplished through resort to the established and recognized facilities of the Protecting Power and the International Committee of the Red

Cross, rather than through the use of partisan, *ad hoc* groups which have extremely limited public acceptance and recognition.

Notes

1. 67 AJIL 465 (1973) (hereinafter cited as Falk).

2. 6 UST 3316; 75 UNTS 135; 47 AJIL SUPP. 119 (1953).

3. One author asserts that "[f]aint though unmistakeable traces of it [ransom] survive even into Napoleon's war, . . ." LEWIS, NAPOLEON AND HIS BRITISH CAPTIVES 43 (1962). *See also*, Levie, *The Nature and Scope of the Armistice Agreement*, 50 AJIL 880, 897 (1956). Perhaps it may be said to have reappeared momentarily as a result of the sequel to the Bay of Pigs episode.

4. When, for some reason, a formal exchange could not be made, a prisoner of war might be released and repatriated in a temporary parole status until his counterpart had been repatriated and the formal exchange had thus been completed. Lewis, *supra* note 3, at 45.

5. The occasional procedure mentioned in the previous note was substantially the system adopted as a general procedure in the rather ineffectual Dix-Hill Cartel during the American Civil War. LEWIS & MEWHA, THE HISTORY OF PRISONER OF WAR UTILIZATION BY THE UNITED STATES ARMY, 1776–1945, at 29–30 (1955); MURPHY, PRISONERS OF WAR: REPATRIATION OR INTERNMENT IN WARTIME 2-3 (1971).

6. The release and repatriation on temporary parole mentioned in note 4, *supra*, was the exception rather than the rule; and the Dix-Hill Cartel, in attempting to make it the rule, failed to accomplish the intended result to the satisfaction of either side.

7. *See*, for example, U.S. Army Field Manual 27-10, THE LAW OF LAND WARFARE, para. 187a (1956); Article III, *Code of Conduct for Members of the Armed Forces*, Exec. Order No. 10631, Aug. 18, 1955, 3 CFR, 1954-1958 Comp., at 266; United Kingdom, THE LAW OF WAR ON LAND, BEING PART III OF THE MANUAL OF MILITARY LAW, para. 246, n. 1 (1958); CODE: DE JUSTICE MILITAIRE, ARMÉE DE TERRE, Art. 235 (Dalloz, 1963).

8. 47 Stat. 2021; 2 Bevans 932; 27 AJIL SUPP. 59 (1933).

9. On Dec. 9, 1970, the UN General Assembly adopted a Resolution in which it:

> *Urges* compliance with Article 109 of the Geneva Convention of 1949 . . . which provides for agreements with a view to the direct repatriation . . . of able-bodied prisoners of war who have undergone a long period of captivity. (A/RES/1676 (XXV) (1970)).

In Havens, *Release and Repatriation of Vietnam Prisoners*, 57 ABAJ 41, 44 (1971), the author argues that after 18 months as a prisoner of war an individual should be entitled to release and repatriation. However, he cites no authority for this interpretation of the provisions of the 1949 Convention.

10. Article 109(3) prohibits the involuntary repatriation of sick and injured prisoners of war during the course of hostilities. Normal rules of treaty interpretation would seem to make this provision inapplicable to the repatriation during hostilities of able-bodied prisoners of war unless it can be said that as a result of the settlement reached in Korea in 1953, supported by a number of resolutions of the UN General Assembly, a norm of international law has evolved which prohibits the involuntary repatriation of prisoners of war under any circumstances.

11. Although both the 1929 and the 1949 Conventions contemplate that such repatriations will be accomplished under agreements between the Parties, there is certainly no reason why one Party cannot elect to take such action unilaterally if it so desires. Article 6(2) of the 1949 Convention specifically mentions this possibility and Article 118(2) of that Convention, dealing with post-hostilities release and repatriation, specifically provides for, and even requires, unilateral action if no agreement covering the subject is reached by the belligerents. Pakistan initiated this unilateral action in November 1972 with respect to the Indian prisoners of war it then held. NY Times, Nov. 28, 1972, at 1, c. 2.

12. Article 117 of the 1949 Convention provides that "[n]o repatriated person may be employed on active military service." This provision is, of course, quite ambiguous. PICTET (ed.), COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 538-39 (1960) (hereinafter cited as PICTET, COMMENTARY). U.S. military authorities have construed Article 117 as only prohibiting the repatriated serviceman from participating in combat against the former Detaining Power and not as requiring his complete separation from the military service. *American Prisoners of War in Southeast Asia, 1971, Hearings before the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 92d Cong., 1st Sess., 350 (1971) (hereinafter cited as 1971 *Hearings*).

13. Although the REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS ON ITS ACTIVITIES DURING THE SECOND WORLD WAR (September 1, 1939—June 30, 1947) (1948) includes a 21-page discussion of the numerous repatriations of seriously wounded and seriously sick prisoners of war in Europe (Vol. I, at

373-93), it does not even mention any proposal by a belligerent or neutral state or a humanitarian organization to implement Article 72 of the 1929 Convention.

14. Probably no armed conflict which has occurred since 1945 (except for those involving the French in Vietnam, Korea, and the later Vietnamese conflict) has really continued for a long enough time for any prisoner of war to be considered as having "undergone a long period of captivity."

15. The Dix-Hill Cartel, *supra* notes 5 and 6, failed because in the early years of the American Civil War the equal exchange of able-bodied prisoners of war favored the Union, while later in the conflict it favored the Confederacy, LEWIS & MEWHA, *supra* note 5, at 30. Of course, this criticism is not true of internment in a neutral country, the alternative provided for in Article 109(2).

16. *See* LINDSAY (ed.), SWISS INTERNMENT OF PRISONERS OF WAR 3 (1917):

> The fear expressed by France [in February 1915] that under the system of exchange wounded soldiers would be returned to Germany who could still be of military service [an amputee could work in a depot, thus relieving an able-bodied solider], was common to other belligerents. . . .

17. Levie, *Prisoners of War and the Protecting Power*, 55 AJIL 374 (1961).

18. *Ibid.*, at 394-96. See also I ICRC REPORT, *supra* note 13, at 11-29.

19. Fourth Meeting of the Joint Committee, FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, Vol. IIB, at 18, 21 (hereinafter cited as FINAL RECORD).

20. Annex 24, FINAL RECORD, Vol. III, at 32.

21. FINAL RECORD, Vol. IIB, at 60 (emphasis added).

22. Article 7/8/8/8, *ibid.*, at 346.

23. At some point in the deliberations the word "body" was changed to "organization" but this author was unable to pinpoint the event in the FINAL RECORD, a result not unique to this particular matter.

24. PICTET, COMMENTARY, 107-08.

25. Both the phrasing of the provision of the 1949 Convention and the doctrine of *ejusdem generis* indicate the validity of the conclusion reached by the ICRC that it was to be considered "as an example of what is meant by 'impartial humanitarian organization'."

26. No matter how politically remote its policymakers and other members may be from the cause of the war and from the belligerents, they will, of course, inevitably have individual prejudices with respect to any armed conflict that may be in progress. However, if the organization is to be able to maintain its aura of "impartiality," even these individual preferences must be both suppressed and concealed because of the human difficulty of ascribing "impartiality" to an organization whose policymakers and other members have publicly expressed individual preferences and prejudices.

27. During the hostilities in Korea the Chinese charged, with the support of the USSR, and totally without justification and solely for political reasons, that the ICRC was a "capitalist spy organization." United Kingdom, Ministry of Defence, TREATMENT OF BRITISH PRISONERS OF WAR IN KOREA 33-34 (1955). The actions of the North Vietnamese during the hostilities in Vietnam would seem to indicate a similar attitude. Falk, *The American POWs; Pawns in Power Politics*, THE PROGRESSIVE, March 1971, at 13, 16. Under the circumstances, it is unexpected, indeed, to find the USSR communicating to the Secretary-General of the United Nations its belief in the need for the ICRC to undertake additional tasks relating to the protection of human rights in armed conflict and omitting any suggestion for the use of "other impartial humanitarian organizations" for this purpose. Report of the Secretary-General, *Respect for Human Rights in Armed Conflict*, UN Doc. A/8052, Sept. 18, 1970, at 119, 120.

28. During World War II, the Young Men's Christian Association, the National Catholic Welfare Conference, and other similar organizations, were permitted, in varying degrees, to supplement the humanitarian work of the ICRC on behalf of enemy prisoners of war held in the United States. Rich (ed.), *A Brief History of the Office of the Provost Marshal General, World War II*, at 489-91 (mimeo., 1946). Some of these organizations might, upon investigation, qualify under Article 9. While their orientation was, for the most part, primarily religious, they normally offered humanitarian assistance to all enemy prisoners of war, without regard to their origin, nationality, or religion. Of course, religious supplies furnished by them were limited to those of their own denomination.

29. When the representative of the United States at the 1949 Diplomatic Conference supported the proposed change in the draft of Article 9 and referred to "welfare organizations of a non-international character," he unquestionably had in mind the operation of such organizations in their own country, based upon the experience in the United States during World War II mentioned in the previous note.

30. There could certainly be little dispute that, during World War II, it would have been impossible for the American Red Cross, or the YMCA, or the National Catholic Welfare Conference, all American-established and based humanitarian organizations, to have obtained permission to function in Germany or Japan, or for the German or Japanese Red Cross to have obtained permission to function in the

United States. The same was indubitably true of the American Red Cross, the Red Cross of the Republic of Vietnam, and the Red Cross of the Democratic Republic of Vietnam (DRV) during the hostilities in Vietnam.

31. No matter how humanitarian may have been H. Ross Perot's motives, his misguided activities on behalf of the American prisoners of war then held in North Vietnam could not have been considered as falling within any provision of the 1949 Convention.

32. The "institutional basis" and the "operational experience and tradition" need not necessarily have been prisoner-of-war oriented, or even war-oriented.

33. Some official action previously taken by the international organization might have called in question its impartiality but it would not affect its "institutional" qualifications.

34. It can be assumed that the People's Republic of Korea and the Democratic Republic of Vietnam would rely on this provision in justification of their right to refuse to allow the ICRC to perform its customary humanitarian functions within their territories. Whether they did indeed act on the basis of law is another question.

35. *See* text in connection with notes 19-23, *supra.*

36. FINAL RECORD, Vol. IIB, at 60.

37. PICTET, COMMENTARY, 109.

38. *Supra* note 30. If Switzerland were a belligerent, the ICRC would undoubtedly find itself refused permission to function in the territory of that country's enemy, despite the century-old tradition of impartial humanitarianism which the ICRC enjoys. It could, of course, continue to perform those humanitarian functions which might be performed in Switzerland.

39. This is why the reservation made to Article 10 of the 1949 Convention by the USSR and the other Communist countries (including, subsequently, the DRV) and objected to by the Western countries, appears to have a valid basis. Levie, *supra* note 17, at 385, n. 32. That article provides that if there is no Protecting Power, and for some reason, a new Protecting Power cannot be designated, the Detaining Power may request the services of a neutral state or of a humanitarian organization such as the ICRC to perform the functions of the Protecting Power. The Communist reservation properly makes the consent of the Power of Origin necessary for the designation of such a substitute. (For a more detailed discussion of the reservation to Article 10, *see* text at pp. 182–84.)

40. "Observations" Nos. (1) and (4), Falk, at 477.

41. *See* text at pp. 174–75 and note 9, *supra.*

42. Mrs. Cora Weiss, co-chairman with David Dellinger of this Committee, testified as follows with respect to this group:

> The Committee of Liaison was established on January 15, 1970, after three women including myself, of Women Strike for Peace, returned from a trip to North Vietnam. In our announcement of formation and purpose, we stated that the purposes of the committee were (1) to facilitate communication between prisoners and their families; and (2) to inquire on behalf of families regarding the status of their missing relatives.

1971 *Hearings* 230. An "Information Sheet" issued by the Committee of Liaison during the month of its inception stated that it had been established "at the request of the North Vietnamese." The Information Sheet goes on to give assurances that the Committee of Liaison "is not in any sense representing the government of North Vietnam." *Ibid.*, 532.

43. Falk, 473-74.

44. The significance of mentioning a time period instead of an exact date is discussed in note 86, *infra.*

45. The men released were Sgt. Edward R. Johnson, Sgt. Daniel L. Pitzer, and Sgt. James E. Jackson. N.Y. Times, Nov. 13, 1967, at 2, c. 6. On three subsequent occasions the Viet Cong released a total of six additional American servicemen in the field, allowing them to return to U.S. military control without the benefit of an escort.

46. The men released were Maj. Norris M. Overly, USAF, captured in Sept. 1967; and Capt. Jon D. Black, USAF, and Lt. (j.g.) David P. Matheny, USN, both captured in Oct. 1967. N.Y. Times, Feb. 17, 1968, at 1, c. 8.

47. The men released were Maj. James F. Low, USAF, captured in Dec. 1967; Capt. Joe V. Carpenter, USAF, captured in Feb. 1968; and Maj. Fred N. Thompson, USAF, captured in March 1968. N.Y. Times, Aug. 5, 1968, at 15, c. 1.

48. The men released were Lt. Robert F. Frishman, USN, captured in Oct. 1967; Seaman Douglas B. Hegdahl, captured in April 1967; and Capt. Wesley L. Rumble USAF, captured in April 1968. N.Y. Times, Aug. 5, 1969, at 1, c. 2.

49. Lt. (j.g.) Markham L. Gartley, USN, had been captured in Aug. 1968; Lt (j.g.) Morris A. Charles, USN, had been captured in Dec. 1971; and Maj. Edward K. Elias USAF, had been captured in April 1972. David Dellinger was once again one of the emissaries selected by the DRV to receive the release of the three

prisoners of war, but this time it was not in his capacity as a member of the "National Mobilization Committee," but in his parallel capacity as a member of the Committee of Liaison. N.Y. Times, Sept. 17, 1972, at 3, c.4.

50. Only Frishman could be said to have had a physical condition which might have warranted his release and repatriation on medical grounds. Gartley, who had been a prisoner of war for more than four years, certainly qualified as a "longtime" prisoner of war. Hegdahl had been a prisoner of war for 28 months, Frishman for 22 months, and Rumble for 16 months. All of the other men released and repatriated by the DRV had been prisoners of war for less than one year (actually, for periods of between 4 and 9 months).

51. Falk, 467, 471-72. Falk seems to have been surprised that no answer was received from the U.S. Government by the Committee of Liaison to this and other messages sent from Hanoi. *Ibid.*, 467. It is difficult to believe that he really expected answers.

52. While the cablegram does state that the conditions it contained were "[i]n accordance with the expressed expectations of the North Vietnamese Government," Falk indicates clearly that its contents were developed by the "escort group" as an outgrowth of internal discussions which took place in Hanoi with respect to the group's "responsibilities" (*ibid.*,466-67) and that the releases by the DRV were, in fact, unconditional. *Ibid.*, 471.

53. It is, of course, possible that the desire of the Committee of Liaison to retain "custody" of the three men and to travel by civilian, rather than military, aircraft, could have been motivated by the publicity anticipated from a press conference and reception planned for their arrival at Kennedy Airport. *Ibid.*, 468.

54. *Ibid.*, 471.

55. The use of the term "furlough" shows a practical ignorance of contemporary military vocabulary. It was never applicable to officers and disappeared from the military lexicon shortly after World War II. Only a certain antiquarian interest would have prompted the three officers to request a "furlough."

56. Was the granting of 30-day "furloughs" one of the "expressed expectations of the North Vietnamese Government"? *See* note 52, *supra*.

57. For example, after Korea some 4,400 prisoners of war were released and repatriated. Each was put through a processing which had been well organized beforehand and which included preliminary hospitalization and medical examination in Japan, return to the United States when medically approved, further hospitalization either in Hawaii or in the military hospital nearest to his home, complete medical examination and treatment, and extended leave as soon as medical clearance was granted.

58. Falk, 471-72. Elsewhere reference is made to "reported *abuses* in relation to prior treatment" and the suggestion is advanced that there should be "a preliminary medical examination, perhaps *under neutral auspices*" (*ibid.*, 472, emphasis added). Incredible as it may seem, these two quotations refer to the treatment of repatriated prisoners of war in military hospitals in the United States!

59. *Ibid.*, 472. Here and elsewhere throughout the article statements appear implying that anything done for the benefit of repatriated prisoners of war in the United States occurred solely because of public pressure by the escort group and in spite of strong governmental (or military service) predilections to the contrary. This, of course, disregards the fact that everything done for these men, as well as those who preceded and followed them, evolved from a refinement of the procedures for repatriated prisoners of war applied after World War II and Korea.

60. *Supra* note 12.

61. PICTET, COMMENTARY, 539.

62. If one of these men had resigned from the military service and had then gone on a speaking tour in support of U.S. participation in the hostilities in Vietnam, he clearly would not have violated Article 117 of the 1949 Convention; but he would have violated the broader prohibition of the fourth "guideline."

63. Falk, 473–74.

64. 1971 *Hearings* 25.

65. Falk, 474 and n. 13. (In the cited note, the activities of the "National League of Families" are equated to the activities of H. Ross Perot.)

66. *Ibid.*, 474.

67. *Ibid.*

68. *Ibid.*, 475.

69. *Ibid.*, 477.

70. *Ibid.*

71. *Ibid.*

72. *See* text *supra* at pp. 700-01.

73. Falk, 474.

74. *Ibid.*

75. 274 UNTS 339.

76. *See* note 39 *supra*. The USSR reservation provides for "the consent of the Government of the country of which the prisoners of war are nationals." 191 UNTS 367. Either wording refers, of course, to the Power of Origin.

77. FINAL RECORD, Vol. IIB, at 347.

78. *Geneva Conventions for the Protection of War Victims, Hearing before the Senate Comm. on Foreign Relations,* 84th Cong., 1st Sess., on Executives D, E, F, and G, 82d Cong., 1st Sess., at 62 (1955).

79. Falk, 475.

80. *Ibid.*

81. *Ibid.*, n. 17.

82. 6 UST 3316, 3514; 213 UNTS 383.

83. PILLOUD, RESERVATIONS TO THE 1949 GENEVA CONVENTIONS 5 (1958).

84. A number of questions, basically along this same line, appear in the Falk article, at 477 and 478. They are not answered except by the statement that "North Vietnamese motivations are of no account." *Ibid.*, 478.

85. When the Viet Cong made the first prisoner-of-war release, in Nov. 1967, Nguyen Van Hieu, the VC representative in Phnom Penh, Cambodia, where it took place was quoted as follows:

> Mr. Hieu said that the soldiers were being released in cooperation with American opponents of the United States involvement in the Vietnam war in the expectation that they would be able to contribute usefully to the United States peace movement.

N.Y. Times, Nov. 13, 1967, at 2, c. 6. This revealing statement was not repeated on the occasion of the subsequent releases.

86. Some evidence of this can found in the fact that with each release of prisoners of war there would be a great fanfare when the announcement of the proposed release was made, or when the escort group set off for Hanoi, or when it arrived in Hanoi—and then there would be an unexplained delay of a number of days while the publicity, of course, continued. For example, in the second 1968 release the delay was "pretty close to three weeks" (1971 *Hearings* 222) and in the 1972 release of which Falk gives us a blow-by-blow description the unexplained delay was from Sept. 17 to 24 (Falk, 466). While it is true that a Gallup poll conducted in Feb. 1970 revealed that a majority of Americans did not believe the glowing statements made by the members of the escort groups upon their return to the United States, a surprising number of Americans apparently did believe them—and even if the number had been much smaller, the propaganda value to the DRV far outweighed the cost, which was negligible.

87. Actually, it is probable that no criteria were used. *See* note 50 *supra*. In the July-Aug. 1968 release the three pilots released had been prisoners of war for only four to seven months. Note 47 *supra*. Concerning the selection of these three individuals, one witness before the House Subcommittee testified:

> When Thompson, Low and Carpenter were brought together at the time of their release, they tried to figure out why they had been selected. They determined, as many others have since determined, that the obvious conclusion was that none of them had been held very long, all were in apparent good health, they were not debilitated or injured, nor had they been subjected to extremes of brutality. And, too, each had been penned up separately, in a solitary cell, barred from learning all they might otherwise have learned about the general condition of the prison camps or the general condition or treatment of other prisoners.
>
> As Major Thompson says, "We were safe bets to release. People would see and say, 'Maybe they do take good care of their prisoners'."

1971 *Hearings* 387.

IX

Weapons of Warfare

Law and Responsibility in Warfare 153 (Peter D. Trooboff ed., 1975)

Any analysis of the legality of using lachrymatories, napalm, and herbicides (defoliants) should not, in my view, be confined to determining their status under the 1925 Geneva Protocol[1] and customary international law. As I have urged elsewhere, we should concern ourselves with the future, not just the past.[2] I will, therefore, attempt here not only to examine the existing law regarding these weapons, but also to look ahead to what this country's policy should be toward their use in armed conflicts.

Lachrymatories

CS,[3] the modern-day lachrymatory or tear gas, is a sensory irritant that harasses and incapacitates by causing a copious flow of tears. While it may sometimes cause irritation, and even blistering, of the skin and, occasionally, nausea and vomiting, the symptoms will usually quickly disappear when the victim is removed from the contaminated area.[4] The incapacity caused by tear gas is said to be "a temporary, reversible disability with few, if any, permanent effects."[5] It is used by most of the police forces of the world for domestic riot-control purposes.[6] Its great advantage over older tear gases, and others currently available such as CN, is the speed with which it incapacitates—about five seconds after exposure. CS is, of course, only a modern version of tear gas, which has long been available in other forms.

Strangely enough, it may truthfully be said that the United States introduced the use of CS in hostilities in Vietnam for humanitarian reasons. One of the first uses of CS, in September 1965, actually accomplished this purpose. A Viet Cong force was holed up in a tunnel. The United States commander believed that there were also quite a few civilian noncombatants, women, and children in the tunnel. He decided to use CS and succeeded in flushing out about four hundred people, including seventeen armed Viet Cong, without inflicting any injuries or causing any deaths.[7] A second use of CS that might be termed "humanitarian" was in helicopter missions to remove the wounded from the field of combat and to rescue downed fliers. In these cases the surrounding area was saturated with

CS in order to hold down small-arms fire against the helicopter during the course of its pickup mission.

However, CS proved so effective for these purposes that its use was quickly extended to include numerous methods of delivery, both by air and on the ground, and many types of combat operations. Among the combat uses in Vietnam listed by various students of the matter are:

Defensive operations:

1. Defending perimeters (to repulse attacks on outposts and other fortified areas);
2. Covering the removal of troops by helicopter (an extension to defensive combat operations of the original humanitarian purpose of removing the wounded and rescuing downed fliers); and
3. Responding to the ambush of convoys (the ambushing troops, who, being unseen, were not good targets for small arms, were frustrated by the use of CS covering wide areas on both sides of the road).

Offensive operations:

1. Flushing the enemy from tunnels, caves, bunkers, fortifications, etc. (this considerably reduced the number of friendly casualties);
2. Covering the landing of troops by helicopter (an extension to offensive combat operations of the original humanitarian purpose);
3. Contaminating an area and thus denying its use to the enemy (while CS is not particularly persistent, during dry spells it can be stirred up by the movement of a vehicle for some period of time); and
4. Reconnoitering enemy troop positions (CS forced concealed troops to reveal their position).[8]

Thus we find CS not being employed for humanitarian purposes to reduce the number of casualties, particularly of noncombatants. Instead, it was being used in conjunction with small-arms and artillery fire and with high-explosive and antipersonnel bombs. The individual driven from his place of safety by the tear gas thus became the victim of the conventional weapon.[9] One commentator believes that developing these uses for tear gas, far from having a humanitarian result, actually increased the number of casualties among noncombatants. He concludes that tear gas forced noncombatants from cover, exposing them to weapons from which they would otherwise have been protected.[10]

Was there anything illegal about the use of these combat procedures? Only if there is some norm of international law, either contractual or customary, prohibiting the use of tear gas in international armed conflict. The questions that then arise are: Do the prohibitions of the 1925 Geneva Protocol include a ban on the use of incapacitating gases, such as tear gas? And, if so, has this ban become

a part of customary international law, binding on nations such as the United States that were not parties to the Protocol during the hostilities?

On both of these questions there is a sharp difference of opinion among the writers. There are those who believe that, because of the discrepancy in wording between the English and French versions of the Protocol,[11] or for other reasons, tear gases such as CS are not included in the treaty ban.[12] There are others who are just as certain that they are.[13]

Even if one assumes that tear gases are included within the prohibitions of the Protocol, that, of course, merely establishes a contractual ban. It does not necessarily mean that there was a norm of customary international law binding on the United States, then not yet a party to the Protocol.[14] There is just as sharp a division of thought among the experts as to whether there is a norm of customary international law prohibiting the use of tear gas in international armed conflict.[15] The positions taken in the writings on the customary law raise three questions that, in my view, remain unanswered.

1. If the Protocol itself is so indefinite that many articles have been written interpreting it both as banning the use of tear gas in international armed conflict and as not covering incapacitating gases such as tear gas, how can it be said to constitute the basis for, or represent the codification of, a norm of customary international law on the subject?

2. If there is a norm of customary international law banning the use of incapacitating gases, such as tear gas, in international armed conflict, what is the significance of the many reservations to the Protocol making the ratifications applicable only with respect to other parties to the Protocol? Are the reserving states not saying that they are free from any ban on the use of any gas, including incapacitating gases, in hostilities with nonparties? If they are not saying that, what are they saying in the reservations?

3. What do writers such as Lauterpacht[16] and Stone [17] mean when they say that the prohibition on the use of gas (which would presumably include tear gases) is binding upon "practically all States"? How can a rule of customary international law be binding only on practically all states?

Setting aside the unresolved legal problems, what are the practicalities that have motivated nations and international lawyers to find that international law, by treaty and by rule of custom, prohibits the use in international armed conflict of a comparatively harmless gas such as CS?[18] The answer appears to be that there exists a well-founded fear that unless all gases, including the incapacitating gases, are considered barred, nations will build up their production capabilities and their reserves and these will not be limited to incapacitating gases.[19] This did, of course, occur.[20] Furthermore, it is feared that if some gases are not included in the ban, it will be difficult, if not impossible, to draw a clear line between the lawful and the unlawful.[21] If tear gases are allowed because of their

nonpermanent effect, why not, for example, a psychochemical that gives the victim temporary hallucinations, or a gas that painlessly immobilizes the victim for a number of hours? Finally, there exists the fear that any use of gas, even an agent that is generally admitted to be only temporarily incapacitating, will inevitably escalate into more extensive gas warfare.[22] We have seen that the use of CS in Vietnam started out with a narrow humanitarian purpose and expanded into a major operational combat weapon. While the escalation fortunately did not go any farther, that possibility was always present.

On the basis of the available materials, I am frankly unable to say that the United States was bound during the Vietnam War by any rule of international law prohibiting the use of tear gas in international armed conflict. I am convinced, however, that morally and politically the United States would be well advised to adopt and follow a policy of self-denial. This country should adopt a policy of no first use of tear gas just as it has announced such a policy for other gases.[23] While the original use of CS in Vietnam may have had a humanitarian basis, the varied combat uses subsequently adopted were actually antihumanitarian in nature and result. The United States has isolated itself politically in this area. It has also created the possibility that the use of tear gas in some future conflict will gradually escalate into full-fledged gas warfare. The advantages derived from the use of tear gas in Vietnam, even assuming that such use was completely in accordance with international law, were not worth the price that had to be paid.

Napalm

Fire has, of course, been used as a weapon since time immemorial. Military forces relied heavily on flamethrowers during World War I and even more so during World War II. Similarly, magnesium and white-phosphorous fire bombs were widely employed during World War II both in Europe and in the Far East.

Napalm was first developed and used during World War II.[24] At no time during either world war did a substantial or authoritative voice challenge the legality of using fire as a weapon in international armed conflict. When napalm was used extensively for the first time, in Korea, cries of outrage were heard. But these protests came almost exclusively from the side whose troops were receiving it and were unable to reciprocate in kind. During the Vietnam War these protests grew in volume, and they had support from elements throughout the world.

Napalm is a gelled gasoline. The word itself is an acronym for the two ingredients that were thought to constitute the thickener that is added to the gasoline to produce the gel.[25] It is an extremely effective weapon and

undoubtedly the most valuable incendiary now available. Napalm is greatly feared, and its use causes far more panic than other weapons.

For these reasons, the United Nations Group of Consultant Experts on Chemical and Bacteriological (Biological) Weapons stated that napalm should be classified with high-explosive weapons, rather than with asphyxiating or poisonous gases.[26] Resolution XXIII of the International Conference on Human Rights, adopted in Tehran on 12 May 1968, contained a preambulary clause classifying napalm bombing with chemical warfare.[27] This portion of the resolution was omitted from General Assembly Resolution 2444 (XXIII), which resulted from the Tehran conference.

In a report to the International Conference of the Red Cross, held in Istanbul in 1969, the International Committee of the Red Cross (ICRC) noted that napalm is a weapon that "can be very effective, while remaining precise in its consequences"; and that "napalm and incendiary weapons in general are not specifically prohibited by any rule of international law."[28] Some members of the Group of Experts convened by the ICRC expressed the opinion that napalm falls within the coverage of the 1925 Protocol because it can cause asphyxia by air deprivation. Others "considered such an assimilation difficult" and concluded that it is the use to which the weapon is put that determines its legality.[29] Napalm has also been condemned as causing unnecessary suffering in violation of the 1907 Hague Regulations.[30]

I do not believe that, at present, there is any rule of international law that prohibits the use of napalm upon selected targets, but there is, as I have argued previously, a strong humanitarian basis for urging total prohibition.[31] However, as a practical matter, a meaningful agreement probably will not be reached to ban a weapon as effective as napalm has proved itself to be. As an alternative, I concur in the proposal that the Secretary-General of the United Nations have prepared, with the assistance of qualified consultant experts, a report on napalm similar to the one on chemical and bacteriological (biological) weapons.[32] Such a report would examine whether it is necessary to limit or prohibit the use of napalm in international armed conflict. If either of these types of action is agreed upon, the report would serve as a basis for drafting an international convention on napalm.

Herbicides (Defoliants)

Herbicides (defoliants) are agricultural chemicals that poison or desiccate the leaves of plants, causing them either to lose their leaves or to die. When herbicides cause leaf fall, whether they kill the plant or not, they are known as defoliants. While the first actual use of herbicides in armed conflict was probably during the Vietnam War, they are far from a new weapon. In 1945 the United

States had already developed herbicides known as LN agents, which were stated to be effective against plants, but not injurious to animals or humans. Some consideration was given to their use against the gardens that supplied food to the Japanese military on Pacific islands that the Allied forces bypassed in their advance toward Japan.[33] But no such action was actually taken. Herbicides have, of course, had considerable use as weed-control agents.

As in the case of CS, the passage of time brought about a major change in the nature of the use of herbicides in Vietnam. While the original use was to defoliate jungle growths in order to open up to view enemy infiltration routes, a number of other uses were soon found. Crop destruction subsequently assumed some importance, although it never displaced defoliation as the primary use.[34] By 1968 the extent of the use of herbicides was limited only by the availability of supplies.[35] Some of the uses to which herbicides were put in Vietnam included:

1. Defoliating enemy infiltration routes—to open them to view;[36]
2. Defoliating friendly base perimeters—to prevent sneak attacks;
3. Defoliating lines of communication, including river banks—to prevent ambushes;
4. Defoliating enemy base areas—to make his troops move; and
5. Destroying crops—to make the enemy divert his combat efforts to food procurement and supply.[37]

Once again, there is a sharp division of opinion among the experts on the applicability of the 1925 Geneva Protocol to herbicides. Some believe that the Protocol includes a ban on antiplant chemicals. They concede that the evidence to support this finding is comparatively weak.[38] Their strongest argument is not the legislative history, which they heavily rely upon. It is rather the practical, not legal, point that, as in the case of incapacitating gases, it is impossible to draw a clear line between what is prohibited and what is not. As a result, unless nations consider all herbicides as banned, the possibility of escalation is ever present.[39]

Other writers find no prohibition in the 1925 Geneva Protocol or in customary international law against the use of herbicides.[40] They are particularly certain of this conclusion if defoliation has a valid military purpose and if crop destruction is limited to crops destined for consumption by the military.[41] It is, perhaps, appropriate to note two arguments that have been advanced in support of this basic thesis. The validity of each has been attacked.

The first is that because herbicides are widely used domestically to control weeds and other unwanted vegetation, the Protocol (and, presumably, customary international law) cannot possibly have been intended to apply to them.[42] This argument is correctly met with the response that evidence of domestic use is irrelevant for these purposes.[43] There is nothing to prevent

nations from banning the use as a weapon in international armed conflict of chemicals that may be permitted within the boundaries of many of these same nations.[44] On the other hand, the weakness of this particular argument concerning domestic use of herbicides may not be relied upon to support the view that herbicides are within the reach of the Protocol or of customary international law.

The second argument sometimes advanced against Protocol coverage of herbicides is that it could not have been intended to prohibit the use of herbicides because their military use was unknown in 1925. This is challenged as being of no legal significance if the prohibition falls within the objectives that the parties were attempting to achieve by the Protocol.[45] A similar reply was advanced long ago with respect to Protocol coverage of nuclear weapons.[46] I had difficulty in accepting this view in the context of nuclear weapons. It is equally difficult to support it in this context. The acceptance of such an interpretation could virtually convert a treaty prohibiting the use of certain gases in international armed conflict into a treaty banning war. Salutary as this result might be, I scarcely believe that a legal justification can be found for it. And, of course, if the Protocol is inapplicable, it cannot represent the codification of a norm of customary international law outlawing herbicides.

One of the major practical arguments advanced against the use of herbicides is ecological in character. The report of the United Nations group of consultant experts stated that there had been no scientific evaluation of the long-term ecological changes caused by herbicide spraying. They were able to estimate that twenty years will be needed to regenerate the mangrove forests along the river banks in Vietnam.[47] Another scientist warns that "when we intervene in the ecology of a region on a massive scale we may set in motion an irreversible chain of events."[48] One nonscientist writer in the field coined the word "ecocide" in asserting that a recent scientific study indicated that permanent damage had been done to "future generations [in Southeast Asia] and the very nature of the earth."[49]

The United States heeded the admonitions of the environmentalists and substantially phased out its herbicide-spraying program in Vietnam. When it did so, it sought acceptable substitutes that would accomplish the same missions. Two seemingly noncontroversial methods were adopted: plows that tore up the vegetation along roads and trails to reduce ambushes, and concussion bombs that, by exploding horizontally, destroyed vegetation without cratering. The environmentalists, concerned only with their "thing," attacked the use of these new technologies.[50] Perhaps they will soon make the side effects of war so unpopular that they will succeed where the statesman and the international lawyer have long labored in vain—they will make it impossible for wars to be fought by denying all weapons to their military forces.

I am inclined to conclude that international law does not prohibit the use of herbicides so long as such use does not violate any of the general norms of the laws of war. This means that the destruction caused by herbicides must have a valid military purpose and that a food crop that is sprayed has to be identifiable as being grown for the use of the military. However, this is a weapon the ultimate effects of which are not now really predictable. It is one that may cause a complete upsetting of the life cycle of a treated area. Ultimately, the use of such a weapon may be as destructive to mankind as a nuclear or biological war. It appears not only that the United States was well advised to phase out its use of this weapon, but also that it should cut off the supply to South Vietnam in order to eliminate completely the use of herbicides in that country. With its ratification of the Geneva Protocol of 1925, the United States has now taken the first step by voluntarily renouncing the first use of herbicides, with certain minor exceptions.[51]

Notes

1. The United States was not a party to the 1925 Geneva Protocol at the time of the Vietnam War. President Nixon submitted it to the Senate for its advice and consent to ratification on 19 August 1970 (U.S., Congress, Senate, Foreign Relations Committee, *Committee Print: Message by President Richard M. Nixon of August 19, 1970, and Report by Secretary of State William P. Rogers,* 91st Cong., 2d Sess., 1970; 63 *Dep't State Bull.* 273 [1970]). Because of a disagreement as to coverage, the Senate had not acted on the Protocol for four years.

On 5 August 1974, by a 315-70 vote, the House of Representatives passed House Res. No. 1258, declaring the sense of the House that the United States should ratify the 1925 Geneva Protocol and that "the President and the Congress should resolve the position of the United States on the future status of herbicides and tear gas so that the Senate may move toward ratification...." 120 *Congressional Record* H 7651-56, 7673 (daily ed. 5 August 1974). See U.S., Congress, House, Committee on Foreign Affairs, *Ratification of the Genera Protocol of 1925,* H. Rep. 93-1257, 93d Cong., 2d Sess., 1974. The Protocol has now been ratified by the United States and will soon enter into force for it. For an account of the Senate action leading to its advice and consent to ratification, see Introduction, p. 17 and n. 37.

2. Howard Levie, "Some Major Inadequacies in the Existing Law Relating to the Protection of Individuals During Armed Conflict," in *When Battle Rages, How Can Law Protect?,* ed. John Carey, Hammarskjold Forum Series, no. 14 (Dobbs Ferry: Oceana Publications, for the Association of the Bar of the City of New York, 1971), p. 18.

3. Contrary to the statement that appears in Seymour Hersh, *Chemical and Biological Warfare: America's Hidden Arsenal* (New York: Doubleday & Company, 1969) p.51, the "S" in CS does not stand for "super." The name is derived from its codevelopers, B. B. Corson and R. W. Staughton, as reported in Stewart Blumenfeld and Matthew Meselson, "The Military Value and Political Implications of the Use of Riot Control Agents in Warfare," in *The Control of Chemical and Biological Weapons,* ed. A. Alexander et al. (New York: Carnegie Endowment for International Peace, 1971), p. 68 (hereafter cited as *Control of Chemical and Biological Weapons).*

4. U.N., *CB Weapons,* paras. 44 and 153.

5. Ibid., para. 147. In Blumenfeld and Meselson, "Military Value," in *Control of Chemical and Biological Weapons,* p. 69, the statement is made that "for CS the difference between an incapacitating exposure and one that might produce serious lasting effects is quite large, a factor of many thousands."

6. A frequently quoted statement is that made by the United States representative (James M. Nabrit, Jr.) during a debate in the United Nations General Assembly on 5 December 1966. He said: "It would be unreasonable to contend that any rule of international law prohibits the use in combat against an enemy, for humanitarian purposes, of agents that Governments around the world commonly use to control riots by their own people" *(Documents on Disarmament* [Washington, D.C.: United States Arms Control and Disarmament

Agency, 1966], p. 801). A much-publicized domestic use of CS was in the riot at the Attica Correctional Facility in New York during 1971 (see *New York Times*, 14 September 1971, p. 1).

7. Blumenfeld and Meselson, "Military Value," in *Control of Chemical and Biological Weapons*, pp. 67-68.

8. Ibid., pp. 71-75. See also testimony of Matthew Meselson, Senate Subcommittee on Refugees, *Hearings on War-Related Civilian Problems in Indochina*, 92d Cong., 1st Sess., April 1971, pp. 133-37; Professor Meselson's testimony and preliminary report, Herbicide Assessment Commission, American Association for the Advancement of Science, "The Effects and Use of Herbicides in Vietnam," U.S., Congress, Senate, Foreign Relations Committee, *Hearings on Geneva Protocol of 1925*, 92d Cong., 1st Sess., March 1971, pp. 353-77; and testimony of Admiral Lemos, U.S., Congress, House, Subcommittee on National Security Policy and Scientific Developments of the House Committee on Foreign Affairs, *Hearings on Chemical-Biological Weapons*, 91st Cong., 1st Sess., November and December 1972, pp. 225-28.

9. George Bunn, "Banning Poison Gas and Germ Warfare: Should the United States Agree?" [1969] *Wis. L. Rev.* 405-6. Ann Van Wynen Thomas and A. J. Thomas, Jr., *Legal Limits on the Use of Chemical and Biological Weapons* (Dallas: Southern Methodist University Press, 1970), p. 149, find that "the tear gas remains a nonlethal agent. The actual killer is the fragmentation bomb."

10. Meselson testimony, *Hearings on Geneva Protocol of 1925*, pp. 353-57. The House Committee on Foreign Affairs recommended in its report on H. Res. No. 1258 that the Senate consider exercising its Constitutional prerogative to ratify the 1925 Geneva Protocol without the interpretation made by the Administration that the treaty does not cover herbicides and tear gas (House Foreign Affairs Committee, *Geneva Protocol of 1925*, p. 4). See also testimony of Professor Richard R. Baxter, U.S., Congress, House, Subcommittee on National Security Policy and Scientific Developments, Committee on Foreign Affairs, *Hearings on U.S. Chemical Warfare Policy*, 93d Cong., 2d Sess., 7 May 1974, pp. 139-40.

11. The English version of the Protocol uses the words "asphyxiating, poisonous or other gases." The word "other" has been interpretated by some writers to include gases that are not asphyxiating or poisonous. The French version of the Protocol uses the words "gaz asphyxiants, toxiques ou similaires." The word "similaires" has been interpreted by some writers to limit the coverage to gases that are "asphyxiants" or "toxiques." For an excellent discussion of this problem in semantics see Henri Meyrowitz, *Les Armes biologiques et le droit international* (Paris: Editions A. Pedore, 1968), pp. 38-45.

12. See, for example, "Report by Secretary of State William P. Rogers to President Richard M. Nixon, 11 August 1970," 63 *Dep't State Bull.* 273, 274 (1970); Greenspan, *Modern Law of Land Warfare*, p. 359.

13. See, for example, Oppenheim, *International Law*, ed. Lauterpacht, p. 344, n. 1; Richard R. Baxter and Thomas Buergenthal, "Legal Aspects of the Geneva Protocol of 1925," in *Control of Chemical and Biological Weapons*, p. 14 (also published in 64 *A. J. I. L.* 853, 866 [1970]). In 1930 the British government expressed the opinion that the use of tear gas was banned by the Protocol (Oppenheim, *International Law*, ed. Lauterpacht, p. 344, n. 1). In 1970 it reversed its stand (*New York Times*, 3 Feb. 1970, p. 3).

14. Baxter and Buergenthal, "Legal Aspects," in *Control of Chemical and Biological Weapons*, p. 3.

15. For authorities supporting the existence of such a norm, see *ibid.*, p. 32, n. 8; contrary, see Denise Bindschedler-Robert, "A Reconsideration of the Law of Armed Conflicts," in *Law of Armed Conflicts*.

16. Oppenheim, *International Law*, ed. Lauterpacht, p. 344.

17. Stone, *Legal Controls*, p. 556.

18. While some of the extreme antiwar organizations insisted that they had identified cases in which individuals had been killed by CS, the more responsible scientists do not agree. See notes 4 and 5 above. Moreover, CS has been used in literally hundreds of cases of domestic disturbances with no deaths being charged to it.

19. Bunn, "Banning Poison Gas," p. 404. Unfortunately, even a specific ban on the use of tear gas in international armed conflict would have no effect in this area because of its use for domestic riot-control purposes throughout the world.

20. Stone, *Legal Controls*, p. 556-57.

21. Bunn, "Banning Poison Gas," p. 404.

22. Matthew Meselson, "Ethical Problems: Preventing CBW," in *CBW: Chemical and Biological Warfare*, ed. Steven Rose (Boston: Beacon Press, 1969) p. 167. In World War I tear gas was used as early as 1914. It did not prove effective and it was followed in 1915 by the more effective lethal gases.

23. 61 *Dep't State Bull.* 541 (1969). With several stated exceptions, the United States has now done this. See Introduction, p. 17 and n. 37.

24. Victor Sidel, "Napalm," in *CBW*, ed. Rose, p. 45.

25. *Ibid.*, p. 44.

26. U.N., *CB Weapons*, para. 19. See also Sidel, "Napalm," in *CBW*, ed. Rose; and Baxter and Buergenthal, "Legal Aspects," in *Control of Chemical and Biological Weapons*, p. 33, n. 10.

27. 8 *Int'l Rev. Red Cross* 473 (1968).

28. ICRC, *Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflict: Report to the Twenty-first International Conference* (Geneva: ICRC, 1969), p. 61. To the same effect see, for example, Ian Brownlie, "Legal Aspects of CBW," in *CBW*, ed. Rose, p. 150, and Van Wynen Thomas and Thomas, *Legal Limits*, p. 185.

29. ICRC, *Reaffirmation and Development*, pp. 61-62.

30. This contention is based upon the provisions of art. 23(e) of the Hague Regulations.

31. I have previously recommended that the use of napalm in international armed conflict be prohibited. See Levie, "Some Major Inadequacies," in *When Battle Rages*, ed. Carey, pp. 20-21. (In so doing, I erroneously classified napalm as a chemical weapon. This was, however, irrelevant to the recommendation.)

32. This suggestion was made in the report of the U.N. Secretary-General, *Respect for Human Rights in Armed Conflict*, U.N. Doc. A/8052 (1970), para. 126. Since the foregoing was written, the U.N. General Assembly has made such a request of the Secretary-General in G.A. Res. 2852, 28 U.N. GAOR Supp. 29, p. S0, U.N. Doc. A/8429 (1971); the Secretary-General appointed a group of government experts, which, incidentally, did not include a representative of the United States, and the experts prepared and filed a Report (Report of the Secretary-General, *Napalm and Other Incendiary Weapons and All Aspects of Their Possible Use*, U.N. Doc. A/8803/Rev. 1 [1973]). The final paragraph of that report states: "193....[I]n view of the facts presented in the report, the group of consultant experts wishes to bring to the attention of the General Assembly the necessity of working out measures for the prohibition of the use, production, development and stockpiling of napalm and other incendiary weapons." A finding of "the necessity of working out measures for the prohibition for the use, production, development and stockpiling of napalm" would appear to confirm the conclusion reached in the text that there is currently no rule of international law that prohibits the use of napalm upon selected targets.

33. Judge Advocate General Myron C. Cramer to the Secretary of War, SPJGW 1945/164, March 1945, Memorandum concerning Destruction of Crops by Chemicals, 10 *Int'l Leg. Mat.* 1304 (1971).

34. Bunn, "Banning Poison Gas," pp. 408-9.

35. David E. Brown, "The Use of Herbicides in War: A Political/Military Analysis," in *Control of Chemical and Biological Weapons*, pp. 39-40.

36. It has been estimated that "vertical visibility improves in sprayed areas by 60 to 90 percent and ground visibility by a lesser amount" (Brown, "Use of Herbicides," in *Control of Chemical and Biological Weapons*, p. 46). See also John Constable and Matthew Meselson, "The Ecological Impact of Large Scale Defoliation in Vietnam," 56 *Sierra Club Bull.* 4 (1971).

37. Testimony of Admiral Lemos, Hearings on "Chemical-Biological Weapons," pp. 239-30.

38. See, for example, Baxter and Buergenthal, "Legal Aspects," in *Control of Chemical and Biological Weapons*, p. 16.

39. Arthur Galston, "Defoliants," in *CBW*, ed. Rose, p. 62.

40. Bunn, "Banning Poison Gas," p. 407; Cramer, SPJGW 1945/164, *supra*.

41. Bindschedler-Robert, "Reconsideration," in *Law of Armed Conflicts*, p. 36. To the same effect see *U.S. Army Field Manual 27-10*, para. 37(b).

42. Continuing with the quotation cited in note 6 above, Mr. Nabrit said: "Similarly, the Protocol does not apply to herbicides, which involve the same chemicals and have the same effects as those used domestically in the United States, the Soviet Union and many other countries to control weeds and other unwanted vegetation" *(Documents on Disarmament*, p. 801).

43. Baxter and Buergenthal, "Legal Aspects," in *Control of Chemical and Biological Weapons*, p. 14.

44. The legality of the use of shotguns in international armed conflict was the subject of controversy during World War I. See Oppenheim, *International Law*, ed. Lauterpacht, p. 340, n. 4. Certainly, no one would contend for their legality in international armed conflict solely because they are legal for hunting in most countries.

45. Baxter and Buergenthal, "Legal Aspects," in *Control of Chemical and Biological Weapons*, p. 15.

46. See, for example, Georg Schwarzenberger, *The Legality of Nuclear Weapons* (London: Stevens & Sons, 1958), pp. 37-38.

47. U.N., *CB Weapons*, para. 311. Of course, had the trees been uprooted and destroyed by high explosive shells or aerial bombs, the regrowth period would probably have been equally long. Strangely, no one wept for the millions of coconut palms destroyed by gunfire and aerial bombs in the Pacific during world War II.

48. Galston, "Defoliants," in *CBW*, ed. Rose, p. 63.

49. Fred Warner Neal, "The Nazis Had Their Nuremberg, Americans Will Have Their—Election," 11 *War/Peace Report* 16 (August-September 1971) (review of Albert Speer, *Inside the Third Reich* [New York: Macmillan, 1970]). The report to which Warner refers is Stanford Biology Study Group, *The Destruction of Indochina* (1970).

50. *New York Times*, 29 August 1971, p. 8.

51. See note 23 above and Introduction, p. 17 and n. 37.

Weapons of Warfare

Addendum

At the time that this article was written in 1970, the United States, after half a century, had finally ratified the *1925 Geneva Gas Protocol* although it was not yet in force for this country. However, many of the questions of law with respect to the use of the weapons referred to in the basic article continue to exist. Discussions of some of the developments in these matters will be found in the articles entitled "Nuclear, Chemical, and Biological Weapons" and "Prohibitions and Restrictions on the Use of Conventional Weapons" in the present collection.

In 1976 the General Assembly of the United Nations adopted the *Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification* (better known as the *ENMOD Convention*). This Convention entered into force on 5 October 1978. The United States is a Party.

X

The Falklands Crisis and the Laws of War

The Falklands War: Lessons for Strategy, Diplomacy and International Law 64 (Alberto R. Coll and Anthony C. Arend eds., 1985)[*]

One week before the Argentine surrender at Port Stanley, the well-respected British news journal, *The Economist*, published an article captioned "War Laws—Made To Be Broken." After discussing a number of provisions of the laws of war which the writer, obviously not an expert in the field, thought had been violated during the course of the hostilities, he ended up with this alarming conclusion: "These, and no doubt other matters not yet to appear, will be the subject of anguished inquiry, once the fighting ends." Despite such contentions, the laws of war were more widely observed in the Falklands crisis than in any other conflict since World War II. This essay will analyze several law-of-war problems that arose during the hostilities, and will illustrate the degree to which both belligerents succeeded in observing legal norms of combat without any significant military disadvantage.

Maritime Exclusion Zone

The Argentine invasion of the Falkland Islands began on 2 April 1982. Great Britain broke off diplomatic relations that same day; but it was not until 7 April 1982, five days later, that Great Britain took its first real retaliatory step, announcing that as from 12 April 1982 it was establishing a "maritime exclusion zone" 200 miles around the Falkland Islands, and that any Argentine warships and naval auxiliaries thereafter within that zone "will be treated as hostile and are liable to be attacked by British forces." On the following day Argentina responded by establishing a 200-mile defense zone off its coast and around the Falklands.

When the British announcement was made the impression was given, and it was generally understood, that the British nuclear submarine *Superb* was on

* The facts presented in this essay were drawn primarily from Christopher Dobson, THE FALKLANDS CONFLICT (1982), and from press reports contained in such publications as THE ECONOMIST, U.S. NEWS & WORLD REPORT, TIME, the NEW YORK TIMES, and others for the period of 1 April to 1 July 1982.

station in that area and this was undoubtedly the major reason for the failure of the Argentine fleet to emerge from its base at Puerto Belgrano, south of Buenos Aires. There were later complaints that the press, as well as the Argentines, had been intentionally misled when it was discovered that the *Superb* was at its base in Scotland. However, this was a perfectly valid and successful piece of "disinformation" by the British.

Since the 1856 Declaration of Paris it has been a settled rule of maritime warfare that a blockade, in order to be binding, must be effective; that is, the blockading belligerent must be able to enforce its announced blockade. The British declaration was not really a blockade, as merchant ships and neutral vessels were not barred from the exclusion zone; it only applied to enemy naval vessels. It was, therefore, nothing more than a gratuitous warning to the Argentine naval forces. A state of armed conflict certainly existed between Argentina and Great Britain and, hence, the armed forces of each, including naval vessels, were, apart from some limitations not here applicable, subject to attack wherever found. In any event, if, by disinformation, a belligerent can convince the enemy (and neutrals) that there is an effective blockade in existence, then there is an effective blockade.

On 23 April the British informed the Argentine government that "any approach on the part of Argentine warships, submarines, naval auxiliaries or military aircraft which would amount to a threat to interfere with the mission of British forces in the South Atlantic would encounter the appropriate response." At the same time it stated that "all Argentine vessels, including merchant vessels or fishing vessels apparently engaged in surveillance of or intelligence gathering activities against British forces in the South Atlantic, would also be regarded as hostile." Then on 30 April the British extended their maritime exclusion zone to include "any ships and any aircraft" found therein. This was now a true blockade—and, presumably, there were now British submarines on station in the area prepared to enforce the declaration. So far as is known, only one Argentine support ship, the *Formosa*, managed thereafter to reach the Falkland Islands. A number of military cargo aircraft were also successful in reaching their destination before the British carriers arrived in the area. It is interesting to note that sometime after the hostilities had ended a United Press International dispatch from Buenos Aires quoted an Argentine general as saying that the British air and sea blockade "was a success, a total success."

On 2 May the Argentine cruiser, *General Belgrano*, was sunk by a British submarine with a loss of almost 400 lives. The exact location of the *Belgrano* at the time of the attack has not been officially disclosed, but there have been suggestions that it was about 35 miles outside the maritime exclusion zone. Certainly, a cruiser of a belligerent has no right to consider itself immune from enemy attack because it is on the high seas beyond the range of a proclaimed

maritime exclusion zone. Great Britain justified its action by pointing out that the cruiser was a threat to its picket ships, frigates, and destroyers, and that it had previously advised the Argentine government of the establishment of a defensive zone around units of the British fleet which the *Belgrano* had disregarded. Sympathy for the Argentine loss, and the feeling that the British had somehow been "unfair," were quickly dissipated when, two days later, on 4 May an Exocet missile fired by an Argentine plane hit and sank the British destroyer *Sheffield* with a loss of about twenty lives.

On 7 May the British extended their war zone to 12 miles off the Argentine coast. This blockade was completely effective, made so by the Argentine fear that if its fleet sortied from its base it would be the victim of the British nuclear submarines which were now, beyond any doubt, patrolling the waters off the coast of Argentina outside the twelve-mile limit. However, on 15 May the Soviet Ambassador in London advised the British government that the Soviet Union considered the British blockade to be unlawful because it "arbitrarily proclaimed(ed) vast expanses of the high seas closed to ships and craft of other countries," citing the 1958 Convention on the High Seas as the basis for its claim. Of course, a blockade always denies the use of part of the high seas to other countries. While the Soviet Union might have questioned the extent of the blockaded area as excessive, if the blockade was effective (and there seems little doubt that it was), it was a valid blockade under the 1856 Declaration of Paris, to which Russia was one of the original parties.

Fishing Vessels

In 1900 the United States Supreme Court held that by customary international law fishing vessels were exempt from seizure by enemy naval forces in time of war.[1] In 1907 this rule was incorporated into the Hague Convention No. XI. Article 3 (1) of that Convention says, in part, that "[v]essels used exclusively for fishing along the coast . . . are exempt from capture." Paragraph 2 of that same article goes on to qualify that provision by stating that "[t]hey cease to be exempt as soon as they take any part whatsoever in hostilities." As we have already seen, on 23 April 1982 the British government informed the Argentine government that, among other things, "fishing vessels apparently engaged in surveillance or intelligence gathering activities" would be regarded as hostile. This statement was really unnecessary as it was merely another declaration of the British intention to apply existing law.

On 9 May 1982 the Argentine fishing vessel *Narwal* was attacked by British forces and was so severely damaged that she sank on the following day. At the time of the attack she was about 60-70 miles within the British maritime exclusion zone, shadowing British fleet units. According to one report: "She was not armed but she was a spy ship with an Argentine Navy Lieutenant

Commander on board sending back information about the [British] fleet's movements."[2] The Argentines have not denied that allegation. That being so, the *Narwal* had lost her immunity and was legally subject to the treatment which she received.

Hospital Ships

Shortly after hostilities in the Falklands began, the British government requisitioned the SS *Uganda*, a vessel previously used for education cruises for schoolchildren, converting it into a hospital ship. There were allegations that en route to the South Atlantic the *Uganda* carried combat troops.[3] If such allegations are true, this was a violation of articles 30 (2) and 33 of the Second Geneva Convention of 1949 on the treatment of sick and wounded sailors. While extra medical personnel may be carried on hospital ships, combat troops may not be. The fact that after the combat troops were debarked the vessel was used exclusively for proper purposes does not change the situation. When a hospital ship is used for improper purposes it ceases permanently to be entitled to the immunity granted to such ships. During both World Wars there were numerous claims of the misuse of hospital ships and rejection of their subsequent entitlement to immunity. It appears that such claims are inevitable and that, all too often, they will be justified.

The Economist (5 June 1982, p. 20) asserted that by bringing the *Uganda* into Falkland Sound at night to pick up wounded and shipwrecked Argentine soldiers the British "may have breached" the provision that hospital ships must "be situated in such a manner that attacks against military objectives cannot imperil their safety." The reporter or editor who wrote that article was obviously not very familiar with the laws of war. He cited the First Geneva Convention of 1949, which is concerned with land warfare, not sea warfare; and the provision he quoted relates to the placement of medical establishments and units on land, not to hospital ships. Article 18 (1) of the Second Convention makes it mandatory that " [a]fter each engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick." This is presumably what the *Uganda* was doing in the Sound, and it is one of the humanitarian functions of every hospital ship.

Incendiary Weapons

Among the Argentine material captured by the British on the Falkland Islands was a large supply of napalm, one of the most effective incendiary weapons in military arsenals. This caused a great deal of critical comment in the British press. Actually, even under the provisions of Protocol III of the still unratified 1980 Conventional Weapons Convention, incendiaries such as napalm are not

outlawed, only their mode of use is restricted; and since those restrictions are all directed towards the protection of civilians, it does not appear that they would have been violated by Argentine use against British combat troops.

Protecting Powers

Diplomatic relations between Argentina and Great Britain were broken off on 2 April 1982, immediately after the news of the Argentine landings on the Falklands reached London. Shortly thereafter Great Britain requested the Swiss government to act as its Protecting Power vis-à-vis Argentina, presumably pursuant to Common Article 8/8/8/9 of the four 1949 Geneva Conventions, while the Argentine government requested Brazil to act in that capacity on its behalf. Even though they performed no major functions in the military area, this is of extreme importance in view of the fact that it was the first clear-cut instance of the use of Protecting Powers since World War II, despite the innumerable international armed conflicts which have occurred in the interim. There were, for example, no Protecting Powers in either Korea or Vietnam, and there do not appear to be any in the Iran-Iraq War.

Civilians

Civilians presented on the whole a physical rather than a legal problem. However, there were a number of rules of the laws of war which came into play. When resistance at Port Stanley ended on 2 April, Governor Rex Hunt (in full ceremonial dress with a white-plumed Napoleon-style hat), his wife, and his family were escorted to an Argentine Air Force plane and flown to Montevideo, Uruguay. The British Antarctic Survey Team's civilian scientists, based at Grytviken, on South Georgia, were also repatriated by the Argentines after a short delay. LADE, the airline which had been operated by the Argentine Air Force between Port Stanley and Commodoro Rivadavia, in South Argentina, continued to fly after the Argentine takeover. While eighty to one hundred British subjects who were living on the islands as civilian employees of the British government elected to avail themselves of this method of departure with their families, only twenty-one "Kelpers" so elected; and when members of the Anglo-Argentine community in Argentina proposed that a neutral ship be sent to the islands to evacuate the 300 children to the mainland, it was the Falkland Islanders, not the Argentine government, who rejected the proposal.

Article 35(1) of the Fourth Geneva convention of 1949 authorizes the departure of protected persons (civilians) from the territory of a party to the conflict. On the basis of the Argentine claim of sovereignty over the Falkland Islands and their dependencies, this article would have been applicable. However, if we adopt the thesis of British sovereignty, then the departure of

those who left the islands was an act of grace by Argentina since article 48 of that Convention, relating to occupied territory, only requires the Occupying Power to permit the departure of protected persons who are not nationals of the power whose territory is occupied—and all but thirty of the Falkland Islanders and other residents were British nationals. (The other thirty were Argentines.) One British subject, William Luxton, was deported, probably because he was considered to be a subversive influence; several others were apparently placed in a detention center at Fox Bay. Article 41 (1) of the Fourth Convention states that the only measures of control which the Occupying Power may adopt with respect to protected persons are assigned residence and internment. Deportation is specifically prohibited by article 49 (1) of the Convention but it may be assumed that Mr. Luxton preferred it to internment. Article 42 (1) of the Convention authorizes internment if the security of the Occupying Power makes it necessary—a decision which, of course, is a subjective one made by that power. Accordingly, the action of the Argentines in this respect was within the purview of and in accordance with the provisions of the Convention.

There were estimated to be 17,000 British passport-holders in Argentina when hostilities commenced on 2 April 1982. The Argentine government announced that it would guarantee the safety of these individuals. Nevertheless, on 5 April the British government broadcast a radio message recommending that they leave the country. How many did so is unknown but there is no evidence that the Argentine government made any effort to prevent them from exercising the right granted to them by article 35 of the Fourth Convention, mentioned above, to leave the territory of a party to the conflict.

Argentina claimed in a television broadcast that the British were guilty of "indiscriminate bombing" of Port Stanley as a result of which two civilians were killed and four were wounded. Inasmuch as more than 10,000 members of the Argentine military forces were crowded into the area of that small town (normal population: 1,050), with somewhere between 250 and 600 civilians who had remained in their homes, the civilian casualties appear to have been remarkably light. Certainly, the British bombardment and bombing of the Argentine personnel and positions in Port Stanley cannot be said to have violated any provision of the 1907 Hague Regulations on Land Warfare, 1907 Hague Convention No. IX on Naval Bombardment, or the as-yet inapplicable 1977 Protocol I. The residents of Port Stanley were British nationals and were the persons on whose behalf the British forces had traveled 8,000 miles to fight and there is no reason to believe that the British commanders did not exercise the utmost caution on their behalf. Thus, when, on 13 June 1982, the International Committee of the Red Cross (ICRC) proposed the creation of a "neutral zone" for the protection of the civilians still in Port Stanley, the British immediately

agreed. The Argentines did so on the following day and the ICRC announced that it had arranged for such a zone.

Prisoners of War

Article 13 (1) of the Third Geneva Convention of 1949 provides that "[p]risoners of war must at all times be humanely treated." Although there were undoubtedly individual cases in which this provision was violated during the hostilities in the Falkland Islands, on the whole the treatment of prisoners of war, first by the Argentines and later by the British, more closely resembled the Russo-Japanese War of 1904–5 than either World War I, World War II, Korea, or Vietnam. In this respect, as in others, the war was fought as a "gentlemen's war." Thus, although article 118 of the Third Convention merely requires the release and repatriation of prisoners of war "without delay after the cessation of active hostilities," the Royal Marines captured on both the Falkland Islands and on South Georgia were repatriated almost immediately by the Argentines. So also were two Royal Air Force technicians captured at the airfield at Port Stanley, men who were able to provide the British with valuable intelligence information.

When the British began to take prisoners of war, first on South Georgia and then on the Falkland Islands, they followed the pattern established by the Argentines of promptly repatriating them. In fact, the practice was so regular and so prompt that it aroused the ire of the Royal Navy when the entire crew of the Argentine submarine *Santa Fe*, captured by the British at South Georgia, was quickly returned to Argentina. As one report stated, "to give the Argentines back a fully trained crew of submarine specialists seemed the height of folly."[4]

We have seen that article 118 of the Third Convention requires the repatriation of prisoners of war "without delay after the cessation of active hostilities." Despite this clear provision, India held Pakistani prisoners of war for over two years after the complete cessation of active hostilities, from December 1971 to March-April 1974, allegedly because there was no guarantee that hostilities would not break out again, but actually as political hostages in an effort to compel Pakistan to recognize Bangladesh. Contrary to the procedure followed by India, which flagrantly violated the Convention provision, Great Britain began the repatriation of Argentina prisoners of war immediately after the final surrender of the Argentine forces on the Falklands. At first the British sought to obtain a statement from Argentina acknowledging the cessation of active hostilities. Even though such an acknowledgment was not forthcoming, the British quickly repatriated over 10,000 prisoners of war, retaining about 550 officers, including the Argentine commander on the Falklands, General Menendez. Within a month, despite the Argentine government's refusal to

admit to a complete cessation of hostilities, the remaining prisoners of war were returned by the British.

There were some instances in which it has been suggested that the provisions of the Third Convention may have been violated. When the Royal Marines at Port Stanley surrendered they were required to lie on the ground, face down, under guard while they were being searched for weapons. Photographs were made of that scene. It has been implied that the taking of those photographs violated article 13(2) of the Convention which requires that prisoners of war be protected against "insults and public curiosity." Inasmuch as hundreds of photographs have been taken and published in every war of the moment of surrender, hands held high in the air, and full-faced, with no complaints by the belligerents, and inasmuch as it is impossible to recognize any particular individual in the Falklands picture, there is at least a reasonable doubt that the photograph violated article 13 (2) of the Convention.

One Argentine naval sub-officer was shot and killed while a prisoner of war, while apparently attempting to sabotage the captured submarine *Santa Fe.* The British immediately informed the Argentine government of the incident through the medium of the International Committee of the Red Cross and instituted a Court of Inquiry, presumably pursuant to article 121 of the Third Convention. The Argentine government was advised of the result reached by that court, which exonerated the British guard, and apparently it was satisfied that justice was done.

As in all modern armed conflicts, land mines were used in the Falklands in great profusion; at the end of hostilities, their removal became a major problem. Article 7 of Protocol II to the as yet unratified 1980 Conventional Weapons Convention contains provisions for the recording of the location of minefields. Apparently, as is not unusual in modern warfare, this was not done in many instances by the Argentines, with the result that the locating and removal of the numerous buried mines became a slow, painstaking, and dangerous procedure.

After World War II large numbers of captured German soldiers were retained in France for the purpose of removing mines, and a substantial number were killed or injured in the process. As a result, article 52(1) of the Third Convention specifically provides that only prisoners of war who volunteer for the task may be employed on labor which is of a dangerous nature, and the third paragraph of that article provides that the removal of "mines and similar devices" is to be considered dangerous. It has been asserted that captured Argentine soldiers were "ordered" to clear minefields near Goose Green. If this was so, it constituted a clear violation of the provisions of the Convention. If they were volunteers, it did not.

Article 117 of the Third Convention provides that "[n]o repatriated person may be employed on active military service." While the meaning of this phrase

is subject to numerous interpretations there can be no doubt that it precludes the use of repatriated personnel in actual combat. There are charges that some Royal Marines, captured by the Argentines on South Georgia and repatriated to Great Britain, were subsequently included in the British Task Force. If this was so, it was a violation of the provisions of the Convention.

One interesting episode occurred with respect to prisoners of war. When Captain Alfredo Astiz, the commander of the Argentine forces on South Georgia, surrendered to the British forces on 22 April 1982, he and the commander of the *Santa Fe*, the Argentine submarine which had been captured that morning, were entertained at dinner by the British officers. Subsequently, it was alleged that Captain Astiz was the infamous "Captain Death," one of the most sadistic of the government's interrogators during the suppression of the guerrilla movement in Argentina some years before. Sweden wanted to question him concerning eyewitness reports that he had shot a young Swedish girl. France wanted to question him concerning the disappearance of two French nuns. This raised an interesting question of law. The offenses were alleged to have occurred in Argentina long before the beginning of the hostilities between Argentina and Great Britain. Assuming that they constituted violations of article 3 of the Fourth Convention, dealing with non-international armed conflicts, can a Detaining Power in a subsequent international armed conflict turn over a prisoner of war to a third state, a party to the Conventions, for possible trial and punishment? The British answered that question in the negative, rejecting the Swedish and French requests. Whether that decision was correct remains an open question. After being taken to Great Britain, where he was subjected to what has been described as a "token" interrogation, Captain Astiz was repatriated.

Mercenaries

One of the most difficult problems which confronted the Diplomatic Conference drafting the 1977 Protocol I involved proposals seeking to eliminate the use of mercenaries. Under the definition now contained in article 47 of that instrument, one of the requirements for categorizing an individual as a mercenary is that he "is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party."

The Gurkha Rifles have been part of the British Army for well over 100 years. They are recruited from an ethnic group which lives in what is now Nepal. During World War II there were 100 battalions of Gurkhas in the British Army; today there are five such battalions. When it became known that the 7th Gurkha Rifles was being sent to the Falklands, Argentina protested to Nepal. Whether that protest was based on the allegation that the Gurkhas were serving the British

as mercenaries, or was made merely because they were Nepalese citizens, is not known. The Gurkhas are certainly motivated by the desire for private gain. They serve the required number of years, and then retire in Nepal as relatively prosperous citizens. However, inasmuch as they receive a considerably smaller pay than do British soldiers, it is doubtful that they come within the definition of mercenaries.

Neutrals and Neutrality

Prior to World War II, during hostilities there was a dichotomy under which all states in the world community were either belligerents or neutrals, with well-established rules applicable to each status. At various times in the course of World War II, Italy and Spain, and perhaps others, announced that they were "non-belligerents." That term can be defined best by saying: "I hope that you win, and I will do everything I can to help you, except fight." During the Anglo-Argentine hostilities in the Falkland Islands, the United States did not officially use the term "non-belligerent," but that was undoubtedly its status. After Secretary Haig failed in his peacemaking efforts, the United States announced its support of Great Britain which included a willingness to supply any military aid short of direct involvement of American combat forces. On 29 April 1982 the United States Senate adopted a resolution in which it declared that "the United States cannot stand neutral." Five days later, on 4 May, the United States House of Representatives adopted a similar resolution in which it expressed "full diplomatic support of Great Britain in its efforts to uphold the rule of law." In the course of the war the United States furnished the British with a secure method of communication with its nuclear submarines in the war zone, weather information, aviation fuel, use of the airfield on Ascension Island, ammunition and missiles, and KC-135 tanker planes.[5] A request for AWACS was refused because it would have involved American airmen in the hostilities. Whether the United States acted in accordance with the rules of neutrality which existed prior to World War II is, at the very least, questionable.

There was speculation that, despite the strong anticommunist stance of the Argentine junta, it was receiving aid of various kinds from the Soviet Union. It can be assumed that if the Soviet Union considered the granting of such aid to be in its own interests, it would not have found it impossible to overlook the ideological differences. The USSR abstained on, but did not veto, United Nations Resolution 502, calling for Argentina to withdraw its forces from the Falkland Islands. The Soviets also employed surface vessels and planes from Angola and Cuba for surveillance of the British Task Force as it sailed towards the South Atlantic. This, however, may have been routine since Soviet ships and planes do this with respect to all naval movements of Western powers; there is no hard evidence that the USSR passed the information so obtained to the

Argentines. In fact, it has been suggested, with a good deal of reason, that had the Soviet Union been doing so the *Narwal* would never have been sent on the suicidal spy mission in which it was engaged when it was sunk by the British.

Implications for the Laws of War

In some important respects, the Falklands crisis offers much hope for the continued viability of the laws of war. Despite the intense nationalistic rivalries underlying it, the conflict illustrates that states can wage conventional warfare in compliance with the laws of war without thereby giving adversaries a substantial military advantage. But, on the other hand, one must be mindful of the peculiar qualities of the Falklands War that made it possible for the laws of war to exert their restraining influence. First, this was a limited war, fought for limited ends with limited means. For both parties the end was quite specific—control of a particular territory. This was not an abstract, hazy goal, but rather a concrete, easily recognizable objective. The means, too, were limited. The adversaries restricted their operations to the disputed territory, and refrained from military actions against the enemy's homeland; had it not been conducted otherwise, the war would have been much more violent and destructive and could have released the kind of political frenzy and hatred that weaken the observance of the laws of war. Second, the adversaries, despite obvious differences in political regimes, saw themselves as members of the same civilization, and shared many cultural affinities and bonds—some stretching over centuries. This helps to explain why the war was in many respects a "gentlemen's war." Third, the conflict was brief. It is difficult to predict how well the laws of war would have been observed had this been a protracted struggle, filled with the usual weariness and mounting frustration against the enemy. It is an open question whether further conflicts that lack all these special characteristics will have as encouraging a record on the observance of the laws of war as did the Falklands War of 1982.

Notes

1. The Paquete Habana, 175 U.S. 677 (1900).
2. Christopher Dobson, *The Falklands Conflict* (London: Hodder & Stoughton, 1982), p. 104.
3. The *Uganda* may have been confused with the *Canberra* (*New York Times*, 28 May 1982, p. A8:4). In a letter dated 8 October 1982 Captain L. W. L. Chelton, R.N., Chief Naval Judge Advocate of the Royal Navy, advised the author that no British hospital ship carried combat troops to the South Atlantic; and that members of the International Committee of the Red Cross, carried thereon, could verify this.
4. Dobson, *The Falklands Conflict*, pp. 156-7.
5. The British were legally entitled to use the Ascension airfield under an agreement, "Use of Wideawake Airfield in Ascension Island by United Kingdom Military Aircraft," signed at Washington, 29 August 1962 (13 UST 1917, TIAS 5148, 449 UNTS 177).

XI

Criminality in the Law of War

1 International Criminal Law 233 (M. Cherif Bassiouni ed., 1986)

There are two completely different aspects of the subject of criminality in the law of war insofar as prisoners of war are concerned—offenses committed before capture (pre–capture offenses or war crimes); and offenses committed after capture (post–capture offenses). Many of the rules applicable are similar or identical, but some are different. The two aspects of the problem are certainly worthy of separate treatment. They will be so treated and in the order mentioned.

Pre–capture Offenses (War Crimes)

Historical

By offenses committed before capture we normally refer to violations of the law of war committed against the nationals, civilian or military, or the property, of the Capturing Power or of one of its allies. Despite a rather widespread misunderstanding on the subject, there was nothing new about the war crimes trials conducted after World War II except their numbers and the broad range of the offenses charged. One author has given considerable publicity to a case which occurred in 1474 in which an *ad hoc* international tribunal tried one Peter von Hagenbach for various crimes committed while he was in command of what might be termed a military occupation, although the war was yet to come. Hagenbach pleaded that he had only obeyed the orders of his master, the Duke of Burgundy. His defense was rejected, he was found guilty, and he was executed.[1]

After the termination of hostilities in the American Civil War (1861–1865), a conflict which had most of the characteristics of an international war, the Federal authorities conducted a number of trials of individuals for offenses committed against Union prisoners of war during the course of the conflict.[2] During the pacification of the Philippines which followed the acquisition of those islands by the United States as a result of the Spanish-American War (1898), a number of American officers were tried by American Army courts-martial for violations of the law of war.[3] (This is another area where there is a good deal

of misunderstanding. While these men were tried for violations of specific provisions of the American Army's "Articles of War," the offenses for which they were tried were also violations of the law of war and their trials would have been denominated "war crimes trials" if they had been tried by an enemy, or an international court.) And at about this same period the British Army not only tried some of its own personnel for violations of the law of war committed during the hostilities in the Boer War (1899-1902),[4] but the Treaty of Vereeniging (1902) which ended that conflict specifically provided for British courts-martial for certain Boers who had allegedly committed acts "contrary to the usages of war."[5]

After the end of World War I a "Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties" created by the Versailles Peace Conference recommended criminal prosecution for all persons, without distinction of rank, "who have been guilty of offenses against the laws and customs of war or the laws of humanity."[6] The Peace Conference implemented that recommendation with Articles 228-230 of the Treaty of Versailles[7] by which Germany recognized the right of the Allies to conduct trials for violations of the laws and customs of war and promised to hand over the individuals requested for trial by a requesting Ally. Public opinion prevented a weak German government from complying with those provisions and agreement was reached for trials to be conducted by the Supreme Court of Leipzig. The results of the twelve trials which were conducted were so unsatisfactory to the former Allies that they dropped the matter.[8] This episode convinced most students of the problem that the Versailles solution to the problem was not a viable one. (The so-called "war crimes trials" conducted by the Federal Republic of Germany itself since the end of World War II do not disprove that conclusion. For the most part they have involved the trials of Germans for offenses against Germans, where no nationalism is involved; and when they were begun sufficient time had elapsed for a change of public attitude and a cooling of wartime patriotism.)

Codification

All that has been mentioned up to this point was in the realm of the customary law of war. In a 1906 Convention for the protection of the wounded and sick there was a provision by which the Parties agreed, if their laws were then insufficient, to seek from their legislatures

> "the necessary measures to repress, in time of war, individual acts of robbery or ill treatment of the sick and wounded of the armies, as well as to punish, as usurpations of military insignia, the wrongful use of the flag and brassard of the

> Red Cross by military persons or private individuals not protected by the present convention."[9]

This was, of course, a call for national legislation to provide for the punishment of certain specific war crimes. Little was done to implement this provision; but the 1929 version of this Convention went even further when the Parties agreed therein to seek from their legislatures

> "the necessary measures for the repression in time of war of any act contrary to the provisions of the present Convention."[10]

(For some reason there was no comparable provision in the prisoner-of-war convention drafted at the same time by the same Diplomatic Conference.)

The first real international codification in this area, if such it can be called, was the 1945 London Charter drafted and signed by France, Great Britain, the Soviet Union, and the United States, to which 19 other states subsequently adhered.[11] It was, of course the basis for the Nuremberg Trial. A number of the other war crimes trials in Germany which followed World War II were based on an adaptation of the London Charter by the four Powers governing occupied Germany, issued either jointly or severally.[12] However, most of the several thousand war crimes trials which followed World War II, both in Europe and in the Pacific, were based on the customary law of war and were conducted by courts established by individual states.[13] It was not until the drafting of the four 1949 Geneva Conventions for the Protection of War Victims that we find true codification in this area of international law. Those Conventions contained two articles which, with appropriate and understandable differences, were common to all of them.[14] The articles contained in the 1949 Third (Prisoners-of-War) Convention read as follows:

Article 129

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
>
> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Parties shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defense, which shall not be less favourable than those provided by Article 105 and those following of the present Convention.

Article 130

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of a hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

If you analyze the provisions of these two articles you will find that the Parties to these Conventions have:

a. specifically established a number of substantive penal offenses which they have characterized as "grave breaches" of the Conventions;

b. agreed to universal jurisdiction (of Parties to the Conventions) over those offenses;

c. indicated that trials for "grave breaches" of the Conventions will be conducted by national courts;

d. agreed that they will either themselves try any accused found in their territory or will extradite that accused to any other Party concerned who makes out a *prima facie* case (*aut dedere aut punire*);[15] and

e. guaranteed a fair trial for any person accused of having committed such a grave breach.

The procedural rules relating to the trials and punishment of prisoners of war contained in the 1949 Third (Prisoner-of-War) Convention, set forth in some detail below in the discussion of post-capture offenses, would be equally applicable with respect to pre-capture offenses. However, it is probably appropriate to mention here that although Article 85 of the 1949 Third Geneva Convention provides that prisoners of war prosecuted for pre-capture offenses "retain, even if convicted, the benefits of the present Convention," a number

of states have made reservations to that article, insisting upon the right to treat such individuals as common criminals after they have been finally convicted and while they serve their sentences.[16]

In 1977 a Protocol I to the 1949 Geneva Conventions was signed which elaborated considerably on the provisions quoted above.[17] Articles 11, 75(2), and 85 of this Protocol repeat many of the offenses listed in the 1949 Geneva Conventions. They also add to the list contained in the Conventions a number of offenses which cannot be considered as being established penal offenses; rather, they are offenses more closely related to the conduct of war. These offenses include such matters as making the civilian population the object of attack; or the launching of an attack against an installation known to contain dangerous forces, such as a nuclear generating plant; or attacking an undefended locality; or attacking an individual who is *hors de combat;* etc.

Although the Diplomatic Conference which drafted this Protocol was unable to reach agreement on the question of the defense of "superior orders," it did agree on provisions making superiors responsible for the acts of a subordinate

> "if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."
> (Article 86(2))

It also agreed on provisions making it the duty of a commander who is aware that persons under his control

> "are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof." (Article 87(3)).

Presumably, should the commander fail to comply with the foregoing provisions of Article 87(3), he would be punishable under Article 86(2), above.[18]

Article 88 of the 1977 Protocol I is entitled "Mutual assistance in criminal matters;" and Article 89 is entitled "Co-operation." As is not unusual in this area, where politics determine policy, these articles express pious statements rather than positive rules:

> "The High Contracting Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings in respect of grave breaches;" (Article 88(1)).

". . . when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition;" (Article 88(2)).

". . . The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters;" (Article 88(3)).

". . . the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations." (Article 89).

On the other hand, Article 75 of the 1977 Protocol I, entitled "Fundamental guarantees," does affirmatively set forth the whole gamut of protections to which a person charged with an offense "related to the armed conflict" or "arising out of the hostilities" is to be afforded. Thus, he is entitled to be informed of the reason for his arrest. He is to be tried by "an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure;" and those "generally recognized principles of regular judicial procedure" are enumerated at length. Suffice to say that if they are applied by a truly impartial court (if any court trying enemy military or civilian personnel in time of war can be such!), no accused could complain that he had not had a fair trial.

Mercenaries

There is one aspect of the 1977 Protocol I which requires special mention. Article 47 of that document defines the term "mercenary" and provides that

> A mercenary shall not have the right to be a combatant or a prisoner of war.

The drafting of such a provision and its inclusion in the 1977 Protocol I was, of course, a matter within the discretion of the Diplomatic Conference. However, what is bothersome is that all attempts to provide in that article that if the individual alleged to be a mercenary was tried as an illegal combatant, he would be entitled to proper trial safeguards, to the "Fundamental guarantees" of Article 75 of the Protocol,[19] a privilege accorded to the members of liberation movements who fail to comply with certain provisions of the Protocol and thus become, in effect, illegal combatants. Numerous aspects of the trial of the mercenaries in Angola[20] appear to warrant considerable pessimism with respect to the fairness of the trials that these individuals will receive.

Conclusion

Apart from the weakness of the provisions calling for international cooperation in the prosecution of pre-capture offenses, including the extradition of persons charged with such offenses, the 1949 Geneva Conventions and the 1977 Protocol I establish a number of substantive offenses and provide for the trials of persons accused of having committed those offenses, at the same time granting them all of the safeguards necessary to assure a fair trial. Any problems which may arise in the future with respect to the trial and punishment of persons alleged to have committed war crimes will not be because of a lack of applicable law, substantive or procedural, but because such law is disregarded or because of the improper manner in which it is applied.

Post–Capture Offenses

Introduction

There has never been any question but that a Detaining Power has the right to try enemy personnel in its hands for offenses committed during the period of internment.[21] The problems which have arisen in this regard are usually concerned with the actions of the Detaining Power in making penal offenses out of acts committed by prisoners of war, when the same acts would not be penal offenses if committed by its own personnel; in trying enemy personnel before specially constituted "hanging" courts; in denying to enemy personnel the safeguards of trial accorded to its own personnel; and in adjudging sentences against enemy personnel in excess of the sentences which could be adjudged against its own personnel found guilty of committing the same acts.

When the matter of a convention on prisoners of war was under review after World War I, the Xth International Conference of the Red Cross recommended that "An international code of disciplinary and penal sanctions applicable to prisoners of war should be included in this Convention."[22] That recommendation suffered the not-unusual fate of attempts to expand the international criminal law field—it was not accepted by the subsequent conferences on the subject. However, over the course of the years the offenses committed during the period of detention for which prisoners of war may be punished, and the procedures by which they may be punished for those offenses, have become highly institutionalized and, if there is compliance with the provisions of the latest and currently applicable set of rules in this regard, those contained in the 1949 Third (Prisoner-of-War) Convention, there should be no valid cause for complaint either by the person convicted and punished, or by his Protecting Power, or by his Power of Origin.

Substantive Offenses

The Convention has reached a very simple solution to the problem of the specific substantive offenses for which prisoners of war may be punished:

1. Article 82(1) of the 1949 Third Convention makes them subject to the "laws, regulations and orders in force in the armed forces of the Detaining Power" and authorizes the Detaining Power to take appropriate action for violations of those laws, regulations and orders.

2. Article 82(2) of that Convention provides that if any law, regulation or order of the Detaining Power makes an act committed by a prisoner of war punishable when that same act committed by a member of its own forces would not be punishable, the maximum allowable punishment is to be disciplinary, not penal, in nature.

By this means the Convention has, with respect to penal matters, equated the prisoner of war to the member of the armed forces of the Detaining Power. It has, moreover, accepted the fact that there will necessarily be some special rules of conduct promulgated by the Detaining Power which will be uniquely applicable to prisoners of war—but it has placed severe limitations on the punishment which may be imposed for violations of those special rules of conduct.

Procedural Rules

General: a. A prisoner of war must be tried by the same court, either military or civilian, that would try a member of the armed forces of the Detaining Power for the particular offense charged (Article 84(1));

b. The trial court must be one which affords the prisoner-of-war accused "the essential guarantees of independence and impartiality as generally recognized" (Article 84(2));

c. Double jeopardy (*non bis in idem*) is specifically prohibited (Article 86);

d. The penalty assessed against a prisoner of war may not exceed that provided for in respect of members of the armed forces of the Detaining Power (Article 87(1)).

Disciplinary sanctions: a. This is a type of punishment for minor offenses which may be imposed administratively by the camp commander or his delegate (Article 96(2)). There is probably an equivalent type of administrative punishment in the armed forces of most nations;

b. The accused must be advised of the charge and must be given an opportunity to defend himself (Article 96(4));

c. The allowable punishments are limited to a monetary fine, discontinuance of any privileges normally allowed by the Detaining Power above those granted by the Convention, fatigue duties not exceeding two hours daily, and a maximum of 30 days confinement (Articles 89 and 90(2));

d. The punishment must not be inhuman, brutal or dangerous to the health (Article 89(3));

e. There are a number of provisions establishing norms for any confinement awarded as a disciplinary punishment (Articles 88, 97 and 98);

f. It is here that violations of the offenses unique to prisoners of war mentioned above will be punished; for example, there are several provisions with respect to attempted escapes which, when unsuccessful, are punishable by disciplinary sanctions only (Articles 91-94, inclusive).

Judicial proceedings: a. The offense for which a prisoner of war is to be tried must have been such in the law of the Detaining Power or in international law at the time of its commission (no *ex post facto* laws) (Article 99(1)). Logically, this provision should have been in the general provisions, with the prohibition against double jeopardy;

b. Lists of the offenses punishable by the death sentence must be exchanged as soon as possible after the outbreak of hostilities and additions to those lists may not be thereafter made without the agreement of the two belligerents involved (Article 100); and when a death sentence is adjudged, it may not be executed until six months after notice of its imposition has been given to the Protecting Power (Article 101);

c. Mental or physical coercion in order to extort a confession is specifically prohibited (Article 99(2));

d. The Protecting Power must be notified of an impending trial three weeks in advance (Article 104(1)) and must, except in rare cases involving state security, be permitted to attend the trial (Article 105(5)); proof of the notification is jurisdictional (Article 104(4));

e. The accused is entitled to particulars of the charge and other documents in a language which he understands; to be represented by counsel of his own choice, or one provided by the Protecting Power, or one provided by the Detaining Power; to confer with counsel freely and privately; to confer with and to call witnesses; to have the services of an interpreter (Article 105); and to have a full opportunity to present his defense (Article 99(3));

f. The punishment which may be imposed upon conviction is limited to that which could be imposed upon a member of the armed forces of the Detaining Power convicted of the same offense (Article 87(1));

g. The accused is entitled to the same rights of appeal as a member of the armed forces of the Detaining Power (Article 106);

h. There are a number of provisions establishing norms for any confinement adjudged by the court (Articles 88 and 108).[23]

Conclusion

Under the able guidance of the International Committee of the Red Cross, in the course of drafting the 1949 Third Convention the 1949 Diplomatic Conference modernized the provisions of the 1929 Geneva Prisoner-of-War Convention with respect to the trial and punishment of prisoners of war for offenses committed while in that status. Although there has, fortunately, been no occasion to test the application of these provisions on a wide scale they do appear to ensure fair and just treatment for prisoners of war accused of post-capture offenses. Once again, it may be stated that any problems which may arise will not be because of a lack of applicable law, substantive or procedural, but because such law is disregarded or because of the improper manner in which it is applied.

Notes

1. G. Schwarzenberger, *International Law as Applied by Courts and Tribunals*, 462-466 (1968).

2. H. Levie, *Prisoners of War in International Armed Conflict* 343-344 (1979). See, e.g., "*United States v. Henry Wirz*," *Documents on Prisoners of War* 46 (H. Levie, ed., 1979) (hereinafter Levie, Documents).

3. See, e.g., *The Law of War: a Documentary History*, I, 799-829 (L. Friedman, ed., 1972).

4. One such incident has recently been given wide publicity in the Australian motion picture "Breaker Morant."

5. Article 4, Treaty of Vereeniging, Pretoria, 31 May 1902, 191 Parry, *Consolidated Treaty Series* 232; Levie, *Documents*, 66.

6. 14 *Am. J. Int'l L.* 95 (1920); Levie, *Documents*, 158. The recommendation was limited to "persons belonging to enemy countries."

7. Treaty of Peace between the Allied and Associated Powers, of the One Part, and Germany, of the Other Part, Versailles, 28 June 1919, 255 Parry, *Consolidated Treaty Series* 188; Levie, *Documents*, 165.

8. See, generally, C. Mullins, *The Leipzig Trials* (1921). It is worthy of note that in one trial the German Court said:

> "Patzig's order does not free the accused from guilt. It is true that according to the Military Penal Code, if the execution of an order in the ordinary course of duty involves such a violation of the law as is punishable, the superior officer issuing such an order is alone responsible. However, the subordinate obeying an order is liable to punishment, if it was known to him that the order of the superior involved the infringement of civil or military law. This applies in the case of the accused. Military subordinates are under no obligation to question the order of their superior, and they can count upon its legality. But no such confidence can be held to exist, if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law. This happens only in rare and exceptional cases. But this case was precisely one of them, for in the present instance, it was perfectly clear to the accused that killing defenceless people in the life-boats could be nothing else but a breach of the law. . . ."

The Llandovery Castle Case, ibid., 130–131.

9. Article 28(1), Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 6 July 1906, 222 Parry 144, *The Laws of Armed Conflicts* 233 (D. Schindler & J. Toman, eds., 1981) (hereinafter Schindler/Toman).

10. Article 29(1), Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929, 118 *U.N.T.S.* 303; Schindler/Toman, 257.

11. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 United Nations Treaty Series 280; Levie, *Documents*, 276. Although the Court which heard the Tokyo Trial was international in membership, it was created by a Special Proclamation of General MacArthur, acting as the Supreme Commander for the Allied Powers. Schindler/Toman 823; Levie, *Documents*. 312.

12. Control Council Law No. 10, 20 December 1945, Trial of War Criminals before the Nuremberg Military Tribunals, I, xvi (hereinafter T.W.C.); Levie, *Documents*, 304. For a typical implementing order, see Ordinance No. 7 of the Military Government of Germany, U.S. Zone of Occupation, 18 October 1946, T.W.C., I, xxiii, Levie, *Documents*, 364.

13. See generally the fifteen volumes issued by the United Nations War Crimes Commission entitled *Law Reports of Trials of War Criminals* (1947–1949).

14. Common Articles 49/50/129/146 and 50/51/130/147, 1949 Conventions for the Protection of War Victims, 75 *U.N.T.S.* 31/85/135/287; Schindler/Toman, 305-333-355-427.

15. There is, however, disagreement as to whether Article 146(2) is itself an extradition treaty or is effective only when the two States involved have a general extradition treaty.

16. The North Vietnamese reservation stated:

> "The Democratic Republic of Vietnam declares that prisoners of war *prosecuted for and convicted of war crimes* or crimes against humanity, in accordance with the principles laid down by the Nuremberg Court of Justice shall not benefit from the present Convention as specified in Article 85." (Emphasis added.) (The original French translation furnished to the depositary by the North Vietnamese used the words "poursuivis et condamnes"—prosecuted *and* convicted. 274 United Nations Treaty Series 340.)

Despite the foregoing, the North Vietnamese took the position that *upon capture* all American prisoners of war were immediately war criminals and, therefore, not entitled to any of the benefits of the 1949 Third (Prisoner-of-War) Convention, a denial which would, presumably, include the provisions thereof with respect to trial safeguards.

17. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Schindler/Toman, 551; Levie, *Documents*, 824.

18. This represents a return to the doctrine of the responsibility of the commander expounded in *In re Yamashita*, 327 U.S. 1, Levie, *Documents*, 294 and 319, which had appeared to be on its way to oblivion.

19. The Nigerian delegate, the main proponent of the provisions which became Article 47 of the 1977 Protocol I, stated that mercenaries would not be denied the protection of the fundamental guarantees of Article 75 and of the 1949 Geneva Conventions generally. Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, XV, 192 (par. 16). However, statements by the delegates of other supporters of the article, and their adamant refusal to include any specific mention of Article 75 does not augur well in this regard. This was the obvious feeling of many of the delegates. *See, e.g., id.*, 191 (par. 14), 193 (par. 23), 194 (par. 25); 195 (par. 28); etc.

20. *See* Note, "The Laws of War and The Angolan Trial of Mercenaries: Death to the Dogs of War," 9 *Case W. Res. J. Int'l L.* 323 (1977).

21. Many of the provisions with respect to this time period will likewise be found, *mutatis mutandis*, in Articles 64–77 (civilian population in occupied territory) and 117–126 (civilian internees) of the 1949 Fourth (Civilians) Convention.

22. International Committee of the Red Cross, Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War 407 (Pictet, ed., 1960).

23. Persons who do not benefit from more favorable treatment under the 1949 Third or Fourth Conventions would fall within the purview of the protective provisions of Article 75 of the 1977 Protocol I.

Criminality in The Law of War

Addendum

After the end of World War II in 1945 the victorious Allied Powers established International Military Tribunals for the trials of the major German and Japanese war criminals, as well as many other tribunals and military commissions for the trials of other persons who were deemed guilty of having violated the law of war. Hundreds of such trials were conducted. (Probably the

last of those trials were those of Klaus Barbie, decided on 4 July 1987, and of Paul Touvier, decided on 20 April 1994, both by French Cours d'Assises. In October 1997 proceedings were instituted in a Bordeaux court charging Maurice Papon, once a member of post-war French cabinets, with responsiblity for the deaths of 1,090 French Jews during World War II.)

Despite the many international wars which have taken place since 1945 and the many violations of the law of war which have been committed during the course of those conflicts, there has not been a single war crimes trial arising out of violations of the law of war which had occurred during those conflicts. (The United States tried William Calley and others for violations of the law of war at My Lai, in Vietnam, but at the time these were not considered to be true war crimes trials because the United States was trying its own personnel. Why this should make a difference is difficult to understand.)

For subsequent developments in this area, see *The Statute of the International Tribunal for the Former Yugoslavia: A Comparison with the Past and a Look at the Future* (page xx hereof) and *War Crimes in the Persian Gulf* in the present collection. In August 1996 the Congress enacted, and on 21 August 1996 the President approved, the *War Crimes Act of 1996,* an amendment to Title 18 of the United States Code, which reads as follows:

Chapter 118—WAR CRIMES

§2401. War crimes

(a) OFFENSE. Whoever, whether inside or outside the United States, commits a grave breach of the Geneva Conventions, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) CIRCUMSTANCES. The circumstances referred to in subsection (a) are that the person committing such breach or the victim of such breach is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) DEFINITIONS. As used in this section, the term 'grave breach of the Geneva Conventions' means conduct defined as a grave breach in any of the international conventions relating to the laws of warfare signed at Geneva 12 August 1949 or any protocol to any such convention, to which the United States is a party.

Under this statute the *Calley Case* would now be considered to be a war crimes case.

XII

Means and Methods of Combat at Sea

14 Syracuse Journal of International Law and Commerce 727 (1988)

It is strange indeed that an individual whose only military experience has been with land forces and who has only once been aboard a warship (and that was to be present at a ceremony where the ashes of a deceased naval officer were strewn at sea) should be asked to present a paper on the subject of "Means and Methods of Combat at Sea" to this Round Table. In view of the fact that there are a great number of naval experts present, I cannot even believe that it was intended to be a case of the blind leading the blind! If this had been scheduled to be the first paper delivered I would have assumed that the organizers of this Round Table were motivated by the desire to lay a groundwork in this area at the lowest possible technical level and then work up to the more esoteric problems. However, in view of the sequence of the programming, that explanation likewise seems to be ruled out. Fortunately I am in a position to state without fear of challenge that because of limitations of time and space, I will only be able to specify the modern methods or means of conducting warfare at sea with respect to which there appear to be legal problems, without attempting to offer any solutions to those problems.

It will be recalled that the Final Act of the 1907 Hague Peace Conference included the statement of a wish that its successor conference prepare regulations relative to the laws and customs of naval warfare.[1] Of course, because of the outbreak of World War I, that conference never took place and the series of Hague Peace Conferences was brought to an end. Subsequent efforts to fill the *lacunae* in the law of naval warfare through conventional means, such as the 1909 Declaration of London,[2] were, for one reason or another, unsuccessful, with the result that, apart from the much-disregarded 1936 London Procès-Verbal on submarine warfare,[3] the law of naval warfare consists basically of the 1856 Declaration of Paris,[4] the several conventions on the subject adopted in 1907, the 1949 Second Geneva Convention,[5] and customary international law.

The 1977 Protocol I

An important preliminary question concerns the extent, if any, to which Article 49 of the 1977 Protocol I[6] makes the provisions of that Protocol applicable to warfare at sea. It unquestionably applies to naval bombardments of

land targets, the subject of the 1907 Hague Convention IX Concerning Bombardment by Naval Forces in Time of War.[7] Does it also apply generally to other methods and means of conducting warfare at sea? One commentator, Dr. Elmar Rauch, asserts with considerable vigor that this protocol "regulates the conduct of hostilities and the pertinent treaty provisions apply to any land, air, or sea warfare."[8] Another commentator, Professor Frits Kalshoven, is equally categorical in asserting that "[t]his goes to show once again that the Diplomatic Conference, carefully avoided taking up, in particular, the matter of naval warfare proper."[9]

When Dr. Rauch presented his thesis to a Committee of the International Society for Military Law and the Law of War at Garmisch in September 1985, it generated considerable controversy. At the risk of oversimplification, I shall quote the two paragraphs of the article of the Protocol relied upon by Dr. Rauch and a very small part of the relevant activities at the Diplomatic Conference and then let you draw your own conclusions:

> Article *49-Definition of attacks and scope of application*
>
> 3. The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.
>
> 4. The provisions of this Section are additional to the rules concerning humanitarian protection contained in the Fourth Convention, particularly in Part II thereof, and in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities.

When Article 49, then draft Article 44, was being discussed in the Working Group of Committee III of the Diplomatic Conference, the words "on land" at the end of what is now the first sentence of paragraph 3 were the subject of considerable debate. The following statement with respect thereto is contained in the report of the Working Group:

> Discussions in the Working Group showed almost complete agreement that it would be both difficult and undesirable in the time available to try to review and revise the laws applicable to armed conflict at sea and in the air. Moreover, it was clear that we should be careful not to revise that body of law inadvertently through this article. The solution was found by combining the ICRC text with a sentence

which stated clearly that, except for attacks against objectives on land, the law applicable to armed conflict at sea or in the air is unaffected.

Several delegates wish it recorded that they remain dissatisfied with this draft. They object to the phrase 'on land' in the first sentence and to the second sentence as a whole. These delegates would prefer to have this section of the Protocol affect the law applicable to the conduct of warfare at sea or in the air to the extent that provisions of this Section would be more favorable to civilians than the existing law.[10]

The additional sentence referred to is, of course, the second sentence in Paragraph 3 (then paragraph 1). At the meeting of Committee III which took place immediately after the submission of that report, the following occurred:

The term 'on land' was adopted by 56 votes to one, with 7 abstentions. The part of the second sentence beginning with 'but do not' . . . and ending with . . . 'or in the air' was adopted by 56 votes to one, with nine abstentions.

Paragraph 1 of Article 44 was adopted by 60 votes to none, with 7 abstentions.[11]

The Report of Committee III, Second Session, adopted the wording of the report of the Working Group almost verbatim[12] and the Plenary Meeting adopted the article without discussion.[13] I now ask you: did the Diplomatic Conference make the provisions of the 1977 Protocol I generally applicable to warfare at sea?[14]

Blockade

For centuries a naval blockade for the purpose of cutting off supplies to the enemy, like a land siege, has been an accepted method of conducting naval warfare and the supplies so cut off have frequently included foodstuffs. This has been true whether foodstuffs have been considered to be absolute contraband, conditional contraband, or not contraband. The unratified 1909 Declaration of London[15] (which itself stated that it corresponded with generally recognized principles of international law) listed foodstuffs as conditional contraband. The imposition of the "long distance" blockade by the United Kingdom during World War I was intended to bring Germany to its knees by starving the civilian population and it is alleged to have caused the deaths by malnutrition of half a million German noncombatants.[16] When, during the last year of World War II, the United States instituted a blockade of Japan primarily by mining the waters around that country, it actually called the mining program "Operation Starvation."[17]

Article 3 of the Resolution of the General Assembly on the Question of Defining Aggression includes in its list of acts qualifying as acts of aggression, "regardless of a declaration of war":[18] "(c) The blockade of the ports or coasts of a State by the armed forces of another State."

One well-known commentator on the subject has stated:

> The 'blockade of the ports or coasts' of another State was another listed indicator of aggression, but what precisely constituted a 'blockade . . . was deliberately left vague.'[19]

Does this provision of the resolution purport to constitute an attempt to eliminate the blockade completely, as a method of conducting warfare at sea? Does this mean that even after there is no question but that hostilities have erupted between two or more nations and after the Security Council has been unable to obtain a cease fire, and the two sides are attacking each other wherever they are in contact and are bombing each other wherever targets are available, the imposition of a blockade by one of the participants in the dispute would be an act of aggression? Did the Committee which drafted the definition of aggression consider that, among other things, it was recommending a material change in the law of warfare at sea? Or was the banning of blockades a prohibition on the use of this type of force to bring pressure to bear on a nation during peacetime, such as that used by Germany, Great Britain, and Italy against Venezuela in 1902?[20]

Article 54(1) of the 1977 Protocol I states:[21] "Starvation of civilians as a method of warfare is prohibited."[22] Does this mean that naval blockades may no longer prevent foodstuffs from reaching enemy ports? The 1975 Report of the Committee charged with this matter by the Diplomatic Conference stated:[23] "The fact that the paragraph [Article 54(1)] does not change the law of naval blockade is made clear by Article 44, paragraph 1 [Article 49(3)]."

The Australian delegation was even more specific in its explanation of its vote. It said:

> The Australian delegation wishes to place on record its view that Article 48 [now Article 54] does not prevent military operations intended to control and regulate the production and distribution of foodstuffs to the civilian population, and that it does not affect existing legal rule concerning the right of military forces to requisition foodstuffs. Moreover, in the view of my delegation, nothing in Article 48 directly or indirectly affects existing rules concerning naval blockade.[24]

Dr. Rauch disagrees with the foregoing interpretations of Article 54(1) of the 1977 Protocol I, taking the position that under that provision of the Protocol

there is an absolute prohibition of a naval blockade of foodstuffs.[25] It remains to be seen how belligerents will interpret it.

Mine Warfare

The only conventional law with respect to the subject of mine warfare at sea is the 1907 Hague Convention No. VIII Relative to the Laying of Automatic Submarine Contact Mines.[26] Inasmuch as that Convention repeatedly refers to "automatic contact mines," there is a dispute on the question of its applicability to the modern "influence mines" (magnetic, pressure, acoustic, etc.), which do not require contact with the target in order to explode. Some commentators believe that the Convention is equally applicable to the various influence mines.[27] Others believe that the wording of the Convention is so restrictive that mines other than those specified are not subject to its provisions.[28] Professor O'Connell has taken the position that while influence mines are not specifically covered by the Convention, the practice of belligerents has been such as to bring them within its purview.[29] Influence mines are frequently bottom or ground mines, which lie on the seabed unmoored. If the Convention is applicable to them, the question which arises is whether, under Article 1(1) of the Convention, they must disarm themselves one hour after they have been planted—a requirement which would make them practically useless. In view of the validity of the dispute, this appears to be one area where new laws with respect to the conduct of warfare at sea might prove useful.

During the drafting of the 1907 Hague Convention No. VIII the Netherlands sought to have included therein a provision which would have prohibited the laying of mines barring passage through a strait connecting two open seas.[30] This proposal was rejected and all that was done in this regard was to include in the Commission report a statement that there was no intention to change the law relating to straits without stating what that law was.[31] During both World Wars straits were mined, and with such success that it is deemed unlikely that any restriction on this practice would be acceptable to most nations now or in the foreseeable future.

One comparatively recent development in naval weapons systems is the "torpedo mine." It is an anti-submarine weapons system consisting of a torpedo inserted into a mine casing.[32] It is deployed like an ordinary mine in deep water in the vicinity of routes traveled by enemy submarines. It has the ability to detect and classify submarine targets while surface ships will pass over it without triggering the torpedo. At the present time it is moored but suggestions have been made that it be used as a bottom or ground mine, buried in the seabed for concealment purposes, and not moored. Two legal problems would then arise with respect to this weapon: first, it might be argued that under the provisions of Article 1(1) of the 1907 Hague Convention No. VIII such a weapon should

disarm itself one hour after being deployed. On the other hand, it is actually unarmed and inactive while lying on the seabed; the torpedo only becomes activated, armed, and sent on its way when it receives the signal of the approach of a target—a submarine. The second problem is that under Article 1(3) of the Convention a torpedo which misses its mark must become harmless. When released, the encapsulated torpedo would be no different from any other torpedo. Presumably the fact that it would sink to the bottom of the sea at the end of an unsuccessful run would meet the Convention's requirement although it is probable that all torpedoes can be and are programmed to disarm themselves when they miss their target.

One final aspect of mine warfare is worthy of mention. In 1972 the Seabed Arms Control Treaty[33] came into effect. This Treaty prohibits emplacing or emplanting any nuclear weapons or any other types of weapons of mass destruction on the seabed beyond a twelve-mile coastal zone. The same restriction exists as to any facilities for storing, testing, or using such weapons. The coastal State, whether belligerent or neutral, may emplace or emplant any type of mine, conventional or nuclear, within its twelve-mile zone, subject, presumably, to notification, and, in appropriate cases, to the right of innocent passage. Other States are limited to the employing or emplanting of conventional mines beyond the twelve-mile zone. A belligerent may, of course, lay conventional mines within the territorial waters of its enemy provided that it is not the "sole object" of such mines to intercept commercial vessels. May it lay nuclear mines in those waters subject only to that same limitation?

The Natural Environment

There is one aspect of the conduct of war at sea to which little attention has been paid and which could prove catastrophic for mankind—that is, the effect of such warfare on the natural environment. What will happen to the live natural resources of the sea if supertankers carrying hundreds of thousands of tons of crude oil are torpedoed and sunk? Or if off-shore pumping facilities are attacked and left discharging their product into the sea? What will happen to those natural resources and to mankind itself if nuclear submarines and other nuclear warships are destroyed by shells, missiles, mines, or torpedoes? Or if a warship, surface or submarine, carrying weapons with nuclear warheads is so destroyed? While there are "fail-safe" devices intended to protect against harm arising from these two latter eventualities, not only will there be instances where they cannot operate, but events have demonstrated the undependability of such devices. I have no solution for this problem nor, unfortunately, can I envision any rules in this regard which would be generally acceptable to states.[34] Even if the provisions of the 1977 Protocol I are deemed to be applicable to warfare at sea, it does not appear that its Articles 35 and 55 thereof will solve the problem. For example,

no torpedo mine is programmed in such a way as to limit its attacks to conventional submarines. And with the desperate need for oil of every belligerent during wartime, no nation can realistically be expected to provide in its rules of engagement a prohibition against attacks on tankers.[35]

Missiles

The development and use of missiles with conventional warheads, such as Exocet, should not create any major legal problems. As in land warfare, they are nothing more than modern artillery, even when they are used over the horizon. Of course, if missiles from the sea are used against land targets their use is subject to the provisions of the 1907 Hague Convention No. IX Concerning Bombardment by Naval Forces in Time of War[36] and the 1977 Protocol 1.[37] However, if they are used against targets at sea they are subject to no prohibitions or restrictions not imposed on the use of a warship's guns. One commentator, writing in 1972, questioned whether naval surface-to-surface missiles were "sufficiently discriminating to ensure that the distinction between military targets on the one hand, and civilian and neutral targets on the other, can be maintained."[38] However, while a missile, like any other projectile, may hit an innocent victim and thus create an international incident, this would not appear to affect the legal status of missiles as a means of conducting warfare at sea.

Exclusion Zones

Naval warfare may take place anywhere that ships may sail except in the territorial seas or internal waters of neutral states. This, of course, includes the high seas. The right of neutral vessels and aircraft to use the high seas, even during wartime, cannot be denied—but, legally or illegally, certain limitations have frequently been placed on that right by belligerents. One such limitation which has had many names is probably now best known as an "exclusion zone." One commentator, Commander Fenrick, has defined this term as follows:

> An exclusion zone, also referred to as a military area, barred area, war zone or operational zone, is an area of water and superadjacent air space in which a party to an armed conflict purports to exercise control and to which it denies access to ships and aircraft without permission.[39]

Exclusion zones, under various names, were notified in both World Wars, frequently under the guise of reprisals. After World War II the International Military Tribunal (IMT) at Nuremberg found German Admiral Doenitz guilty of a violation of the 1936 London Procès-Verbal (Protocol I)[40] holding:

> The order of Doenitz to sink neutral ships without warning when within these [operational] zones was, therefore, in the opinion of the Tribunal, a violation of the protocol.[41]

It will be noted that the Tribunal referred only to the sinking without warning of *neutral ships* within these zones. The effect of such an order directed solely at enemy merchant vessels is left unstated.[42] During the 1982 Falklands/Malvinas War the establishment of exclusion zones proliferated with the British announcing four and the Argentines announcing three.[43] The most extensive such zone announced by the British was its Total Exclusion Zone (TEZ) of 28 April 1982, effective 30 April 1982. The core of that announcement was to the effect that:

> Any ship and any aircraft, whether military or civilian, which is found within the zone without authority from the Ministry of Defence in London will be regarded as operating in support of the illegal occupation [of the Falkland Islands] and will therefore be regarded as hostile and will be liable to be attacked by British forces.[44]

So far as is known, the Soviet Union was the only neutral to protest this action—perhaps out of pique because a British spokesman had made reference to "Soviet spy ships trailing the British forces inside the Zone."[45]

Exclusion zones of a sort have been announced by both Iran and Iraq in their long-running war.[46] That complicated situation, with both sides in violation of international law at least as frequently as they are in compliance with it, is better not used either as a precedent or as an indication of the practice of states.

In his study of exclusion zones Commander Fenrick makes the following proposal:

> It is suggested that if belligerents use exclusion zones they should publicly declare the existence, location and duration of the zones, what is excluded from the zone, and the sanctions likely to be imposed on ships or aircraft entering the zone without permission, and also provide enough lead time before the zone comes into effect to allow ships to clear the area.[47]

Doesn't that sound very much like a blockade?

I pose the following questions: Are exclusion zones a legal method of conducting warfare at sea? If not, are there any possible limiting factors which could make them legal?

Submarine Warfare

Part IV of the 1930 London Naval Treaty[48] contains two rules with respect to the method of conducting submarine warfare: first, they must conform to the

rules applicable to surface vessels: and, second, except in certain limited and specified cases, they are prohibited from sinking a merchant vessel without first having placed passengers, crew, and ship's papers in a place of safety—which does not include the ship's boats unless in proximity to land or another vessel. There were eleven parties to these provisions, including France, Italy, Japan, the United Kingdom, and the United States. The provisions were repeated in the 1936 Procès-Verbal[49] to which thirty-seven additional States, including Germany and the Soviet Union, had acceded prior to the outbreak of World War II.

As we have already seen, the International Military Tribunal (IMT) found that, while in command of the German submarine force during World War II, Admiral Doenitz had issued orders which violated the provisions of the 1936 Procès-Verbal. However, the Tribunal did not assess punishment for this offense because of evidence that both the British and the United States navies had followed substantially similar procedures. In other words, three of the major naval Powers of the time had completely disregarded the provisions of the law of naval warfare restricting the methods of conducting submarine warfare. The Tribunal apparently considered that, despite this, the 1936 Procès-Verbal continued to be binding international law of naval warfare. Can it really be believed that in any future conflict involving naval powers, submarine warfare will be conducted in a manner other than it was in World War II? Can it be believed that the reiteration of the provisions on the conduct of submarine warfare in a new treaty, or the drafting of new restrictive provisions on this method of conducting naval warfare, would be other than a useless gesture?

Conclusions

The methods and means of conducting warfare at sea that have been developed since the end of World War II are unquestionably numerous. For some, no new conventional law is necessary. For a few, it would probably be helpful to have new conventional law to replace the customary law which has evolved or the complete lack of law governing their use. For still others, the likelihood of agreement on a viable solution appears to be completely unattainable. It is believed that more harm than good could result from the drafting by the large majority of non-maritime powers, and the attempted imposition on the maritime powers, of prohibitions and restrictions on methods and means of conducting warfare at sea which the latter powers would refuse to accept.

Notes

1. 1 J.B. SCOTT. THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1907, at 679, 689 (1920).

2. Declaration Concerning the Laws of Naval Warfare, signed at London, 26 February 1909; D. SCHINDLER & J. TOMAN, THE LAW OF ARMED CONFLICT 755 (2d rev. ed. 1981)[hereinafter SCHINDLER & TOMAN].

3. Procès-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the London Naval Treaty of 1930, signed at London, 6 November 1936 [hereinafter Procès-Verbal], in SCHINDLER & TOMAN, *supra* note 2, at 795.

4. Declaration Respecting Maritime Warfare, signed at Paris, 16 April 1856, in SCHINDLER & TOMAN, *supra* note 2, at 699.

5. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, signed at Geneva, 12 August 1949, in SCHINDLER & TOMAN, *supra* note 2, at 333.

6. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), signed at Geneva, 10 June 1977, 16 I.L.M. 1391 (1977) [hereinafter 1977 Protocol I]; SCHINDLER & TOMAN, *supra* note 2, at 551.

7. SCHINDLER & TOMAN, *supra* note 2, at 723.

8. RAUCH, THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS . . . AND THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: REPERCUSSIONS ON THE LAW OF NAVAL WARFARE 17, 57-66 (1984). Dr. Rauch goes on to say that this is why no major military power has ratified the Protocol. The validity of that statement is questionable.

9. F. KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 87-88 (1987).

10. XV OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA, 1974-1977, 327 (17 vols., 1978) [hereinafter OFFICIAL RECORDS]; 3 LEVIE, PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS 93 (4 vols., 1979-1981) [hereinafter LEVIE].

11. XIV OFFICIAL RECORDS, *supra* note 10, at 217; 3 LEVIE, *supra* note 10, at 94.

12. XV OFFICIAL RECORDS, *supra* note 10, at 267; 3 LEVIE, *supra* note 10, at 95, 96.

13. VI OFFICIAL RECORDS, *supra* note 10, at 205; 3 LEVIE, *supra* note 10, at 107.

14. It should perhaps be noted at this point that Article 49 para. 4, which was originally para. 3, was adopted by Committee III at its meeting on 21 March 1974 (XIV OFFICIAL RECORDS, *supra* note 10, at 85, 88; 3 Levie, *supra* note 10, at 85, 88), while the second sentence of paragraph 3, then paragraph 1, was not even drafted by the Working Group until almost a year later in February 1975 (XV OFFICIAL RECORDS, *supra* note 10, at 327; 3 LEVIE, *supra* note 10, at 93) and was not adopted by Committee III until 25 February 1975 (XIV OFFICIAL RECORDS, *supra* note 10, at 217, 218; 3 LEVIE, supra note 10, at 94). If either can be said to modify the other, then the second sentence of the present paragraph 3, being the later in date, modifies the present paragraph 4. Frankly, the present commentator sees no relationship between paragraph 4 and the problem under discussion but it has been brought into the dispute by others.

15. SCHINDLER & TOMAN, *supra* note 2.

16. RAUCH, *supra* note 8, at 86-87.

17. Meacham, *Four Mining Campaigns*, NAVAL WAR C. REV., June 1967, at 96-97.

18. *Resolution 3314 (XXIX) of the General Assembly of the United Nations, 14 December 1974*, G.A. Res. 3314 (XXIX), 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631.

19. Ferencz, *The United Nations Consensus Definition of Aggression: Sieve or Substance*, 10 J. INT'L & ECON. 701, 712 (August/December 1976).

20. After hostilities had broken out in the Falklands/Malvinas Islands in April 1982 and Argentina had refused to comply with the Security Council Resolution 502, which called for a cease fire and the withdrawal of Argentine troops from the Falklands, the United Kingdom, on 7 April 1982, established a maritime exclusion zone (MEZ) around the Islands. Argentina contended that this MEZ was a blockade and that it violated the resolution on aggression. (Of course, a basic question beyond the scope of this paper is the legal effect of a resolution of the General Assembly.)

21. See 1977 Protocol I, *supra* note 6.

22. While the United States does not at the present time intend to become a party to the 1977 Protocol I, at a meeting of the American Society of International Law held in Boston in April 1987, a representative of the Office of the Legal Adviser of the Department of State stated that the provision quoted in the text was one of those "that we believe should be observed and in due course recognized as customary law even if they have not already achieved that status." *See* U.S. Senate, Treaty Doc. 100-2, 29 January 1987.

23. XV OFFICIAL RECORDS, *supra* note 10, at 279; 3 LEVIE, *supra* note 10, at 245.

24. VI OFFICIAL RECORDS, *supra* note 10, at 220; 3 LEVIE, *supra* note 10, at 257.

25. RAUCH, *supra* note 8, at 94. He is incorrect in referring to the quotation from the Report as a "statement of the *rapporteur*." It was a statement made in the Committee's Report drafted by the Rapporteur, but reviewed

with meticulous care by the Committee before it was approved. XIV OFFICIAL RECORDS, *supra*, note 10, at 424-42. However, it could be argued with some justification that a naval blockade, with the consequent reduction in the food supplies available to the civilian population resulting in malnutrition and starvation, violates Article 49(3) of the 1977 Protocol I because it unquestionably does "affect the civilian population, individual civilians or civilian objects on land."

26. SCHINDLER & TOMAN, *supra* note 2, at 715 (English); 205 Parry's T.S. 331 (1980)(French). Article 1 of the *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices* (Protocol II to the *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects*), 19 I.L.M. 1524, 1529, specifies that it "does not apply to the use of anti-ship mines at sea or in inland waterways."

27. RAUCH, *supra* note 8, at 116. *See also* J.S. COWIE, MINES, MINELAYERS AND MINELAYING 171-172 (1949); Tucker, *The Law of Naval Warfare*, in 50 INTERNATIONAL LAW STUDIES 304 n.49 (1957).

28. F. KALSHOVEN, BELLIGERENT REPRISALS 133-134 (1971); F. KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 32 (1987); *see also* J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 584-585 (2d rev. ed. 1959).

29. D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 1138-1139 (I.A. Shearer ed. 1984) The conclusion is reached that although influence mines are not covered by the Convention, the "generic principle" established by it "has rigidified in recent times so as to encompass the influence as well as the anchored contact mine." *Id.*

30. 3 SCOTT Annex 12, *supra* note 1, at 663.

31. *Id.* at 286. *But see* Corfu Channel Case [1949] I.C.J. 22.

32. There is some disagreement as to whether this weapon system should be treated as a torpedo, or as a mine. See RAUCH, *supra* note 8, at 117; *see also* L.E. Prima *Deep Threat*, 26 SEA POWER 41, 46 (May 1983). It is, of course, both. It is a mine while it lies in wait and a torpedo when it is triggered to seek its target. The United States Navy version of this device is called "CAPTOR", a contraction of "enCAPsulated TORpedo."

33. *Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction*, 11 February 1971, 10 I.L.M. 146 (1972).

34. States have heretofore drafted the *1971 Seabed Arms Control Treaty* prohibiting the emplacement of nuclear weapons on the seabed and the ocean floor. *See supra* note 33; *see also Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques*, signed at Geneva, 18 May 1977, 16 I.L.M. 88; SCHINDLER & TOMAN, supra note 2, at 131; and supra note 16, at arts. 35 and 55 of the 1977 Protocol I. However, it is extremely doubtful that any belligerent would find any of these rules to be applicable to the problems raised, at least in so far as its own actions were concerned.

35. A number of tankers have been hit by rockets or missiles in the Red Sea in the conflict between Iran and Iraq without any sinkings. Whether this is due to the construction of the tankers or to the nature of the projectiles used is unknown. Such a result could not be expected in a war involving major naval Powers with state-of-the-art missiles, rockets, torpedoes, mines, bombs, and shells.

36. SCHINDLER & TOMAN, *supra* note 7.

37. 1977 Protocol I, *supra* note 6.

38. D.P. O'Connell, *The Legality of Naval Cruise Missiles*, 66 AM. J. INT'L L. 785, 786 (1972). The recent incident involving the U.S.S. *Stark* in the Persian Gulf would seem to indicate that the problem of target identification still exists. *See also* Truver, *The Legal Status of Submarine Launched Cruise Missiles and International Law*, 103 NAVAL INST. PROC. 82 (August 1977) and Parks, *Submarine Launched Cruise Missiles and International Law: A Response*, 103 NAVAL INST. PROC. 120 (1977).

39. Fenrick, *The Exclusion Zone Device in the Law of Naval Warfare*, 1986 CAN. Y.B. INT'L L. . (As this volume of the Yearbook is not yet available, page references are to the manuscript kindly furnished by the author. The quotation in the text appears at page 3 of that manuscript.)

40. *See* Procès-Verbal, supra note 3.

41. Opinion and Judgment of the International Military Tribunal, Nuremberg, 1 October 1946, *reprinted in* 1 TRIAL OF MAJOR WAR CRIMINALS 221, 313 (1948).

42. Fenrick, *supra* note 39, at 22.

43. *Id.* at 30.

44. *Id.* at 32. The British policy statement of 7 May 1982 was not an extension of the TEZ. *Id.* at 33.

45. Argentina protested the original United Kingdom "military exclusion zone" as being a violation of the General Assembly resolution which defined aggression. *See supra* note 20.

46. Fenrick, *supra* note 39, at 41-49.

47. *Id.* at 55.

48. *Treaty for the Limitation and Reduction of Naval Armaments*, signed at London, 22 April 1930,112 L.N.T.S. 65; 25 A.J.I.L. 63 (Supp. 1931).

49. *See* Procès-Verbal, *supra* note 3.

XIII

The Status of Belligerent Personnel "Splashed" and Rescued by a Neutral in the Persian Gulf Area

31 Virginia Journal of International Law 611 (1991)[*]

When a neutral country such as the United States has a rather sizeable naval force in a confined area for the protection of vessels flying its flag, it is inevitable that components of that force will, at times, find themselves in armed confrontation with ships and military aircraft of belligerents in that area. In the Iran-Iraq war, ships and military aircraft frequently attacked the tankers that the U.S. Navy had been sent to the Persian Gulf to protect, or even attacked components of the U.S. Navy itself. There are several discrete examples of just such confrontations.

On August 10, 1987, a U.S. Navy fighter plane fired two missiles at an Iranian plane which had violated the "bubble" announced by the Navy as a measure of self-protection.[1] And on August 25, 1987, a U.S. destroyer fired across the bows of two small unidentified vessels which were approaching the tankers that the destroyer was escorting.[2] On April, 18, 1988, in retaliation for the damaging of an American warship, United States armed forces attacked and destroyed two Iranian oil platforms (which were also used as anti-aircraft platforms) and U.S. naval vessels engaged in a subsequent encounter with Iranian vessels, all of which resulted in heavy Iranian casualties. However, as the individuals on the platforms were given warning of the attacks which were about to take place, and Iranian tugboats were permitted to engage in rescue work without impediment by the U.S. forces, no Iranians were rescued from the sea by the latter.[3]

The first two incidents terminated with no damages, no casualties and no individuals in custody. The third incident terminated with both Iranian casualties and "splashed" personnel, but again with no individuals in custody. The question these examples pose concerns the status of the members of the crews of such ships or aircraft when they are disabled, sunk or shot down by the U.S. forces

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* This article is a revision of remarks delivered at the 82nd Annual Meeting of the American Society of International Law Panel on Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf War, 23 April 1988. *See* Levie, *Remarks*, 82 PROC. AM. SOC'Y INT'L L. 597 (1988).

while they are engaged in such attacks, or while they are committing other illegal acts against U.S. flagged merchant shipping, or warships, or planes, and when they are thereafter rescued from the sea by those forces. I refer to "ships" rather than "warships" because there exists a considerable question regarding the status of some of the Iranian warships involved.

Article 14 of the 1910 Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea states that it does not apply to "ships at war." However, article 11(1) of the same Convention provides that:

> Every master is bound, so far as he can do so without serious danger to his vessel, her crew and passengers, to render assistance to everybody, *even though an enemy,* found at sea in danger of being lost.[4]

This humanitarian rule should be and in fact was complied with by the U.S. naval forces in the Persian Gulf. For example, an Iraqi pilot whose plane had been shot down by the Iranians was rescued from the sea by a component of the U.S. naval forces. Shortly thereafter he was turned over to the Iraqi authorities. On the night of September 21-22, 1987, an Iranian vessel, later identified as the *Iran Ajr,* was observed by a U.S. Army helicopter equipped with night-vision sensors to be laying mines in the Gulf in the vicinity of U.S. naval vessels and an anchorage used by them and the tankers they were there to protect. When the minelayer disregarded the radio orders of the helicopter to discontinue its minelaying activity, the helicopter opened fire on the Iranian vessel and rendered it dead in the water.[5] Twenty-six Iranian seamen and three bodies were subsequently rescued from the sea by a component of the U.S. naval forces.[6] Similarly, on October 8, 1987, when a U.S. helicopter flying over the waters of the Persian Gulf was fired upon by a gunboat, it returned the fire. Four wounded Iranians and the bodies of two others were recovered from the sea by a component of the U.S. naval forces.[7] Were the individuals who were rescued after these incidents prisoners of war? While the question is moot at the moment as all of the individuals were quickly repatriated through the agency of the government of Oman, it is one which may require a hard decision at some time in the future.[8]

Common article 2 of the 1949 Geneva Conventions Relative to the Treatment of War Victims is the article concerned with the circumstances under which those Conventions are to be applied.[9] It provides that:

> [T]he present Convention shall apply in all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.[10]

A number of years ago the International Committee of the Red Cross (ICRC) produced lengthy, and what have subsequently become authoritative, commentaries with respect to each of the four 1949 Geneva Conventions. Each of these commentaries contains a substantially identical statement with respect to common article 2. The pertinent portions of the Commentary on the 1949 Geneva Convention Relative to the Treatment of Prisoners of War state that:

> 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. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4. Even if there has been no fighting, *the fact that persons covered by the Convention are detained is sufficient for its application.* The number of persons captured in such circumstances is, of course, immaterial.[11]

This will be an acceptable interpretation of the provisions of common article 2 in the great majority of cases. However, in some respects, and under some circumstances, it may be too all-encompassing. When Major Arthur D. Nicholson of the United States Army was shot and killed by a Russian soldier in the Potsdam area on March 25, 1985, and his sergeant-driver was held prisoner at gunpoint for a number of hours, he certainly constituted a person "covered by the Convention" who was "detained."[12] But was there an "armed conflict" between the Soviet Union and the United States? Were the provisions of the Prisoner-of-War Convention applicable to the sergeant? When Lieutenant Robert 0. Goodman of the United States Navy was shot down by the Syrian Army on December 4, 1983, and was taken into custody by the Syrians and held for one month before being released, once again there was certainly a person "covered by the Convention" who was "detained."[13] But was there an "armed conflict" between Syria and the United States? Were the provisions of the Prisoner-of-War Convention applicable to the lieutenant? The original announcements made by both U.S. officials and the Syrians appeared to assume that he was a prisoner-of-war.[14] However, the United States appeared to have changed its position. President Reagan later stated: "I don't know how you have a prisoner of war when there is no declared war between nations. I don't think that makes you eligible for the Geneva Accords."[15]

Although an isolated incident of the use of force between two nations may be considered by one or both of them to be indicative of the existence of an armed conflict between them, usually the nations involved will wish to keep their options open and will not consider that such an incident has initiated an

armed conflict—unless the very purpose of the incident was to serve as a basis for such a claim.[16]

The first question to be decided, then, is whether there is an armed conflict between the parties. The ICRC takes the position that such incidents as those which occurred in the Persian Gulf in September and October 1987 constitute armed conflict and bring the Convention into play.[17] I do not agree with that conclusion. But even assuming *arguendo* that the ICRC position is correct, this alone will not always solve the problem.

Article 4 of the 1949 Geneva Prisoner-of-War Convention specifies the categories of persons who are entitled to the status of prisoners of war. First among these categories are "[m]embers of the armed forces of a Party to the conflict as well as militias or volunteer corps forming part of such armed forces."[18] The Iranians who were recovered from the sea by the U.S. Navy on September 22, 1987, were apparently members of the Iranian navy and the vessel was an Iranian warship.[19] If there was an armed conflict and if the Prisoner-of-War Convention was applicable, they would unquestionably come within the coverage of the quoted provision and would be entitled to the protection afforded by the Convention.

Suppose, however, that they had been members of the "Revolutionary Guards"—the individuals who appear to compose the crews of the so-called "gunboats" which attack any and every ship found in the Persian Gulf, without regard to the flag that it flies or the cargo that it carries.[20] Do such individuals fall within the category of persons entitled to prisoner-of-war status when they are rescued by U.S. naval forces from the waters of the Persian Gulf into which they have been precipitated by action of those same armed forces? Or are they illegal combatants who are not entitled to the benefits of that status? While we really know very little about the organization of the Revolutionary Guards, it would appear that they are, at a minimum, members of a militia or volunteer corps forming part of the Iranian armed forces. Under these circumstances, and under the ICRC interpretation of the Convention provision, they, too, are entitled to the status of prisoners of war if they fall into the hands of another power during a period of armed conflict. It is very possible that they have been guilty of violations of international law inasmuch as they have, without warning, attacked unarmed, neutral vessels. But this does not affect their entitlement to prisoner-of-war status. It only means that they could be subjected to trial and punishment for their illegal acts—an unlikely event.

My conclusion, then, is that occasional incidents do not constitute a state of war, or even of armed conflict, if there is a difference, between the United States and Iran or Iraq. Therefore, none of the Iranians who have been, or who are likely to be, "splashed" and rescued by United States forces in the Persian Gulf have been, or will be, entitled to prisoner-of-war status. It must be borne in

mind, however, that a decision that there is no armed conflict and that an individual is, therefore, not entitled to prisoner-of-war status only means that he is not entitled to the protection of all of the specific provisions of the 1949 Geneva Prisoner-of-War Convention. It does not mean that he is unreservedly at the mercy of the power in whose custody he finds himself. He is still entitled to all of the protection of general humanitarian law. For example, he must receive any necessary medical care, he may not be denied adequate food and water, he may not be tortured or otherwise maltreated, he may not be treated as a hostage, etc.

One final aspect of the problem is worthy of mention. It is not beyond the realm of possibility that some American military personnel serving in the Persian Gulf will, in the future, fall into the power of the Iranian regime. It will undoubtedly be recalled that the holding of hostages is not an unknown phenomenon to that regime. It is devoutly to be hoped that the precedent that the United States has established of immediate repatriation will contribute to making it politically inexpedient for Iran to hold such American personnel as hostages, as might otherwise have occurred.

Addendum

Even disregarding the perennial Arab-Israeli controversies, during the past decade international crisis has followed international crisis in the Middle East in general, and in the Persian Gulf in particular. Iran and Iraq fought a bloody war from 1980 to 1988, a war which necessitated the establishment of a naval presence in that area by half a dozen nations in order to protect neutral merchant shipping. During 1984, the mystery of the mines in the Red Sea posed grave difficulties for Egypt and its Suez Canal and necessitated a multilateral force to clear the mines from the sea. During the 1980s there was rarely a moment when the internecine conflict in Lebanon was not costing lives, with international interventions on a number of occasions.[21] Then, on 2 August 1990, less than two years after the Iran-Iraq conflict had come to an inconclusive halt, Iraq, under Saddam Hussein, invaded, occupied, and annexed its neighbor, Kuwait, bringing down upon its head the wrath of the great majority of the members of the international community, including most of the fifteen members of the Security Council of the United Nations. Military forces from thirty nations concentrated in Saudi Arabia and when non-military actions such as economic blockades proved ineffective in inducing Saddam Hussein to recognize the error of his actions, the Security Council authorized Kuwait and its cooperating "coalition" states "to use all necessary means to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions" if Iraq had not complied with the mentioned resolutions by 15 January 1991.[22] This was, of

course, a euphemistic way of authorizing the use of armed force while avoiding the need for any unpalatable words.

Aerial bombardment began shortly after the deadline. Inevitably, coalition planes were shot down and crew members became prisoners of war of the Iraqis. In this instance there was no question with respect to the applicability of the 1949 Geneva Prisoner-of-War Convention.[23] Although Iraq became a party to this Convention in 1956, she paid as little attention to its provisions in this conflict as she had during the Iran-Iraq War.[24] In the other direction there was a fairly substantial number of Iraqis who elected to become prisoners of war rather than fight for Saddam Hussein. The ground war started late in February and within a matter of days the number of Iraqi prisoners of war in the custody of the members of the coalition reached the tens of thousands.[25] Delegates of the ICRC immediately began visiting these prisoners of war, a process which thereafter continued without interruption.

When Iraq capitulated and agreed to comply with the provisions of the previous Security Council resolutions, Security Council Resolution 686 (1991), set forth the requirements to be imposed on Iraq in order to warrant a cease fire. The resolution contained the following provision:

> 3. *Further demand* that Iraq:
>
> (c) Arrange for immediate access to and release of all prisoners of war under the auspices of the International Committee of the Red Cross and return the remains of any deceased personnel of the forces of Kuwait and the Member States cooperating with Kuwait pursuant to resolution 678 (1990). . . .[26]

On March 6, 1991, Iraq released thirty-five prisoners of war, asserting that that was all she held.[27] Shortly thereafter the coalition commenced the incremental repatriation of the Iraqi prisoners of war who had expressed a desire for repatriation.[28] That process was to continue until all Iraqi prisoners of war who desired repatriation were back in Iraq.

Notes

1. N.Y. Times, Aug. 11, 1987, at Al, col. 6.
2. N.Y. Times, Aug. 25, 1987, at Al, col. 6.
3. N.Y. Times, April 19, 1988, at Al, col. 6.
4. 1910 Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea, 37 Stat. 1658, 1672 (1910) (emphasis added).
5. N.Y. Times, Sept. 22, 1987, at Al, col. 6.
6. N.Y. Times, Sept. 23, 1987, at Al, col. 6.
7. N.Y. Times, Oct. 9, 1987, at Al, col. 6. Although it has not been possible to ascertain whether the individuals in this latter group were Iranian naval personnel or members of the so-called "Revolutionary Guards," they were probably the latter. When queried on this point at the time of the first incident, the Administration spokesperson stated that the United States did not consider this question to be important. N.Y. Times, Sept. 25, 1987, at A8, col. 6.

8. After the September repatriation had been accomplished, the ICRC, which had been an observer at the turnover, delivered a note to the United States authorities in which it was asserted that "such situations and their consequences fell within the scope of the Geneva Conventions." 27 Int'l Rev. Red Cross 650 (No. 261, November-December 1987).

9. See 6 U.S.T. 3316, 3318, T.I.A.S. No. 3364, 75 U.N.T.S. 135, 136.

10. Of course, neither the United States nor Iran recognized the existence of a state of war between them. During the early 1950s, when the Netherlands and Indonesia were engaged in hostilities over what was then Dutch New Guinea, the Netherlands took the position that the Convention was not applicable because both countries chose to consider that a state of war did not exist. F. Kalshoven, Constraints on the Waging of War 27 (1987).

11. III Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War 23 (J. Pictet ed. 1960) (emphasis added). Concerning the problem that arises when neither side recognizes the existence of a state of war, the Commentary further states:

> What would the position be, it may be wondered, if both the Parties to an armed conflict were to deny the existence of a state of war? Even in that event it would not appear that they could, by tacit agreement, prevent the Convention from applying. It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.

12. N.Y. Times, Mar. 26, 1985, at Al, col. 6.

13. N.Y. Times, Jan. 8, 1984, § 4, at 1, col. 1.

14. N.Y. Times, Dec. 30, 1983, at A8, col. 1.

15. N.Y. Times, Dec. 21, 1983, at A22, col. 6. It should be noted that the President made a major error in each of these two short sentences. He erred by implying that a "declared war" was a prerequisite for bringing the Convention into effect. He further erred in referring to the "Geneva Accords," the title given to the agreements that ended the French war in Indochina in 1954, instead of to the "Geneva Prisoner-of-War Convention."

16. Typical of the latter type of incident was the "attack" on the German radio station by "Polish" troops which created the basis for Hitler going to war with Poland in 1939.

17. See supra note 8. A representative of the ICRC has informed the author that the note did not refer to the specific incident but was a general note sent to all countries having naval forces in the Persian Gulf.

18. See supra note 9; 6 U.S.T. at 3319, T.I.A.S. at 3364, 75 U.N.T.S. at 138.

19. Letter of President Reagan to Congress, 24 September 1987, 87 Dep't of State Bull. 44 (No. 2128, Nov. 1987).

20. This probably describes the Iranians involved in the October 1987 and the April 1988 incidents.

21. L.A. Times, Apr. 17, 1990, at A21, col. 1. Approximately forty thousand members of the Syrian Army have been in Lebanon for fifteen years and are still there.

22. U.N. Doc. S/RES/678 (1990), reprinted in 29 I.L.M. 1565 (1990).

23. See supra note 9.

24. After obvious physical maltreatment, Iraq presented several of the pilots on television, a violation of article 13 of the Convention. With respect to Iraqi (and Iranian) treatment of prisoners of war during their conflict, see Prisoners of War in Iran and Iraq: The Report of a Mission Dispatched by the Secretary-General, U.N. Doc. S/16962, 22 February 1985, para. 51-158, 271-294.

25. N.Y. Times, Feb. 25, 1991, at A14, col. 1; N.Y. Times, Feb. 26, 1991, at A14, col. 1; N.Y. Times, Feb. 28, 1991, at A10, col. 1.

26. U. N. Doc. S/RES/686 (1991), reprinted in 30 I.L.M. 569 (1991).

27. N.Y. Times, Mar. 6, 1991, at A14, col. 5.

28. Bulletin of the International Committee of the Red Cross, April 1991, at 1, col. 2.

XIV

Nuclear, Chemical, and Biological Weapons

The Law of Naval Operations 331
(Naval War College International Law Studies No. 64,
Horace B. Robertson ed., 1991)

Introduction

Chapter 10 of *The Commander's Handbook on the Law of Naval Operations*[1] is concerned with nuclear, chemical, and biological weapons. While the extent that the use of these weapons, other than nuclear, will impinge on naval warfare (except in connection with naval surface and naval air bombardment of land objectives, riverine operations, etc.) is probably fairly limited, the draftsmen of the *Handbook* have deemed it appropriate to include a full chapter on these subjects—and rightly so. In addition to discussing the evolution and present status of the applicable rules of the international law of war with respect to each of those categories of weapons, this commentary will discuss the extent to which those rules affect naval warfare *qua* naval warfare and the extent to which they affect the operations of naval units against objectives on land.

Nuclear Weapons

When the first atom bomb exploded over Hiroshima on August 6, 1945, it began a new (and perilous) era for the planet Earth. It also began a controversy which has yet to be resolved to the satisfaction of a great many people.

Not unexpectedly, sometime after the facts with respect to the nature of the atom bomb and the extent of the casualties and damage inflicted at Hiroshima and Nagasaki became generally known, an issue was raised as to the legality or illegality of the use of the atom bomb—and, subsequently, the same issue was, of course, raised as to the use of its far more powerful and devastating successors. In the discussion which follows it must be borne in mind that while there are a number of conventions placing various types of restrictions on nuclear weapons,[2] there is no convention which specifically outlaws their use.[3] In light of the complete failure of all of the practically endless efforts undertaken since 1945 to accomplish this result, to argue that the use of such weapons is prohibited by inference derived from the provisions of international agreements dating from

1868, from 1899, or from 1907, appears to be the equivalent of tilting at windmills. In view of the foregoing this writer concurs with the statement contained in the *Handbook* to the effect that, "There are no rules of customary or conventional international law prohibiting nations from employing nuclear weapons in armed conflict."[4] Nevertheless, a brief analysis of the arguments pro and con appears to be warranted.

The 1868 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight[5] contained a number of humanitarian preambular clauses:

> That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
>
> That for this purpose it is sufficient to disable the greatest possible number of men;
>
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
>
> That the employment of such arms would, therefore, be contrary to the laws of humanity.

During the course of the drafting of what became the 1899 Hague Convention (II) With Respect to the Laws and Customs of War on Land[6] and its annexed *Regulations,* several provisions were included which have often been cited as affecting the subject under discussion. These provisions were:

> Art. 22. The right of belligerents to adopt means of injuring the enemy are not unlimited.
>
> Art. 23. In addition to the prohibitions provided by special Conventions, it is especially forbidden:
>
> (a) To employ poison or poisoned weapons; . . .
>
> (e) To employ arms, projectiles, or material of a nature to cause superfluous injury; . . .

The cognate provisions of the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annexed *Regulations* are essentially identical with those quoted above.[7]

Realizing, however, that these and the other provisions that were to be included in the *Regulations* could not possibly cover all of the contingencies that

might arise during the course of a war, the Russian representative at the 1899 Peace Conference, Martens, a noted international lawyer, proposed, and the Conference agreed, that a paragraph be included in the preamble which would read:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.[8]

Assuming that these preambular provisions are law-making in nature, a number of questions arise. Did the use of the atomic bombs in 1945 weaken the military forces of the enemy? Did it uselessly aggravate the sufferings of disabled men, or render their death inevitable? Did it exceed the limits which a belligerent may adopt as a means of injuring the enemy? Did it constitute the use of "poison"? Did it represent the employment of a weapon "calculated to cause unnecessary suffering"? Did it constitute a failure to give the populations and belligerents "the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience" to which they were entitled? And, most important, if one or more of these questions is answered in the affirmative, does the particular principle apply if the alternative would have resulted in a million American military casualties and an even greater number of Japanese casualties, military and civilian? In other words, was the principle of proportionality applicable?[9] While all of those questions have been posed here with respect to Hiroshima and Nagasaki, they will likewise have to be asked—and answered—before any future use of nuclear weapons.

Literally hundreds of books and articles have been written on both sides of the questions posed and it is doubtful that any proponent of either side of the argument has been successful in convincing anyone who disagrees with his position that it is correct and that the other person's position is incorrect. The present writer does not propose to draw himself into that quagmire. Suffice it to say that nuclear weapons are with us and at the present time there does not appear to be any possibility that they will disappear, at least in the foreseeable future. Under those circumstances we can only hope that neither side will make the mistake of using them and thus bring an end to civilization, and to life itself, on this planet.

There is, of course, an area of nuclear warfare in which navies would play an important role. A preemptive first strike by one side might possibly eliminate much of the other side's land-based nuclear deterrent force—but it could not

reach the deployed naval-based force, the submarines of which are the ever-mobile carriers of nuclear ballistic missiles. Thus, this potential naval retaliatory force, maintained by both parties involved in the eyeball-to-eyeball confrontation which has more or less existed since shortly after the end of World War II, is a major factor in the policy of deterrence. Moreover, the strength and speed of these nuclear-powered and nuclear-armed submarines are reputedly such that there are experts who believe that they can only be destroyed by nuclear weapons, such as nuclear-armed depth charges or nuclear-armed torpedoes. If such is the case, the use of these latter nuclear weapons becomes almost inevitable as during a period of active hostilities, whether we call it war or armed conflict, no nation and no navy is going to permit enemy nuclear-powered submarines armed with nuclear ballistic missiles to roam the seas unchallenged.

One problem which arises is whether successful conventional-weapons attacks on nuclear-powered and nuclear-armed submarines (and surface vessels) would adversely affect the waters of the oceans and the air of the atmosphere. While the United States has lost two nuclear submarines with no such adverse effects, this is far from conclusive as the two crews would probably have shut down the nuclear reactors and any nuclear weapons aboard the submarines would not have been armed; accordingly, the amount of radioactivity released by each of those vessels would have been minimal. How much environmental damage would be caused by the sinking of a nuclear armed and nuclear-powered submarine with its reactor in operation appears to be a relative unknown. Moreover, should a war reach the nuclear stage, it is a virtual certainty that any naval engagement would include the use of nuclear weapons against the opposing enemy fleets. When this occurs the extent of the contamination of the oceans and of the atmosphere is incalculable as nuclear explosions would be taking place both in the atmosphere and in the water and nuclear-powered ships would be sunk with their reactors in operation.[10] Of course, should a war reach the nuclear stage, such matters would be a small, and comparatively unimportant, part of the overall picture.

The ballistic missiles carried by nuclear-powered submarines, referred to above, would, of course, if used, be directed against objectives on land. It is doubtful, but not inconceivable, that in a nuclear war a naval bombardment of objectives on land might include nuclear-armed shells and missiles. However, should a war reach that stage, the results of any such bombardment would be miniscule compared to the results that could be expected from landbased nuclear ballistic missiles, from the nuclear ballistic missiles released from below the surface of the seas, and from the nuclear weapons dropped from the air.

It is probably necessary to conclude that if and when an armed conflict approaches the nuclear stage, law will play a very small role in determining the actions of the belligerents.

Chemical Weapons

Chemical warfare agents have been defined as "chemical substances, whether gaseous, liquid, or solid, which might be employed because of their direct toxic effects on man, animals and plants."[11]

The earliest formal international attempt to prohibit the use of chemicals in warfare occurred at the 1899 Hague Peace Conference which drafted and adopted a Declaration stating, "The Contracting Parties agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases."[12] This Declaration was of unlimited duration. All of the major European Powers, including France, Germany, Russia, and the United Kingdom, signed and ratified it. The United States neither signed nor ratified it.

The 1899 Declaration was in force during World War I. Despite this, Germany used gas against the Russians in Poland in January 1915. The gas was delivered by artillery shells but, because of the sub-zero weather, had little effect and the incident passed almost unnoticed.[13] The first major, and well-documented, use of gas occurred in France, on April 22, 1915, when the Germans opened containers of compressed chlorine, permitting a favoring wind to blow the gas towards the Allied Ypres salient.[14] The success of the operation far exceeded expectations[15] and before the war was brought to an end more than three years later many other chemical weapons were being used by both sides and were being delivered by artillery, mortars, projectors, etc.[16] The Treaty of Versailles, which legally terminated World War I as between Germany and the Allies, contained the following provision:

> Art. 171. The use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices being prohibited, their manufacture and importation are strictly forbidden in Germany.
>
> The same applies to materials specially intended for the manufacture, storage and use of the said products or devices.[17]

The 1922 Washington Conference on the Limitation of Armaments, consisting of representatives of France, Italy, Japan, the United Kingdom, and the United States, drafted a treaty which was primarily concerned with submarine warfare but which included the following provisions:

> Art. 5. The use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world and a prohibition of such use having been declared in treaties to which a majority of the civilized Powers are parties,

> The signatory Powers, to the end that this prohibition shall be universally accepted as a part of international law binding alike the conscience and practice of nations, declare their assent to such prohibition, agree to be bound thereby as between themselves and invite all other civilized nations to adhere thereto.[18]

To become effective this treaty required the ratification of all of the participants in the Conference. France refused to ratify it because of objections to some of the provisions with respect to submarine warfare. Accordingly, the treaty never entered into force. However, three years later another conference, this one concerned with international trade in weapons and ammunition, drafted the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.[19] While much of its wording was taken almost verbatim from the prior draftings, its importance warrants the setting forth of its operative provisions in their entirety:

> Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world; and
>
> Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties; and
>
> To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;
>
> Declare:
>
> That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration.

Strange to relate, while the United States had ratified the Washington Treaty, with its provision prohibiting the use of poisonous gases, just two years earlier, and was the chief proponent of the 1925 Geneva Protocol, it did not ratify the latter until 50 years later, in 1975!

Many of the states which have ratified the 1925 Geneva Protocol have done so with a so-called "first use" reservation. Typical of those reservations is that of the United Kingdom: "The said Protocol shall cease to be binding on His Britannic Majesty toward any Power at enmity with him whose armed forces, or the armed forces of whose allies, fail to respect the prohibitions laid down in the Protocol."[20] It does not appear that this "first use" reservation has ever been invoked despite the not-infrequent use of the prohibited gases. For example,

Italy, a party to the Protocol (as was Ethiopia), admittedly used poison gas in its 1935-1936 war with Ethiopia. Japan, although a party to the 1899 Declaration, did not ratify the Protocol until after World War II. On June 5, 1942, President Roosevelt warned the Japanese against the use of poisonous gas.[21] While at that time Japan denied using such gas in China,[22] it has never officially denied such use since the end of the war. Egypt, a Party to the 1925 Protocol (as was the Yemen Arab Republic), is alleged to have used gas in the civil war in Yemen. Iraq, also a party to the Protocol (as is Iran), has been accused of using gas in its recent war with Iran.[23] In none of these cases is there evidence of retaliation in kind, probably because the victim of the gas attack was not in possession of a stock of chemical weapons.

During World War II Hitler on occasion considered the use of chemical weapons against England. However, he apparently realized, or his military advisers were able to convince him, that Germany's opponents were well able to reply in kind and that, in the long run, the use of such weapons would be self-defeating to Germany.[24] On June 5, 1943, President Roosevelt warned Germany that the use of chemical weapons by any Axis country against any one of the United Nations would result in "swift retaliation in kind," specifying that the targets would be "munition centers, seaports, and other military objectives throughout the whole extent of the territory of such Axis country."[25] With the possible exception of Japanese use in China, chemical weapons were not used by any belligerent during World War II.[26]

The General Assembly of the United Nations has adopted a number of resolutions on the subject of chemical warfare.[27] A resolution adopted in 1968, among other things, requested the Secretary-General to prepare, with the assistance of experts, a report on chemical and bacteriological (biological) weapons.[28] This report, which was submitted to the General Assembly in 1969, found that "because of the scale and intensity of the potential effects of their use, they are considered as weapons of mass destruction."[29] The report contained the following statement:

> The general conclusion of the report can thus be summed up in a few lines. Were these weapons ever to be used on a large scale in war, no one could predict how enduring the effects would be, and how they would affect the structure of society and the environment in which we live.[30]

Upon the receipt of that report the General Assembly adopted a resolution to the effect that the 1925 Geneva Protocol "embodies the generally recognized rules of international law prohibiting the use in international armed conflict of all biological and chemical methods of warfare."[31] Of course, this merely represented the political judgment of those nations which voted in favor of the resolution.

The need to maintain a supply of chemical weapons for use in retaliation against a violator of the provisions of the 1925 Geneva Protocol, or any other "first user," has created the longtime problem of finding a safe method for the disposition of overage gas, with leaky containers adding to the difficulties of the possessor. One technical advance in this field, the so-called "binary" gases, will considerably alleviate this problem. These gases consist of two non-toxic chemicals which only become toxic when mixed, an action which is accomplished while, for example, an artillery shell is in flight. A representative of the Chemical Corps of the United States Army listed the advantages of binary weapons as including "improved safety during production, transportation and storage; no requirement for high-cost toxic production facilities; and simplified low-cost demilitarization procedures."[32]

A number of problems have arisen with respect to the interpretation of the 1925 Geneva Protocol. One such problem is whether it includes within its prohibitions the use of smoke, sometimes a major weapon in naval warfare, and the use of riot control agents, such as lachrymatories, or tear gas. The argument against the use of smoke, that it at least temporarily incapacitates due to a type of asphyxia, is weak and is not very frequently advanced. Originally the British interpreted the provisions of the 1925 Geneva Protocol as covering lachrymatories.[33] However, deeming it an essential weapon for use in Northern Ireland, in 1970 the British Government took the position that "CS and other such gases" were not prohibited by the 1925 Geneva Protocol.[34] Practically all governments use lachrymatories domestically for the suppression of such events as riots and other civil disturbances. Nevertheless, the propriety of their use in armed conflict remains a matter of dispute.

A further problem of interpretation is whether the Protocol includes within its prohibitions the use of herbicides. This problem arose during World War II when the question was raised as to whether it would be in accordance with international law to use "crop-destroying chemicals" on the gardens being grown by Japanese units located on by-passed islands of the Pacific. Although the Judge Advocate General of the Army found no legal impediment to such action,[35] no action was taken, probably because it would have been a waste of resources. During the hostilities in Vietnam herbicides were used extensively, both for crop destruction and as a defoliant.[36] When the issue was raised in the Senate during the consideration by that body of the 1925 Geneva Protocol, the General Counsel of the Department of Defense arrived at the same conclusion the Army had reached in 1945.[37] Nevertheless, as will be noted below, the United States has renounced the first use of herbicides except for certain extremely limited purposes.[38]

Another such problem of interpretation is whether incendiary weapons are within the prohibitions of the Protocol. The United States has long taken the

position that there is no rule of international law prohibiting the use of incendiary weapons.[39] At a conference of experts convened in 1969 by the International Committee of the Red Cross, some of the experts were of the opinion that the use of incendiary weapons, and particularly napalm, was prohibited by the 1925 Geneva Protocol because, by burning the oxygen, it "causes a sort of asphyxia." Others took the position that incendiary weapons were not prohibited but were subject to "discriminating" use. The ICRC concluded that "more extensive studies should be made of the consequences of incendiary weapons in order to reach a clear legal solution as to their employment."[40] The U.N. Report with respect to chemical and bacteriological (biological) weapons, published that same year, contains the following relevant statement:

> We also recognize that there is a dividing line between chemical agents of warfare, in the sense in which we use the terms, and incendiary substances, such as napalm and smoke, which exercise their effects through fire, temporary deprivation of air or reduced visibility. We regard the latter as weapons which are better classified with high explosives than with the substances with which we are concerned. They are therefore not dealt with further in this report.[41]

Studies were subsequently made by a group of experts appointed by the Secretary-General of the United Nations, by the Stockholm Peace Research Institute (SIPRI), and by the ICRC itself in 1973, in 1974, and in 1976; and probably by other organizations and institutions. The U.N. experts found it appropriate "to bring to the attention of the General Assembly the necessity of working out measures for the prohibition of the use, production, development and stockpiling of napalm and other incendiary weapons"[42]— a clear indication of their understanding that there was no such prohibition then extant. The author of the SIPRI report stated that "there was never any positive indication that the intention of the [1925] Geneva Protocol was to prohibit incendiaries."[43] The ICRC studies were inconclusive.[44] Finally, the subject was discussed by the *Ad Hoc* Committee on Conventional Weapons of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts[45] and the Diplomatic Conference adopted a resolution in which it recommended the convening of a conference to draft agreements on certain conventional weapons.[46] Such a conference was held in 1980 and resulted in, among others, a Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons.[47] This Protocol does not prohibit the use of incendiaries; it merely places certain restrictions on the manner in which they may be used. The sum total to be derived from the foregoing survey is, of course, that incendiary weapons do not come within the purview of the prohibitions of the 1925 Geneva Protocol or, for that matter, of any other international agreement on the law of war.

The 1980 Protocol provides that it is prohibited "to make the civilian population, individual civilians or civilian objects the object of attack by incendiary weapons." (Of course, the law of war generally prohibits such attacks by *any* weapon!) Such a prohibition, and the accompanying restrictions on the use of air-delivered and other types of incendiary weapons intended to implement that prohibition, would obviously have no effect on naval engagements at sea. However, they would be applicable with respect to naval bombardments of land targets, either by warships or by aircraft, and with respect to the use of incendiaries by marines ashore.

Now let us see where the United States stands generally on the question of chemical warfare. It has already been mentioned that the United States did not ratify the 1899 Declaration and that the 1925 Geneva Protocol was not ratified by it until 1975. During that 50-year interim period the position of the United States with respect to chemical warfare was well summed up in the predecessor to the *Handbook,* which contained the following statement:

> The United States is not a party to any treaty now in force that prohibits or restricts the use in warfare of poisonous or asphyxiating gases or of bacteriological weapons. Although the use of such weapons frequently has been condemned by states, including the United States, *it remains doubtful that, in the absence of a specific restriction established by treaty a state legally is prohibited at present from resorting to their use.* However, it is clear that the use of poisonous gas or bacteriological weapons may be considered justified against an enemy who first resorts to the use of these weapons. [Footnotes omitted][48]

The United States has almost uniformly taken the position that there is no customary law prohibiting the use of these weapons.[49] During the hostilities in Vietnam the United States used two controversial types of chemical weapons - tear gas and herbicides.[50] Tear gas was originally used for humanitarian purposes[51] but its utility as a non-lethal gas quickly became apparent and it was widely used for a number of purposes.[52] This created considerable discussion both in the United States and elsewhere in the world with the result that on November 25,1969, President Nixon issued a statement in which he said that he was resubmitting the 1925 Geneva Protocol to the Senate for its advice and consent to ratification and that the United States "Reaffirms its oft-repeated renunciation of the first use of lethal chemical weapons" and "Extends this renunciation to the first use of incapacitating chemicals."[53]

After extensive hearings and further commitments by the Executive Branch, the Senate gave its advice and consent to the ratification of the 1925 Geneva Protocol[54] and President Ford ratified it on January 22, 1975. The ratification was deposited, and the Protocol became binding on the United States, on April

10, 1975. On April 8, 1975, President Ford signed Executive Order 11,850 which provides:

> The United States renounces, as a matter of national policy, first use of herbicides in war except use, under regulations applicable to their domestic use, for control of vegetation within U.S. bases and installations or around their immediate defensive perimeters, and first use of riot control agents in war except in defensive military modes to save lives such as:
>
> (a) Use of riot control agents in riot control situations in areas under direct and distinct U.S. military control, to include controlling rioting prisoners of war.
>
> (b) Use of riot control agents in situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided.
>
> (c) Use of riot control agents in rescue missions in remotely isolated areas, of downed aircrews and passengers, and escaping prisoners.
>
> (d) Use of riot control agents in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists and paramilitary organizations.[55]

Fortunately, since the issuance of that Executive Order, the United States has not been involved in any armed conflict which would make its application appropriate. However, the *Handbook,* issued in 1987, further illuminates the United States position with respect to the use of chemical weapons. It will be recalled that its predecessor, *The Law of Naval Warfare,* stated that it would be difficult to hold that use of such weapons was prohibited by customary international law.[56] In a complete turnabout, the *Handbook* says:

> The United States considers the prohibition against first use of lethal and incapacitating chemical weapons to be part of customary international law and, therefore, binding on all nations whether or not they are parties to the 1925 Gas Protocol.[57]

It will be interesting to record the reactions to this position of states which are still not parties to the 1925 Protocol and which have not committed themselves in the General Assembly of the United Nations.[58]

As we shall see, there is in existence a Convention which supplements the 1925 Geneva Protocol by prohibiting the development, production, and stockpiling of biological agents and their delivery weapons.[59] Although separate proposals made in 1962 by both the Soviet Union and the United States included similar provisions with respect to chemical weapons,[60] both the United

Kingdom and the United States later insisted on separating chemical weapons from the others. As a result, despite fairly continuous efforts, the only restriction on chemical weapons at the present time is the 1925 Geneva Protocol which prohibits *use* only.

In 1984 then Vice President Bush went to Geneva to attend a meeting of the Conference on Disarmament (CD) and to table a United States proposal which sought to accomplish for chemical weapons what had already been accomplished for biological weapons.[61] It has since been under consideration in the CD, which subsequently drafted and studied a 1987 revision.[62] In January 1989 a conference hosted by the French Government in Paris adopted a resolution calling for reaffirmation of the 1925 Geneva Protocol and stressed "the necessity of concluding, at an early date, a convention on the prohibition of the development, production, stockpiling and use of all chemical weapons and on their destruction."[63] In July 1989 the United States and the Soviet Union reached agreement on the key remaining issues[64] and currently (December 1989) the CD is working on a May 1989 version[65] with changes made up to 15 October 1989.[66] In view of the insistence of the United States on "anywhere-anytime" inspections, it is of interest to know that the Soviet Union has agreed to permit "surprise inspections" and that it is now the United States which has a problem in this respect in view of the Fourth Amendment to the Constitution, prohibiting "unreasonable searches and seizures."[67]

The wheels of diplomacy grind slowly (witness the years of discussion of the 1982 U.N. Law of the Sea Convention and of the 1977 Protocols[68]), so there is still the possibility that in the not-too-distant future there will be agreement on a Convention which will prohibit the development, production and stockpiling of chemical agents and their delivery systems, as well as providing for the destruction of all such chemical agents now in the arsenals of parties to such a Convention.[69]

Bacteriological (Biological) Weapons

Bacteriological (biological)[70] weapons have been defined as "living organisms, whatever their nature, or infective material derived from them, which are intended to cause disease or death in man, animals or plants, and which depend for their effects on their ability to multiply in the person, animal or plant attacked."[71] International restrictions on the use of biological weapons present far fewer legal problems than do those on the use of chemical weapons. In fact, the legal situation is so clear that the major problem is, once again, that of ensuring compliance.

It will be recalled that by the declaration contained in the 1925 Geneva Protocol the Parties agreed "to extend the prohibition [against the use of poisonous gas] to the use of bacteriological methods of warfare."[72] The League

of Nations Disarmament Conference discussed the matter and attempted, albeit unsuccessfully, to draft a treaty which would have prohibited the production and stockpiling of both chemical and biological weapons. During World War II considerable scientific research was done on biological weapons. However, no such weapons were used by either side, with one possible exception. The Soviet Union has long contended that during World War II the Japanese had a unit called "Bacteriological Detachment 731" located at Harbin in China and that this unit had conducted bacteriological experiments on several thousand Chinese, Koreans, Russians, and, perhaps, Americans. When the war ended, many of the senior officers of this unit were taken into Soviet custody and in December 1949 twelve of them were tried by a Soviet court at Khabarovsk, were found guilty of engaging in bacteriological warfare, and received sentences of confinement in a labor correction camp for terms varying from two to twenty-five years.[73] In 1982 the Japanese Government acknowledged that such a unit had existed during the war.[74] Assuming that the Soviet charges are correct, it would appear that the activities of the Japanese unit never passed the experimental stage, that it never reached the stage of actual use of biologicals against enemy military forces as a weapon of war.

In 1962 the Soviet Union tabled at the meeting of the Eighteen Nation Disarmament Committee (ENDC) a proposal for general and complete disarmament which included the following provision: "The prohibition, and destruction of all stockpiles, and the cessation of the production of all kinds of weapons of mass destruction, including atomic, hydrogen, chemical, biological and radiological weapons."[75]

A few weeks later the United States submitted its counterproposal with a provision which called for "Elimination of all stockpiles of nuclear, chemical, bacteriological, and other weapons of mass destruction and cessation of the production of such weapons."[76]

In view of the close similarity of the two proposals, it would seem that agreement with respect at least to chemical and biological weapons could have been quickly attained.[77] However, such was not the case. There were those who took the position that chemical and biological weapons should not be joined in the same treaty as there was experience with chemical weapons, but none with biologicals. While the relevance of this argument is far from clear, it was sufficient to delay the affirmative action which might otherwise have been taken. Finally, in 1969 the United Kingdom submitted a proposal which called for a complete ban on "microbial or other biological agents," but made no mention of chemical weapons.[78] When, in 1971, the United States and the Soviet Union tabled identical drafts[79] relating to biologicals only, the result was a foregone conclusion. Using that draft as a working document the Conference of the Committee on Disarmament (CCD, which had replaced ENDC) produced a

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction.[80] Its most important provision states:

> Art. 1. Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile, or otherwise acquire or retain:
>
> (1) Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;
>
> (2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

It also contains provisions requiring each State Party to destroy all of the items specified in Article 1 within nine months of the Convention coming into force (presumably, for the State concerned); and an undertaking not to transfer to any recipient, or to encourage the manufacture of, any of the prohibited items.

It is thus evident that States Parties to the 1925 Geneva Protocol and to the 1972 Bacteriological Convention are prohibited from *developing, manufacturing, stockpiling, acquiring, retaining,* or *using* biological weapons In view of the coverage of the Convention, nations have not made "first use" reservations. The two international agreements were intended to, and should eliminate biologicals from the arsenals of all such Parties and should mean that in any future war, large or small, limited or unlimited, conventional or unconventional, biologicals would not be a factor. Unfortunately, events have already demonstrated that these expectations will not be met.

A catastrophe occurred in Sverdlovsk in the Soviet Union in 1980 in which more than 1,000 people died as a result of what appears to have been anthrax poisoning, although Soviet officials claimed that the deaths had been caused by meat contaminated by hoof-and-mouth disease.[81] In addition, the United States has contended that the Soviet Union, either directly or through surrogates, has used biological (as well as chemical) weapons in Southeast Asia and in Afghanistan.[82] If, as is generally believed, the Sverdlovsk incident involved anthrax, and if, as the United States contends, biologicals have been used by the Vietnamese in Kampuchea and Laos and by the Soviet Union in Afghanistan, then the Soviet Union is manufacturing and using biologicals contrary to the provisions of the two agreements to which it is a party. Unfortunately, the 1925 Geneva Protocol contains no provision for verification and the only provision for verification contained in the 1972 Convention is a meaningless one providing for resort to the Security Council.

The predecessor to the *Handbook,* published at a time when the United States was not a party to the 1925 Geneva Protocol and when the 1972 Bacteriological Convention had not yet been drafted, stated:

> The United States is not a party to any treaty now in force that prohibits or restricts the use in warfare . . . of bacteriological weapons. Although the use of such weapons frequently has been condemned by states, including the United States, it remains doubtful that, in the absence of a specific restriction established by treaty, a state legally is prohibited at present from resorting to their use. [Footnotes omitted.][83]

This was probably a fair statement of the United States position until November 25, 1969, when President Nixon, on behalf of the United States, renounced the use of biological weapons by this country.[84] Three months later he included toxins in this renunciation.[85] Then this country became a party to the 1972 Bacteriological Convention and in 1975 it finally ratified the 1925 Geneva Protocol with its ban on the use of biologicals. Once again, however, it appears that the *Handbook* may be going too far when it asserts:

> The United States considers the prohibition against the use of biological weapons during armed conflict to be part of customary international law and thereby binding on all nations whether or not they are parties to the 1925 Gas Protocol or the 1972 Biological Weapons Convention.[86]

Can it be that while at a particular point in time a principle may not necessarily be a binding rule of customary international law, it becomes such as soon as the United States ratifies a treaty containing that principle? Certainly, the United States did not consider itself bound by any rule of customary international law prohibiting the use of biologicals when it issued its military manuals in 1955 and 1956; nor did it consider itself so bound at any time thereafter, even when (and until) President Nixon made his 1969 and 1970 statements unilaterally renouncing the use of biologicals and toxins. Would the 50 or more nations which are not parties to the 1925 Geneva Protocol and the 50 or more nations which are not parties to the 1972 Bacteriological Convention agree with the quoted statement? Or is this statement, and the similar one with respect to chemical weapons quoted above, inserted in order to convince non-parties that they might just as well ratify the agreements as they are bound by them in any event?

In view of the mobility of naval forces, it has always been considered unlikely, but not impossible, that naval vessels at sea will have to meet the problem of defending themselves against an attack using biological (or chemical) weapons. Should such an attack occur, for example by guided missiles which succeed in

penetrating the vessel's defenses and dispense the lethal item, the attack would have a devastating effect because air-intake systems would quickly disseminate it throughout the interior of the vessel, or because concurrent high-explosive ordnance would have pierced the shell of the ship. Items such as masks, special clothing, etc., available for the protection of the individual members of the crew, would greatly impede the functioning of the crew, even if there was time to don them. In addition, naval vessels, naval guns and naval aircraft might well be among the weapons systems used for the delivery of biologicals against land targets, should biologicals ever be used in wartime. Thus, in a field trial, a ship sailing 16 kilometers offshore travelled a distance of 260 kilometers parallel to the coastline discharging a harmless powder. The resulting aerosol covered an area of over 75,000 square kilometers. Had the material disseminated been a biological "depending on the organism and its degree of hardiness, areas from 5,000 to 20,000 square kilometers could have been effectively attacked, infecting a high proportion of unprotected people in the area."[87]

Conclusions

There is no law in force, conventional or customary, which prohibits the use of nuclear weapons. However, there can be no winners, but only losers, no victors, but only vanquished, in the event of a nuclear war. Whether or not a war in which nuclear powers are involved becomes a nuclear war will depend upon the wisdom and leadership of the political leaders of those powers and upon the extent to which the desire to win the war outweighs a reluctance to bring disaster not only upon the enemy, but also upon their own people and upon the peoples of neutral nations.

Chemical and biological weapons, like nuclear weapons, are weapons of mass destruction. Once released they are beyond the control of the user and, like nuclear weapons, their effects can come back to haunt the user. The use of certain chemicals can have widespread, long-lasting, and severe consequences for the environment and for the populations. This is even more true with respect to the use of many biologicals. The use of either of these types of weapons is prohibited by an international agreement to which more than two-thirds of the nations of the world community are parties. The very existence of biological weapons is prohibited by an international agreement with a similar amount of participation. Hopefully, there will, in due course, be an identical prohibition with respect to chemical weapons.

In view of the tremendous lethal and destructive capabilities of nuclear, chemical, and biological weapons one might almost regret our inability to turn the clock back to the nineteenth century, when nuclear, chemical, and biological weapons, as we now know them, were not even a gleam in a scientist's eyes.

Notes

1. *The Commander's Handbook on the Law of Naval Operations,* Naval Warfare Publication 9 (NWP 9) (1987) [hereinafter cited as *Handbook].* It replaces the *Law of Naval Warfare,* Naval Warfare Information Publication 10-2 (NWIP 10-2) (1955).

2. *See, e.g.,* Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, August 5, 1963, *United States Treaties and Other International Agreements* [hereinafter U.S.T.], v. 14. p. 1313, T.I.A.S. No. 5433, *United Nations Treaty Series* [hereinafter U.N.T.S.], v. 480, p. 43, reprinted in *International Legal Materials* [hereinafter I.L.M.], v. 2., p. 883 (1963); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, U.S.T., v. 18, p. 2410, T.I.A.S. No. 6347, U.N.T.S., v. 610, p. 205, I.L.M., v. 6, p. 386 (1967); Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, U.S.T., v. 23, p. 701, T.I.A.S. No. 7337, I.L.M., v. 10, p. 145 (1971). The *Handbook,* par. 10.2., lists six multilateral treaties and a number of bilateral treaties on the subject.

3. Resolutions of the General Assembly of the United Nations, such as Res. 1653 and Res. 2936 (United Nations, General Assembly, *Official Records: Resolutions adopted by the General Assembly during its Sixteenth Session 19 September 1961-23 February 1962,* Resolution 1653, A/5100 (New York: 1962), p. 4 and *id., Twenty-Seventh Session 19 September-19 December 1972,* Res. 2936, A/8730 (New York: 1973), p. 5) are nothing more than pious, and sometimes self-serving, declarations having no legal significance.

4. *Handbook,* par. 10.2.1. In Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order* (New Haven: Yale University Press, 1961), p. 659, the authors state, "The continuing attempts, however, by various governments and groups to 'outlaw' nuclear weapons tend to sustain the impression that such weapons are regarded as permissible pending the achievement of agreement to the contrary."

5. *American Journal of International Law (Supp.)* [hereinafter A.J.I.L. (Supp.)], v. 1, p. 95 (1907); Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents,* 3rd ed. (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1988), p. 101 [hereinafter cited as Schindler & Toman]. The United States is not a party to this Declaration and apparently does not consider that it has become customary international law. In the U.S. Army's FM 27-10, *The Law of Land Warfare* (Washington: U.S. Govt. Print. Off., 1956), par. 34, there is a list of various illegal weapons. Those covered by this Declaration are not included in that list. Nevertheless it would be difficult to quarrel with the quoted preambular provisions.

6. U.S. Statutes at Large, v. 32, p. 1803, reprinted in A.J.I.L. (Supp.), v. 1, p. 129 (1907).

7. U.S. Statutes at Large, v. 36, p. 2277, reprinted in A.J.I.L. (Supp.), v. 2, p. 90 (1908). Unfortunately, when the Department of State made its official translation from French to English in 1907, the translators did not refer back to the 1899 translation, with the result that there are some small but unimportant differences in wording between the two English versions.

8. *See supra* notes 6 and 7. When preparing the working document for the Diplomatic Conference which was to meet in 1974 in an attempt to bring the 1907 Hague Convention (IV) and the 1949 Geneva Conventions up to date, the International Committee of the Red Cross [hereinafter referred to as ICRC] included a version of the Martens clause in the preamble. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Bern: Federal Political Department, 1978), v.1, part III, p. 3 [hereinafter *Official Records].* The Diplomatic Conference moved this provision to a more prominent place, as Article 1(2) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I). *Official Records,* v. 1, part I, p. 126, reprinted in I.L.M., v. 6, p. 1396 (1977), and Schindler & Toman, *supra* note 5, p. 621 at p. 628 [hereinafter cited as Protocol I].

9. There were an estimated 80,000 casualties at Hiroshima and 65,000 at Nagasaki. The potential casualties referred to in the penultimate question were the estimates of what would occur in the event of armed landings on the home islands of Japan. These estimates appear, among other places, in Henry L. Stimson, "The Decision to Use the Atomic Bomb," *Bulletin of Atomic Scientists, v.* 3, no. 2, p. 40 (1947), and in Winston S. Churchill, *The Second World War, v. VI, Triumph and Tragedy* (Boston: Houghton Miflin, 1953), p. 638, where he estimates one million American dead and one-half million British dead.

10. Such an engagement would, of course, be fought in an area isolated from the civilian population and civilian objects—but the reactor accident at Chernobyl, in the Ukraine, in April 1986 demonstrated the distance which radioactivity can travel. It was detected in the Scandinavian countries a few days after it had occurred (Serge Schmemann, "Soviet Announces Nuclear Accident at Electric Plant," *New York Times,* April 29, 1986, p. A1:6) and was subsequently detected as far west as the United Kingdom (Francis X. Clines, "Chernobyl Cloud Keeps Welsh Lamb Off Table," *id.,* July 3, 1986, p. A1:2). In addition, one recent newspaper article

states that "many studies indicate the radiation released by a nuclear anti-aircraft missile would disable the radar gear on which the U.S. surface navy increasingly relies, and the shock waves sent through the sea from a nuclear antisubmarine rocket could disable any U.S. subs in the area." *Boston Globe,* Dec. 18, 1989, p.3:8.

11. United Nations, *Chemical and Bacteriological (Biological) Weapons and the Effects of Their Possible Use: Report of the Secretary-General,* A/7575/Rev. 1 (New York: 1969), par. 19 [hereinafter cited as *U.N. Report].* There are many types of poisonous and asphyxiating gases (choking, blister, nerve, blood, etc.) and many different such gases within each type (chlorine and phosgene are both choking gases; mustard and lewisite are both blister gases). Nerve gases were developed by Germany before World War II but, happily, were never used. Since then even more effective nerve gases have been developed.

12. A.J.I.L. (Supp.), v. 1, p. 157 (1907); Schindler & Toman, *supra* note 5, p. 105.

13. S.L.A. Marshall, *World War I* (New York: American Heritage, 1971), p. 157.

14. *Id.,* pp. 163-66. Actually, the reason for the rather unusual method of delivery was that the amount of gas that could be delivered by the available types of artillery shells was so small that they could only be used for very limited objectives. The effect of gas as an offensive weapon was probably not fully appreciated because of the lack of results three months earlier in Poland.

15. It has sometimes been argued that the German action at Ypres did not violate the 1899 Declaration because no projectiles were used. The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties established by the Diplomatic Conference, which was drafting the Treaty of Versailles, refused to accept this thesis and listed the use of poison gas as one of the war crimes committed by Germany during the course of the war. *See* A.J.I.L. (Supp.), v. 14, p. 115 (1920).

16. According to the *U.N. Report, supra* note 11, par. 3, during World War I "gas casualties numbered about 1,300,000, of which about 100,000 were fatal."

17. A.J.I.L. (Supp.), v. 13, p. 151 at p. 230 (1919).

18. Treaty Relating to the Use of Submarines and Noxious Gases in Warfare, Feb. 6, 1922, A.J.I.L. (Supp.), v. 16, p. 59 (1922); Schindler & Toman, *supra* note 5, p. 877 at p. 878.

19. U.S.T., v. 26, p. 571, T.I.A.S. No. 8061, *League of Nations Treaty Series* [hereinafter L.N.T.S.], v. 94, p. 65, Schindler & Toman, *supra* note 5, p. 115.

20. L.N.T.S., v. 94, p. 69; Schindler & Toman, *supra* note 5, p. 126. As of January 1, 1989, there were 135 parties to the 1925 Geneva Protocol, of which 50 had made reservations, many of the "first use" variety. U.S. Department of State, *Treaties in Force -January 1, 1989,* pp. 311-12.

21. "Warning to Japan Regarding the Use of Poisonous Gases," *Department of State Bulletin,* June 6, 1942, v. 6, p. 506.

22. "Tokyo Denies Using Gas," *New York Times,* June 9, 1942, p. 2:3.

23. A list of the "Instances and Allegations of CBW, 1914-1970" will be found in Stockholm International Peace Research Institute, *The Problem of Chemical and Biological Warfare,* v. 1, *The Rise of CB Weapons* (Stockholm: Stockholm International Peace Research Institute, 1971), pp. 125-230.

24. In a conference with a number of American officials and military officers in October 1941 concerning a possible German landing in England, Churchill said, "The enemy may use gas, but if so it will be to his own disadvantage, since we have arranged for immediate retaliation and would have admirable concentrated targets in any lodgments he might make on the coast. Gas warfare would also be carried home to his own country." Winston S. Churchill, *The Second World War,* v. III, *The Grand Alliance* (Boston: Houghton Miflin, 1950), p. 425. *See also* Marjorie M. Whiteman, *Digest of International Law* (Washington: U.S. Govt. Print. Off., 1968), v. 10, pp. 464-65.

25. "Use of Poison Gas," *Department of State Bulletin,* June 12, 1943, v. 8, p. 507.

26. Lynwood B. Lennon, "Defense Planning for Chemical Warfare," in Matthew Meselson, ed., *Chemical Weapons and Chemical Arms Control* (New York: Carnegie Endowment for International Peace, 1978), p. 1; Barton J. Bernstein, "Why We Didn't Use Poison Gas in World War II," *American Heritage,* August-September 1985, p. 40.

27. *E.g.,* United Nations, General Assembly, *Official Records: Resolutions adopted by the General Assembly during its Twenty-First Session 20 September-2- December 1966,* Res. 2162 B, A/6316 (New York: 1967), pp. 10-11.

28. United Nations, General Assembly, *Official Records: Resolutions adopted by the General Assembly during its Twenty-Third Session 24 September-21 December 1968,* Res. 2454 A, A/7218 (New York: 1969), p. 11.

29. *U.N. Report, supra* note 11, par. 369.

30. *Id.,* par. 375.

31. United Nations, General Assembly, *Official Records: Resolutions adopted by the General Assembly during its Twenty-Fourth Session 16 September -17 December 1969,* Res. 2603 A, A/7630 (New York: 1970), p. 16. The vote was 80-3-36 with the United States casting one of the three negative votes. United Nations Office of Public Information, *1969 Yearbook of the United Nations* (New York: 1970), p. 30.

32. U.S. Congress, House, Committee on Foreign Affairs, Subcommittee on National Security Policy and Scientific Developments, *U.S. Chemical Warfare Policy*, Hearings, 93rd Cong., 2nd Sess. (Washington: U.S. Govt. Print. Off.,, 1974) , p. 29.

33. *Memorandum on Chemical Warfare Presented to the Preparatory Commission for the Disarmament Conference by the Delegation of the United Kingdom*, Cmd. 4, no. 3747 (1930).

34. Anthony Lewis, "Britain Asserts CS Gas is not Banned," *New York Times*, Feb. 3, 1970, p. 3:6. "CS was the tear gas originally used by the United States in Vietnam. It has been the standard tear gas used by police throughout the world. Presumably the term "other such gases" as used by the British refers to CS-1 and CS-2, the later versions of CS.

35. Judge Advocate General Myron C. Cramer to the Secretary of War, SPJGW 1945/164, March 1945, "Memorandum concerning Destruction of Crops by Chemicals," I.L.M., v. 10, p. 1304 (1971). It should be borne in mind that at the time this memorandum was written, the United States was not a party to the 1925 Geneva Protocol.

36. Howard S. Levie, "Weapons of War," in Peter D. Trooboff, ed., *Law and Responsibility in Warfare The Vietnam Experience* (Chapel Hill, N.C.: University of North Carolina Press, 1975), p. 153 at p. 158 [hereinafter cited as Trooboff].

37. Letters from the General Counsel, Department of Defense, to the Chairman, Senate Committee on Foreign Relations, April 5, 1971, reprinted in I.L.M., v. 10, pp. 1300 and 1303 (1971).

38. *See* Executive Order 11,850, *infra* note 55 and accompanying text.

39. The predecessor to the *Handbook, supra* note 1, stated, "Weapons of chemical types *which are at times asphyxiating in nature*, such as white phosphorus, smoke, and flame throwers, may be employed." *The Law of Naval Warfare* (NWIP 10-2), par. 612a (emphasis added), reprinted in the appendix to Robert W. Tucker, *Naval War College International Law Studies, 1955: The Law of War and Neutrality at Sea* (Washington: U.S. Govt. Print. Off., 1957), p. 410. To the same effect, see the U.S. Army's Field Manual, *The Law of Land Warfare*, FM 27-10 (1956), par. 36.

40. ICRC, *Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflict: Report to the XXIst International Conference of the Red Cross* (Geneva: 1969), pp. 61-62.

41. *U.N. Report, supra* note 11, par. 19.

42. United Nations, Department of Political and Security Council Affairs, *Napalm and Other Incendiary Weapons and All Aspects of their Possible Use: Report of the Secretary-General*, A/8303/Rev.1 (New York: 1973), par. 193. See also United Nations Secretariat, *Respect for Human Rights in Armed Conflicts: Existing Rules of International Law Concerning the Prohibition or Restriction of Use of Specific Weapons*, A/9215 (New York: 1973), v. 1, pars. 20-21 and 59-86.

43. Stockholm International Peace Research Institute, *Incendiary Weapons* (Cambridge, Mass.: Massachusetts Institute of Technology Press, 1975), p. 24.

44. ICRC, *Weapons that May Cause Unnecessary Suffering or Have Indiscriminate Effects: Report on the Work of Experts* (Geneva: 1973), pars. 182-223; *Conference of Government Experts on the Use of Certain Conventional Weapons: Lucerne, 1974* (Geneva: 1975), pars. 43-117; *Conference of Government Experts on the Use of Certain Conventional Weapons: Lugano, 1976* (Geneva: 1976), pars. 9-12 and 104-112.

45. *Official Records, supra* note 8, v. 16, *passim*.

46. *Id.*, v. 1, part 11, p. 52.

47. *United Nations Conference on Prohibitions or Restrictions of Use of* Certain *Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects: Final Report of the Conference to the General Assembly*, A/CONF.95/15 (1980), Annex I, Appendix D, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Schindler & Toman, *supra* note 5, p. 190. The United States has, as yet, taken no steps towards the ratification of the Convention to which this Protocol is attached.

48. *The Law of Naval Warfare* (NWIP 10-2), *supra* note 39, par. 612b (emphasis added). The footnote to that statement is even more definite, stating, "[I]t is difficult to hold that the use of these [chemical] weapons is prohibited to all states according to customary international law."

49. "Almost" because of such occasional statements like that contained in the 1945 Memorandum of the Judge Advocate General of the Army, *supra* note 35, to the effect that, "An exhaustive study of the source materials, however, warrants the conclusion that a customary rule of international law has developed by which poisonous gases and those causing unnecessary suffering are prohibited. "

50. "Controversial" because, as we have seen, there is no general agreement as to whether lachrymatories and herbicides are included within the prohibitions of the 1925 Geneva Protocol.

51. Stewart Blumenfeld and Matthew Meselson, "The Military Value and Political Implications of the Use of Riot Control Agents in Warfare," in Carnegie Endowment for International Peace, *The Control of Chemical and Biological Weapons* (New York: 1971), pp. 64, 67-68.

52. Howard S. Levie, "Weapons of Warfare," in Trooboff, *supra* note 36, p. 154. During the conflict in Vietnam the North Vietnamese took the position that all chemical warfare, including both tear gas and herbicides, was prohibited by international law. Nguyen Khac Vien, ed., *Chemical Warfare,* Vietnamese Studies No. 29 (Hanoi: 1971), *passim.* They appear to have departed from this position in recent years, at least insofar as it applies to their own use of both chemical weapons and toxins. U.S. Department of State, *Chemical Warfare in Southeast Asia and Afghanistan: Report to the Congress from Secretary of State Alexander M Haig, Jr.,* Special Report No. 98, March 22, 1982; U.S. Department of State, *Chemical Warfare in Southeast Asia and Afghanistan: An Update: Report from Secretary of State George P. Shultz,* Special Report No. 104, November 1982.

53. "Statement by President Nixon," *Department of State Bulletin,* Dec. 15, 1969, v. 61, p. 541. A correction to this statement containing omitted paragraph appears at *Department of State Bulletin,* March 2, 1970, v. 62, p. 272, reprinted in A.J.I.L., v. 64, p. 386 (1970).

54. For a brief summary of the legislative history of this action, *see* "Introduction," in Trooboff, *supra* note 36, pp. 242-43, note 37. The U.S. ratification included the typical "first use" reservation.

55. Gerald R. Ford, Executive Order 11,850, "Renunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents," *Federal Register,* April 8, 1975, p. 16,187, reprinted in I.L.M., v. 14, p. 794 (1975).

56. *See supra* note 48 and accompanying text.

57. *Handbook, supra* note 1, par. 10.3.2.1.

58. It will be recalled that U.N. Resolution 2603 A, *supra* note 31, was adopted with three votes against (including the United States) and 36 abstentions.

59. *See infra* note 80.

60. *See infra* text accompanying notes 75 and 76.

61. "Bush, in Geneva, Offers Chemical Arms Ban," *New York Times,* Apr. 19, 1984, p. A13:1; "U.S. Proposes Banning Chemical Weapons," *Department of State Bulletin,* June 1984, v. 84, p. 40.

62. Draft of April 27, 1987, *1987 Arms Control Reporter* 704.D.105.

63. *1989 Arms Control Reporter,* 704.B.338.2.

64. Robert Pear, "U.S. and Moscow Settle Key Issues on Chemical Arms: Agree on Ban in 10 Years, but Constitutional Questions Are Raised by Accord on Surprise Inspections," *New York Times,* July 18, 1989, p. A1:6. This sudden agreement may well have been prompted by the public reaction to the construction by a West German chemical concern at Rabta, Libya, of a plant capable of manufacturing large quantities of mustard gas. *1989 Arms Control Reporter,* 705.B.339-354.2.

65. "Outline of the Rolling Text and Principal Remaining Issues—1 May 1989," *1989 Arms Control Reporter,* 704.D.131-137.

66. "Changes of the Rolling Text and Principal Remaining Issues—15 October 1989," *id.,* 704 3 139 144.

67. Pear, "U.S. and Moscow Settle Key Issues on Chemical Arms," *supra* note 64. For a discussion of the constitutional problem, see, Dennis S. Aronowitz, *Legal Aspects of Arms Control Verification in the United States* (Dobbs Ferry: Oceana Publications, 1965), pp. 104-14.

68. United Nations Convention on the Law of the Sea (New York: United Nations, 1983), Sales No. E.83.V.5. The negotiation of this Convention took from 1973 to 1982; Protocols Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Armed Conflicts, I L S., v. 16, p. 1391 (1977), Schindler & Toman, *supra* note 5, pp. 621 and 689. The negotiation of these Protocols took from 1974 to 1977, preceded by several years of preliminary negotiations.

69. In September 1989 an International Government-Industry Conference Against Chemical Weapons consisting of representatives of more than 65 Governments and of the world's major chemical manufacturers, meeting in Canberra, Australia, endorsed a chemical warfare convention and sought ways to assist in bringing the Geneva negotiations to a successful conclusion. Department of State, *GIST,* November 1989. On September 23, 1989, at Jackson Hole, Wyoming, the Soviet Union and the United States signed an *Agreement Regarding a Bilateral Verification Experiment and Data Exchange Related to Prohibition of Chemical Weapons,* reprinted in I.L.S., v. 28, p. 1438.

70. For the sake of brevity, the broader term "biological" is hereinafter used alone. It is intended to include toxins.

71. *U.N. Report, supra* note 11, par. 17.

72. *See supra* text accompanying note 19.

73. *Materials on the Trial of Former Servicemen of the Japanese Army Charged with Manufacturing* and *Employing Bacteriological Weapons* (Moscow: Foreign Languages Publishing House, 1950).

74. Henry Scott Stokes, "Japan Looks at Grisly Side of its Past," *New York Times,* July 13, 1982, p. A3:1. *See* also John W. Powell, "Japan's Biological Weapons, 1930-1945," *Bulletin of Atomic Scientists,* Oct. 1981, v. 37, pp. 44-52; "Japan's Biological Weapons, 1930-1945: An Update," *Bulletin of Atomic Scientists,* Oct. 1982,

v. 38, p. 62. The Germans may well have engaged in similar experimentation or employment during World War II, but, if so, the usage was not for military purposes, their victims being German or Jewish civilians.

75. United States Arms Control and Disarmament Agency, *Documents on Disarmament* (Washington: U.S. Govt. Print. Off., 1962), p. 104 [hereinafter cited as *Documents on Disarmament*].

76. *Id., p.* 279.

77. One might question the seriousness of the two proposals as far as they related to nuclear weapons.

78. *Documents on Disarmament, supra* note 75, pp. 324-25 (1969).

79. *Documents on Disarmament, supra* note 75, pp. 456-57 (1971).

80. U.S.T., v. 26, p. 583, T.I.A.S. No. 8062, reprinted in I.L.M., v. 11, p. 310 (1972). This Convention was opened for signature in Washington, London and Moscow on April 10, 1972. As of January 1, 1989, 110 states had either ratified or acceded to it, including all of the major powers. U.S. Department of State, *Treaties in Force - January 1, 1989* (Washington: U.S. Govt. Print. Off., 1989), pp. 28~85.

81. Bernard Gwertzman, "Soviet Mishap Tied to Germ-War Plant," *New York Times,* March 19, 1980, p. A1:6; Bernard Gwertzman, "Soviet Lays Outbreak of Illness to Bad Meat not Germ-War Plant," *id.,* March 21, 1980, p. A1:1; "Soviet Now Mentioning Foot and Mouth Disease," *id.,* March 27, 1980, p. A11:1.

82. *See* Department of State Special Reports, *supra* note 52.

83. *The Law of Naval Warfare, supra* note 39, par. 612B. The Army's *The Law of Land Warfare, supra* note 39, par. 38, is to the same effect.

84. Statement of President Nixon, "Chemical and Biological Defense Policies and Programs," November 25,1969, *Weekly Compilation of Presidential Documents,* December 1,1969, *Department of State Bulletin,* December 15, 1969, v. 61, p. 541. (A correction to this statement containing omitted paragraphs appears at *id.,* March 2, 1970, v. 62, p. 272.)

85. White House Press Release, "U.S. Renounces Use of Toxins as a Method of Warfare," February 14, 1970, *Department of State Bulletin,* March 2, 1970, v. 62, p. 226.

86. *Handbook, supra* note 1, par. 10.4.2.

87. *U.N. Report, supra* note 11, pars. 39-41. Chemical weapons used in the same way would have to be disseminated in much greater quantities and, even so, would cover a considerably smaller area. However, the result would still be devastating and would establish beyond doubt that they are, indeed, weapons of mass destruction.

Nuclear, Chemical, and Biological Weapons

Addendum

In 1971 there was drafted a *Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed* and *the Ocean Floor and the Subsoil Thereof.* The United States is a Party to this Treaty.

In 1972 the United Nations Committee on Disarmament drafted a *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction* which was approved by the General Assembly of the United Nations. The United States has ratified this Convention, as have the great majority of other States. All types of bacteriological and biological weapons are now completely banned and each State is given nine months from the date of the entry into force of the Convention within which to destroy all such weapons in its stockpile. (Presumably this means nine months after the Convention enters into force for a particular country.) The Convention itself entered into force on 26 March 1975. As is not unusual, Iraq is believed to continue to possess such weapons

and has placed constant difficulties in the way of the United Nations inspectors who have attempted to ascertain whether it is complying with the terms of the 1991 Security Council Resolution (S.C. Res. 687) requiring their destruction, as well as that of chemical weapons.

In 1993 the General Assembly of the United Nations approved a *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.* This Convention supplements the *1925 Geneva Gas Protocol* which merely prohibited "use." Once again, Iraq is believed to continue to possess such weapons and has placed constant difficulties in the way of the United Nations inspectors who have attempted to ascertain whether it is complying with the terms of Security Council Resolution 687. (The United States Senate gave its advice and consent to the ratification of this treaty on 24 April 1997, despite the vehement opposition of Senator Jesse Helms, Chairman of the Senate Foreign Relations Committee, and President Clinton ratified it on 25 April 1997. Unfortunately, the ratification includes a number of "understandings," many of which will not coincide with the interpretations of other Parties to the Convention.)

On 15 December 1994 the General Assembly of the United Nations adopted a resolution in which it requested the International Court of Justice to provide an advisory opinion on the question: "Is the threat or use of nuclear weapons in any circumstances permitted under international law?" The Court decided unanimously that "There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons" and by a vote of eleven to three that "There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such." However, a further holding of the Court, on which the vote was seven to seven, decided by the President's casting vote, states:

> It follows from the above mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law.
>
> However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

XV

The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders

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Introduction

As long as there have been trials for violations of the laws and customs of war, more popularly known as "war crimes trials", the trial tribunals have been confronted with the defense of "superior orders"—the claim that the accused did what he did because he was ordered to do so by a superior officer (or by his Government) and that his refusal to obey the order would have brought dire consequences upon him. And as along as there have been trials for violations of the laws and customs of war the trial tribunals have almost uniformly rejected that defense. However, since the termination of the major programs of war crimes trials conducted after World War II there has been an ongoing dispute as to whether a plea of superior orders should be allowed, or disallowed, and, if allowed, the criteria to be used as the basis for its application. Does international action in this area constitute an invasion of the national jurisdiction? Should the doctrine apply to all war crimes or only to certain specifically named crimes? Should the illegality of the order received be such that any "reasonable" person would recognize its invalidity; or should it be such as to be recognized by a person of "ordinary sense and understanding"; or by a person of the "commonest understanding"? Should it be "illegal on its face"; or "manifestly illegal"; or "palpably illegal"; or of "obvious criminality"?[1] An inability to reach a generally acceptable consensus on these problems has resulted in the repeated rejection of attempts to legislate internationally in this area. Consequently, the continued existence of an international rule denying superior orders as a defense to a charge of violating the laws and customs of war appears to be in jeopardy—if it has not already ceased to exist.[2]

More than five centuries ago, when one Peter von Hagenbach was tried by an "international" tribunal for maltreating, and permitting his subordinates to maltreat, the inhabitants of the town of Breisach while he was in command of what might be termed a military occupation (although the war did not begin

until thereafter), his defense was that his actions were in compliance with the orders of his master, the Duke of Burgundy. Even though complete obedience to the commands of one's liege lord was a way of life in the fifteenth century, and even though human life, particularly of civilians, was not respected then as it is today, von Hagenbach was found guilty and he was sentenced to death.[3]

Similarly, in 1865, at the conclusion of the American Civil War, when Captain Henry Wirz, the erstwhile Confederate commander of the notorious prisoner-of-war camp at Andersonville, Georgia, was tried before a federal Military Commission for the maltreatment of the prisoners of war in his custody, one of his defenses was "superior orders." In his personal summation Wirz said:[4]

> I think I may also claim as a self-evident proposition that if I, a subaltern officer, merely obeyed the legal orders of my superiors in the discharge of my official duties, I cannot be held responsible for the motives that dictated such orders.

Against this claim the prosecutor asserted:[5]

> I know that it is urged that during all this time he was acting under General Winder's orders, and for the purpose of argument I will concede that he was so acting. A superior officer cannot order a subordinate to do an illegal act, and if a subordinate obey such an order and disastrous consequences result, the superior and the subordinate must answer for it. General Winder could no more command the prisoner to violate the laws of war than could the prisoner do so without orders. The conclusion is plain, that where such orders exist both are guilty. . . .
>
> And notwithstanding his earnest appeal, made to you in his final statement, begging that he, a poor subaltern, acting only in obedience to his superior, should not bear the odium and punishment deserved, with whatever force these cries of a desperate man, in a desperate and terrible strait, may come to you, there is no law, no sympathy, no code of morals, that can warrant you in refusing to let him have all justice, because the lesser and not the greater criminal is on trial.

Wirz was found guilty and he was sentenced to death.[6]

It is interesting to note that in the first (1906) edition of his now famous and standard work on international law, Oppenheim said:[7]

> If members of the armed forces commit violations *by order* of their Government, they are not war criminals and cannot be punished by the enemy; the latter can, however, resort to reprisals. In case members of forces commit violations ordered by their commanders, the members may not be punished, for the commanders are alone responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy.

That statement, or one closely resembling it, appeared in the subsequent editions of Oppenheim's treatise, with its various editors, including the first edition (the 5th) edited by Lauterpacht.[8] In the next (6th) edition Lauterpacht reversed himself[9] and in the 7th edition, the last that he edited (and the last edition of the second volume that has appeared to date), the following rule is set forth:[10]

> 253. The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. A different view has occasionally been adopted in military manuals, and by writers, but it is difficult to regard it as expressing a sound legal principle. Undoubtedly, a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously, the legal merits of the order received; that rules of warfare are often controversial; and that an act otherwise amounting to a war crime may have been executed in obedience to orders conceived as a measure of reprisals. Such circumstances are probably in themselves sufficient to divest the act of the stigma of a war crime. . . . However, subject to these qualifications, the question is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity.

The Preliminary Peace Conference which met at Versailles in 1919 to draft a treaty of peace with Germany at the end of World War II established a *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties* with the task of inquiring into and reporting upon, among other things, the degree of responsibility for breaches of the laws and customs of war. In its report the Commission listed thirty-two types of violations of the laws and customs of war and, concerning the defense of superior orders, its report unanimously stated:[11]

> We desired to say that civil and military authorities cannot be relieved from responsibility by the mere fact that a higher authority might have been convicted of the same offence. It will be for the court to decide whether a plea of superior orders is sufficient to acquit the person charged from responsibility.

Article 228 of the *Treaty of Versailles* which actually ended World War I for many of the belligerents required the German Government to hand over to the

Allied Governments for trial "all persons accused of having committed an act in violation of the laws and customs of war."[12] In the face of the public opinion prevailing in Germany at that time no Government could have survived compliance with such a requirement and so it was subsequently agreed that the individuals named would, instead, be tried by the Supreme Court of Leipzig. The trials were a fiasco;[13] but in one of them, involving the trial of two officers who had obeyed the order of their commanding officer to fire upon the lifeboats of a hospital ship which their submarine had torpedoed, the German Court said:[14]

> It is true that according to the [German] Military Penal Code, if the execution of an order in the ordinary course of duty involves such a violation of the law as is punishable, the superior officer issuing such an order is alone responsible. However, the subordinate obeying an order is liable to punishment, if it was known to him that the order of the superior involved the infringement of civil or military law. This applies in the case of the accused. It is certainly to be urged in favour of the military subordinates that they are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can be held to exist, if such an order is universally known to everybody, including the accused, to be without any doubt whatever against the law.

The accused were found guilty by the Court and were sentenced to imprisonment for a term of years.[15]

While the *1922 Treaty of Washington*[16] never came into force because of the failure of ratification by France, it is of interest to note that Article 3 thereof stated:

> The Signatory Powers, desiring to ensure the enforcement of the humane rules of existing law declared by them with respect to attacks upon and the seizure and destruction of merchant ships, further declare that any person in the service of any Power who shall violate any of those rules, whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy and may be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found.

Although the inter-war period (1919-1939) was far from free of international hostilities, the subject of war crimes trials appears to have been raised, or even written about by the students of the subject, on comparatively few occasions.[17]

World War II and its Aftermath

All during the course of World War II there had been statements made by the Allies that there would be trials for those major war criminals who had

plunged the world into catastrophic war and for those individuals who had otherwise violated international law.[18] A private conference of British and European jurists from occupied countries which met in Cambridge in November 1941 established a committee to draft rules and procedures to govern war crimes trials. The sub-committee on superior orders concluded that

> generally speaking, the codes of law of the respective countries recognize the plea of superior orders to be valid if the order is given by a superior to an inferior officer, within the course of his duty and within his normal competence, provided the order is not blatantly illegal. The conclusion reached was that each case must be considered on its own merits, but that the plea is not an automatic defence.[19]

The London International Assembly, established by the League of Nations Union of Great Britain, adopted a resolution which included the following with respect to the defense of superior orders:[20]

> *(a)* That an order given by a superior to an inferior to commit a crime violating international law was not in itself a defence, but that the Courts were entitled to consider whether the accused was placed in a 'state of compulsion' to act as ordered, and acquit him or mitigate the punishment accordingly;
>
> *(b)* That such exculpating or extenuating circumstances should in all cases be disregarded in two types of cases: when the act was so obviously heinous that it could not be committed without revolting the conscience of an average human being; and when the accused was, at the time of the offence, a member of an organization whose membership implied the execution of criminal orders.

The *United Nations Commission for the Investigation of War Crimes* (later the United Nations War Crimes Commission) was established in London on 20 October 1943 by 17 of the States at war with Germany and Japan. (The Soviet Union was not represented at this meeting, nor did it later participate in the activities of the Commission.)[21] Its Legal Committee concluded that a general understanding between the victorious belligerent nations on the subject of superior orders was desirable and stated that it believed the following rule to be consistent with international law:[22]

> The defence of obedience to superior orders shall not constitute a justification for the commission of an offence against the laws and customs of war, if the order was so manifestly contrary to those laws or customs that, taking into account his rank or position and the circumstances surrounding the commission of the offence, an individual of ordinary understanding would have known that such an order was illegal.

This recommendation did not meet with unanimous support and the Commission's Enforcement Committee eventually recommended that the Commission submit the following statement to the Governments:[23]

> The Commission has considered the question of 'superior orders'. It finally decided to leave out any provision on the subject. . . . The Commission considers that it is better to leave it to the court itself in each case to decide what weight should be attached to a plea of superior orders. But the Commission wants to make it clear that its members unanimously agree that in principle this plea does not of itself exonerate the offenders.

Finally, in March 1945, the Commission itself adopted the following position:[24]

> Having regard to the fact that many, if not most, of the members States have legal rules on the subject, some of which have been adopted very recently, and that in most cases these rules differ from one another, and to the further consideration that the question how far obedience to the orders of a superior exonerates an offender or mitigates the punishment must depend on the circumstances of the particular case, the Commission does not consider that it can usefully propound any principle or rule.
>
> The Commission unanimously maintains the view . . . that the mere fact of having acted in obedience to the orders of a superior does not of itself relieve a person who has committed a war crime from responsibility.

Early in 1945 the United States prepared a draft of a proposal for an international military tribunal to try the major German war criminals. Paragraph 11 of that proposal stated:[25]

> The fact that a defendant acted pursuant to order of a superior or government sanction shall not constitute an absolute defense but may be considered either in defense or in mitigation of punishment if the tribunal before which the charges are being tried determines that justice so requires.

That proposal was submitted to the representatives of the Provisional French Government, the Soviet Union, and the United Kingdom at San Francisco in April 1945, together with a later draft in which a paragraph concerning trial procedures contained a sub-paragraph stating that any agreement on the matter should include a provision which could,

> *(c)* except as the court in its discretion shall deem appropriate in particular cases, exclude any defense based upon the fact that the accused acted under orders of a superior officer or pursuant to state or national policy.[26]

Then, on 14 June 1945, the United States distributed a revision of its draft proposal, a document which later became the working paper for the London Conference which met to draft the definitive Charter of the International Military Tribunal. Paragraph 15 of that revision stated:[27]

> In any trial before an International Military Tribunal the fact that a defendant acted pursuant to order of a superior or government sanction shall not constitute a defense *per se,* but may be considered either in defense or in mitigation of punishment if the tribunal determines that justice so requires.

In a further Revised Draft submitted by the United States on 30 June 1945, during the course of the London Conference, the relevant paragraph now read:[28]

> 17. The fact that a defendant acted pursuant to order of a superior or to government sanction shall not constitute a defense *per se,* but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

A Soviet proposal which was tabled at the Conference on 2 July 1945 stated:[29]

ARTICLE 29

Carrying Out of an Order

> The carrying out by the defendant of an order of his superior or government shall not be considered a reason excluding his responsibility for the crimes set out in Article 2 of this Statute. In certain cases, when the subordinate acted blindly in carrying out the orders of this superior, the Tribunal has right to mitigate the punishment of the defendant.

A drafting subcommittee was then created by the Conference. The provision which it drafted on the question of superior orders varied little from that set forth in the last revision proposed by the United States:[30]

> 8. The fact that the defendant acted pursuant to order of a superior or the Government sanction shall not free him from responsibility but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

In what was apparently the only real discussion of superior orders which took place at the London Conference, the following occurred:[31]

> General Nikitchenko: In article 7 [8?] of the Charter I do not propose any change but would like to point out two considerations. Would it be proper really in speaking of major criminals to speak of them as carrying out some order of a

superior? This is not a question of principle really, but I wonder if that is necessary when speaking of major criminals.

Sir David Maxwell Fyfe: There are two points: first, they have already said they were just doing what Hitler said they should do; and secondly, in international law, certainly in some cases, superior orders were a defense, but in the sixth and seventh editions of Oppenheim it appears that they aren't a defense. If we don't make it clear, we may have some trouble on it.

General Nikitchenko: There is a misunderstanding. I wasn't against disallowing orders of a superior as a defense, but I thought that in regard to major criminals it would be improper to say that superior orders could be used in mitigation of punishment.

Sir David Maxwell Fyfe: It seems to me difficult. Suppose someone said, he was threatened to be shot if he did not carry out Hitler's orders. If he wasn't too important, the Tribunal might let him off with his life. It seems to be a matter for the Tribunal.

In one of the German cases on trial which were such a farce after the last war they did say that superior orders were no defense but could be taken into account on mitigation. That has been the general rule on superior orders in international law books.

General Nikitchenko: If the other heads of the delegations consider it best, we have no intention of pressing it. In general, it should be considered in mitigation; we think it is proper.

* * * *

Judge Falco: Is it necessary to indicate to the Tribunal the reason for mitigation? If we say simply that orders are not a defense, it would seem to be left to the tribunal to say that they may be in mitigation.

Mr Justice Jackson: That is about what we proposed originally—not an absolute defense but a mitigation.

Sir David Maxwell Fyfe: The important part is that it should not be an absolute defense.

Judge Falco: That is the important part. Must we add that that is the reason for the Tribunal to consider mitigation?

With some minor editing the Article 8 set forth above became Article 8 of the Charter of the International Military Tribunal which later sat in Nuremberg. As finally adopted it stated:[32]

> Article 8. The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

In applying that rule at the Nuremberg Trial the International Military Tribunal said:[33]

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

Another statement in that judgment was to effect that[34]

> When they [certain of the defendants] with knowledge of his [Hitler's] aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organized domestic crime.[35]

In considering whether the General Staff and the High Command of the Germany armed forces should be found to be criminal organizations, the Tribunal said:[36]

> Many of these men have made a mockery of the soldier's oath of obedience to military orders. When it suits their defense they say they had to obey; when confronted with Hitler's brutal crimes, which are shown to have been within their general knowledge, they say they disobeyed.

On 20 December 1945 the Allied Control Council for Germany, consisting of military representatives of the Occupying Powers, the same four nations which had drafted the London Charter of the International Military Tribunal, promulgated Allied Control Council Law No. 10, setting forth the basis for the trials in Germany of war criminals other than those to be tried by the

International Military Tribunal.[37] The provisions of Article II(4)(b) of that Law with respect to superior orders were substantially the same as those of the London Charter:

> The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.

In *The Hostage Case* the Tribunal, convened pursuant to Law No. 10, held:[38]

> Implicit obedience to orders of superior officers is almost indispensable to every military system. But this implies obedience to lawful orders only. If the act done pursuant to a superior's orders be murder, the production of the order will not make it any less so. It may mitigate but it cannot justify the order. We are of the view, however, that if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the inferior will be protected. But the general rule is that members of the armed forces are bound to obey only the lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates international law and outrages fundamental concepts of justice.

In effect, here the Tribunal was saying that if the subordinate did not know and could not be expected to know that the order was illegal, there was no criminal intent, no *mens rea,* and the subordinate would not be guilty. The opinion in *The Einsatsgruppen Case* is to the same effect, the Tribunal there having said:[39]

> Those of the defendants who admit participation in the mass killings which are the subject of this trial, plead that they were under military orders and, therefore, had no will of their own. As intent is a basic prerequisite to responsibility for crime, they argue that they are innocent of criminality since they performed the admitted executions under duress, that is to say, superior orders. The defendants formed part of a military organization and were, therefore, subject to the rules which govern soldiers. It is axiomatic that a military man's first duty is to obey. If the defendants were soldiers and as soldiers responded to the command of their superiors to kill certain people, how can they be held guilty of crime? That is the question posed by the defendants. The answer is not a difficult one.
>
> The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery. It is a fallacy of wide-spread consumption that a soldier is required to do everything his superior officer orders him to do.... The fact that a soldier may not, without incurring unfavorable consequences, refuse to drill, salute, exercise, reconnoiter, and even go into battle, does not mean that he must

fulfill every demand put to him. In the first place, an order to require obedience must relate to military duty. An officer may not demand of a soldier, for instance, that he steal for him. And what the superior officer may not militarily demand of his subordinate, the subordinate is not required to do. Even if the order refers to a military subject it must be one which the superior is authorized, under the circumstances, to give.

The subordinate is bound only to obey the lawful orders of his superior and if he accepts a criminal order and executes it with a malice of his own, he may not plead superior orders in mitigation of his offense. If the nature of the ordered act is manifestly beyond the scope of the superior's authority, the subordinate may not plead ignorance to the criminality of the order. If one claims duress in the execution of an illegal order it must be shown that the harm caused by obeying the illegal order is not disproportionally greater than the harm which would result from not obeying the illegal order.[40]

In *High Command Case*, the Tribunal before which that case was tried quoted a 1944 statement of Goebbels, the Nazi Propaganda Minister, in which he had said:[41]

> It is not provided in any military law that a soldier in the case of a despicable crime is exempt from punishment because he passes the responsibility to his superior, especially if orders of the latter are in evident contradiction to all human morality and every international usage of warfare.

As would be expected, that statement was made in his official capacity as Minister of Propaganda and referred to alleged acts of Allied troops. It was not intended as a statement of German military law, nor as an admonition to the German soldier.

Concerning the act of an intermediate headquarters in passing down to its subordinate commands an order received from higher headquarters, the Tribunal in *High Command Case* went on to say:[42]

> Military commanders in the field with far reaching military responsibilities cannot be charged under international law with criminal participation in issuing orders which are not obviously criminal or which they are not shown to have known to be criminal under international law. Such a commander cannot be expected to draw fine distinctions and conclusions as to legality in connection with orders issued by his superiors. He has the right to presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance. He cannot be held criminally responsible for a mere error in judgment as to disputable legal questions.
>
> It is therefore considered that to find a field commander criminally responsible for the transmittal of such an order, he must have passed the order to the chain of

command and the order must be one that is criminal on its face, or one which he is shown to have known was criminal.

In a digest of the laws applied by various courts which conducted war crimes trials after World War II the *United Nations War Crimes Commission* said:[43]

> The plea of superior orders has been raised by the Defence in war crimes trials more frequently than any other. The most common form of the plea consists in the argument that the accused was ordered to commit the offence by a military superior and that under military discipline orders must be obeyed. A closely related argument is that which claims that had the accused not obeyed he would have been shot or otherwise punished; it is sometimes also maintained in court that reprisals would have been taken against his family.
>
> It has often been said that an accused is entitled under international law to obey commands which are lawful or which he could not reasonably be expected to know were unlawful. The question, however, arises whether these commands must be lawful under municipal law or international law; ... the legality under municipal law of the accused's *acts* does not free him from liability to punishment if those acts constitute war crimes, and it seems to follow that the plea of having acted upon *orders* which were legal under municipal law must also fail to constitute a defence. On the other hand, if the order is legal under international law, it is difficult to show how an act committed in obedience to it could be illegal under that system.... The true test in practice is whether an order, *illegal* under international law, on which an accused has acted was or must be presumed to have been known to him to be so illegal, or was obviously so illegal ("illegal on its face" to use the term employed by the Tribunal in the *High Command* Trial) or should have been recognised by him as being so illegal.

The provisions contained in Article 8 of the London Charter denying superior orders as a defense and limiting its application to mitigation of punishment were followed by many of the laws enacted and orders issued after the conclusion of World War II which were concerned with the trials of violators of the laws and customs of war. Thus, the Charter attached to the Special Proclamation creating the *International Military Tribunal for the Far East* (IMTFE), issued on 19 January 1946 by General Douglas MacArthur as Supreme Commander for the Allied Powers (SCAP), included the following provisions:[44]

> Article 6. Responsibility of Accused. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such an accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

None of the judges of the IMTFE, concurring or dissenting, found it necessary to advert to the quoted provision of its Charter either in the lengthy judgment or in the other opinions.[45]

As we have already seen, Article 8 of the London Charter was also the source for the cognate provision of Allied Control Council Law No. 10 and for similar provisions issued in other occupied territories.[46]

United Nations

On 11 December 1946 the General Assembly of the United Nations unanimously adopted a resolution the first operative paragraph of which stated that the General Assembly:[47]

> *Affirms* the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal.

Another operative paragraph charged its Committee on Codification (later changed to the International Law Commission) with the formulation of those principles, either in the context of a code of offenses against the peace and security of mankind or of an international criminal code. When the International Law Commission had prepared its first draft in complying with the task assigned to it of "formulating" the principles of international law recognized in the London Charter and in the Judgment of the Nuremberg Tribunal, its Principle IV read as follows:[48]

> The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

The overall document received a mixed reception in the Sixth Committee of the General Assembly, the result of which was the preparation of a draft resolution, later adopted by the General Assembly,[49] referring it to member States for comment, a process which had early evolved in the United Nations as a method of indefinite postponement.

The following year, in accordance with the directive received from the General Assembly, the International Law Commission began to work on a *Draft Code of Offences Against the Peace and Security of Mankind.* Article 4 of the first draft text prepared by the Special Rapporteur, J. Spiropoulos, stated:[50]

> The fact that a person charged with a crime defined in this code acted under the orders of a government or a superior may be taken into consideration either as a defence or in mitigation of punishment if justice so requires.

This proved unacceptable to the Commission which modified the Rapporteur's proposal to read:[51]

> The fact that a person charged with an offence defined in this Code acted pursuant to order of his government or of a superior does not relieve him from responsibility, provided a moral choice was in fact possible to him.

In its commentary on this Article the Commission said:

> Principle IV of the Commission's formulation of the Nuremberg principles, on the basis of the interpretation given by the Nuremberg Tribunal to article 8 of its Charter, states: "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."
>
> The observations on principle IV, made in the General Assembly during its fifth session, have been carefully studied; no substantial modification, however, has been made in the drafting of this article, which is based on a clear enunciation by the Nuremberg Tribunal. The article lays down the principle that the accused is responsible only if, in the circumstances, it was possible for him to act contrary to superior orders.

The International Law Commission's Draft Code did not meet with any greater acceptance in the General Assembly than had its formulation of the Nuremberg Principles and the project was shelved for some time. When it was once again taken up by the Commission in 1954, Article 4 was redrafted to state:[52]

> The fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not comply with that order.

This time the Commission's commentary stated:

> Since some Governments had criticized the expression 'moral choice', the Commission decided to replace it by the wording of the new text above.

However, on the recommendation of its Sixth Commission, the General Assembly postponed all action on the draft Code until a decision had been reached on the definition of aggression.[53] This did not occur until 1974 and the *Draft Code of Offences Against the Peace and Security of Mankind* did not reappear on the agenda of the International Law Commission until 1981. During its 1984 session it once again started to have annual discussions on the subject. Most of

its time has been spent on the question of the offenses to be included and through 1986 the problem of superior orders had not been reached for discussion. As a result, today, almost forty years later, the efforts of the International Law Commission to "formulate" the Nuremberg Principles and to draft a code of offenses against the peace and security of mankind have still not been successful.

On the same day that it adopted the resolution on the "formulation" of the Nuremberg Principles and the drafting of a code of offenses, the General Assembly adopted another resolution which requested the Economic and Social Council to draw up a convention on genocide.[54] The Council, in turn, requested the Secretary-General to collate the comments received and to prepare a draft convention on the subject. Article V of his draft provided:[55]

> Command of the law or superior orders shall not justify genocide.

No provision on the subject of superior orders appears in the convention as eventually drafted and adopted.[56]

Other International Efforts to Codify the Rule

We have seen the actions taken by the United Nations General Assembly, and by its subordinate bodies, concerning the codification of the rule with respect to the non-availability of the defense of superior orders in international criminal trials. Now let us review the efforts of other international bodies on this subject.

In 1948 the XVIIth (Stockholm) International Red Cross Conference recommended that the International Committee of the Red Cross (ICRC) draft provisions for the repression of breaches of the humanitarian conventions which were then in the process of evolution[57] and which ultimately became the four *1949 Geneva Conventions for the Protection of War Victims.*[58] The ICRC complied with that resolution and, with the help of a small group of recognized experts, drafted a number of separate provisions on the subject, one of which provided:[59]

> ARTICLE 40 (a)
>
> The fact that the accused acted in obedience to the orders of a superior or in pursuance of a law or regulation shall not constitute a valid defence, if the prosecution can show that in view of the circumstances the accused had reasonable grounds to assume that he was committing a breach of this Convention. In such a case the punishment may nevertheless be mitigated or remitted, if the circumstances justify.

With respect to this proposed provision the ICRC said:[60]

It establishes, within prescribed limits, the responsibility of offenders; it rejects the principle, recognized in various military penal codes, that orders received from a superior exculpate the subordinate who has carried them out.

The text proposed does not, however, go as far as the Declaration of London of August 8, 1945, which, in the case of 'war crimes', only admitted the plea of superior orders as a possible extenuating circumstance, the executor of the order bearing full responsibility.

The suggested text appears to the ICRC to be an acceptable compromise between obedience to orders,—an essential prerequisite of military discipline,—and the moral duty to oppose any patent atrocity, such as the massacre of defenceless women and children.

It should be noted that the onus of proof lies on the prosecution. This is important in view of the fact that certain legislations called upon the accused to prove that he was not guilty.

The experts debated whether, even in the case of flagrant participation in such violations, the threat of death were not sufficient to constitute a legal excuse for obeying superior orders. No concession of this kind was however made, as every latitude is left to the judge to mitigate or remit punishment. This power of discretion seems the best practical solution to the conflict on this point between English and Continental conceptions of law.

The few bits of legislative history which are available on this subject, particularly the report of its Special Committee, indicate that the 1949 Diplomatic Conference discarded the forgoing provision on the following basis:[61]

[N]or could general agreement be reached at this stage regarding the notions of complicity, attempted violation, duress or legitimate defense or the plea 'by orders of a superior'. These should be left to the judges who would apply the national laws.

The Diplomatic Conference is not here to work out international penal law. Bodies far more competent than we are have tried to do it for years.

As a result, no provision with respect to superior orders appears in the 1949 Geneva Conventions.

In 1971 the ICRC convened a Conference of Government Experts to consider the drafting of a protocol to the 1949 Geneva Conventions which, among other things, would remedy some of the defects in those Conventions which had surfaced over the years. One of the conclusions reached by Commission IV of that first conference was to the effect that:[62]

556. A number of shortcomings in the Conventions should be remedied. They concerned, in particular, the question of superior orders. That problem had not been provided for in the Conventions, and it was necessary to specify precisely

under what conditions an accused person could plead that he had received orders from a superior, as a justification for his commission of an act forbidden by the Conventions. In order to remedy that deficiency it would be necessary to be guided by the work of the United Nations which itself took as a basis the principles laid down by the Nuremberg tribunal.

Apparently the ICRC felt that there was more justification in the decision of the 1949 Diplomatic Conference than in the recommendation of the 1971 Conference of Government Experts and when it prepared a draft Protocol to the 1949 Geneva Conventions for consideration by various other preliminary conferences which it was about to convene, that draft included the following rather innocuous paragraph in its Article 75:[63]

2. The High Contracting Parties shall determine the procedure to be followed for all application of the principle under which a subordinate is exempted from any duty to obey an order which would lead him to commit a grave breach of the provisions of the Conventions and of the present Protocol.

In its Commentary on that provision the ICRC said:[64]

In particular, it [the ICRC] considered that the basic question of superior orders should be settled at the national level, in a manner consistent with the guidelines laid down in the Judgment of the Nuremberg Tribunal, namely, that it should be possible for soldiers to refuse to obey an order which, if carried out, would constitute a serious infraction of humanitarian rules. The military regulations of some countries already contain a provision regarding superior orders and submission to rank, whereby superiors must only issue orders which conform to international law and subordinates are relieved from the obligation to obey an order which would be contrary thereto and which would cause them to commit a crime or an offence.

The summary of the discussions of this article that took place at the 1972 (Second) Conference of Government Experts, convened by the ICRC to review and propose changes in the draft Protocol which the ICRC had prepared, indicates some of the problems that have been encountered in the efforts to legislate internationally in this area. It states:[65]

4.123. A number of experts approved the introduction of a provision on superior orders, such as proposed in draft Article 75, § 2 of the ICRC text. . . . The language of that paragraph did not, however, seem sufficiently clear and a number of amendments were proposed. It was pointed out that attempts had been made in several national legislations to give a satisfactory formulation of the defence of superior orders, a concept recognized by the Charter and the Judgment of the

International Military Tribunal at Nuremberg; but so far it had appeared impossible to find a formula that would really cover all situations and on which agreement would be general. It would not be right to limit the scope of the defence to grave breaches only (as the ICRC draft did). According to one expert, it should be stipulated that the subordinate not merely had the right, but was obliged, to disobey the unlawful order. Some experts, however, were of a completely opposite view and demanded the deletion of the proposed paragraph. They laid emphasis on the necessity to respect the exigencies of military discipline, and they pointed out that it would be difficult in time of armed conflict to permit soldiers to decide whether to obey or not. It was equally considered that the approach to this question should be far more general and that the principles recognized by the Nuremberg Tribunal, the Draft Code of Offences Against the Peace and Security of Mankind should be taken into account.

Actually, there were five separate proposals on the subject of superior orders, none of which was adopted by the Conference.[66] The ICRC thereupon took it upon itself to include the following provisions in the Draft Additional Protocol I prepared by it for use as the Working Document of the Diplomatic Conference which the Swiss Government had already agreed to host beginning in April 1974:[67]

ARTICLE 77. — *Superior orders*

1. No person shall be punished for refusing to obey an order, of his government or of a superior which, if carried out, would constitute a grave breach of the provisions of the Conventions or of the present Protocol.

2. The fact of having acted pursuant to an order of his government or of a superior does not absolve an accused person from penal responsibility if it be established that, in the circumstances at the time, he should have reasonably known that he was committing a grave breach of the Conventions or of the present Protocol and that he had the possibility of refusing to obey the order.

The ICRC's Commentary on that provision stated:[68]

It was pointed out that this provision might put soldiers in an extremely difficult position, as they were compelled by military laws and regulations to obey orders issued to them. That is the reason why it was thought necessary to add to the sentence "he should have reasonably known that he was committing a grave breach" the words "and that he had the possibility of refusing to obey the order."

These provisions fared no better in the Diplomatic Conference which drafted the 1977 Protocol I[69] than had the comparable provision proposed by the ICRC in 1949 fared in the earlier Diplomatic Conference. Fortunately for the researcher, the action on these provisions is better documented than was that of

its 1949 predecessor. After considerable debate in Committee I during the 1976 and 1977 sessions of the Diplomatic Conference, a roll call vote was taken in that Committee to make the basic determination as to whether an article on superior orders should be included in the Protocol which was being drafted. That roll call resulted in a favorable vote of 34/9/35.[70] To implement that decision the following article was subsequently approved by the Committee by a vote of 38/22/15:[71]

Article 77. — *Superior orders*

1. The High Contracting Parties undertake to ensure that their internal law penalizing disobedience to orders shall not apply to orders that would constitute grave breaches of the Conventions and this Protocol.

2. The mere fact of having acted pursuant to an order of an authority or a superior does not absolve an accused person from penal responsibility, if it be established that in the circumstances at the time he knew or should have known that he was committing a grave breach of the Conventions or of this Protocol. It may, however, be taken into account in mitigation of punishment.

The breadth of the differing views of the various delegations was indicated by the fact some twenty-five of them found it necessary to explain their votes.[72] Those explanations fell into three general categories: the proposed article either did, or did not, draw the necessary balance between compliance with humanitarian law and military discipline; the proposed article either did, or did not, draw an adequate distinction between national and international law; and the proposed article properly, or improperly, limited its coverage to "grave breaches" of the 1949 Geneva Conventions and of the Protocol. Thereafter, with a minimum of discussion, the article was taken up by the Plenary Meeting on 30 May 1977 and resulted in a vote 36/25/25.[73] As the Conference rules required a two-thirds majority for the inclusion in the 1977 Protocol I, the vote constituted a rejection of the article on superior orders. (Although abstainers were not considered as voting, the 36 affirmative votes out of 61 votes cast amounted to only 59% of the total. To have been included in the 1977 Protocol I, 41 of the 61 votes cast were required.)

Conclusion

There has been no international activity in this area since the rejection by the Diplomatic Conference in 1977 of the provision adopted by the Committee of that Conference. The current discussions in the International Law Commission appear to have completely eliminated any reference to the subject; and the present author is inclined to believe that even if the Commission were to adopt a provision, perhaps similar to that contained in its 1954 draft of *Code of Offences*

Against the Peace and Security of Mankind, it is doubtful that such a provision would receive the approval of the Sixth (Legal) Committee of the General Assembly or that it would be included in any convention submitted to the nations for adoption. In other words, it appears unlikely that there will be any internationally approved provision on the subject of superior orders in the foreseeable future.[74]

Where does that leave the matter? On two occasions specific proposals for provisions of major humanitarian conventions on the law of war which would have placed limitations on the availability of superior orders as a defense have been rejected by large, representative, Diplomatic Conferences. An organ of the United Nations eliminated such a proposal from the draft of the Genocide Convention prepared by its Secretary-General. Two specific proposals drafted by the International Law Commission which included provisions on the subject of superior orders have met with less than enthusiasm from the General Assembly of the United Nations. Although this latter was not necessarily directed against the proposed provisions with respect to superior orders, but might have been directed against other parts of the documents submitted by the Commission, the fact remains that in the more than forty years which have elapsed since the completion of the war crimes trials after World War II, there has been no successful drafting of such a provision by any international body—and there is none in sight. Unless applicable national law provides otherwise, any defense counsel in a future war crimes trial would be professionally derelict if he failed to assert to the trial court that the rule denying the availability of the defense of superior orders has been rejected as a rule of international law and that such a defense is available to an individual charged with the commission of a violation of the law of war.

Notes

1. For studies in depth of many of these aspects of the problems, *see: L'Obéissance Militaire au regard des Droits Pénaux Internes et du Droit de la Guerre*, V. Recueils de la Société Internationale de Droit Penal Militaire et de Droit de la Guerre (1971); Y. Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (1965) (hereinafter cited as Dinstein); L.C. Green, *Superior Orders in National and International Law* (1976); and N. Keijer, *Military Obedience* (1978).

2. Throughout the discussion which follows it must be borne in mind that there are two totally opposing points of view of the problem of obedience to the order of a superior: the point of view of the armed force which alleges the commission of a war crime against it by a member of the enemy armed force (this will usually be similar to the international point of view); and the point of view of the armed force of which the individual who allegedly received and complied with the illegal order is a member (the primary concern here will be with the problem of military discipline).

3. 2 Schwarzenberger, *International Law as Applied by Courts and Tribunals* 462-466 (1968).

4. *United States v. Henry Wirz*, H.R. Ex. Doc. No. 23, 40th Cong., 2nd Sess., 706 (1867).

5. *Idem* at 773 and 778.

6. *Idem* at 808.

7. 2 Oppenheim, *International Law: A Treatise* 264 (1st ed., 1906). As far as it goes, this statement closely resembles the provision of the German Military Penal Code quoted by the Court in *The Llandovery Castle Case*. *See* text in connection with note 14, *infra*.

8. 2 Oppenheim, *International Law: A Treatise* 453-455 (H. Lauterpacht, ed., 5th ed., 1935).

9. 2 Oppenheim, *International Law: A Treatise* 453-455 (H. Lauterpacht, ed., 6th ed., 1940). An article by Lauterpacht entitled "The Law of Nations and the Punishment of War Crimes", 21 Brit. Y.B. Int'l L. 58, 69-74 (1944) sets forth the reasons for his new position.

10. 2 Oppenheim, *International Law: A Treatise* 568 (H. Lauterpacht, ed., 7th ed., 1952).

11. 14 A.J.I.L. 95, 117 (1920).

12. *Treaty of Peace between the Allied and Associated Powers, of the One Part, and Germany, of the Other Part,* signed at Versailles, 28 June 1919, 112 B.F.S.P. 1; 225 Perry T. S. 188; 2 *Treaties and Other International Agreements of the United States of America,* 1776-1949, at 43 (C. Bevans, ed.).

13. *See,* generally, C. Mullins, *The Leipzig Trials* (1921).

14. *The Llandovery Castle Case,* 2 Ann. Dig. 436 (1923-1924); 16 A.J.I.L. 708, 721-722 (1922). In a prior case *(The Dover Castle,* 2 Ann. Dig. 429 (1923-1924); 16 A.J.I.L. 704 (1922), the same court had acquitted an accused charged with sinking a British hospital ship because he had honestly believed that the order which he obeyed was justified as a lawful reprisal for the misuse of such vessels.

15. One author interprets this decision to lay down the rule that, under German national law, "a subordinate may count on the legality of the orders received by him; but when it is known to one and all, the subordinate himself not excluded, that the order is unlawful, we encounter an exception to the rule, and the subordinate can rely no longer on the alleged legality of the order." Dinstein, *supra note* 1, at 16.

16. *Treaty Relating to the Use of Submarines and Noxious Gases in Warfare* signed at Washington, 6 February 1922, 25 L.N.T.S. 202; 16 A.J.I.L. (Supp.) 57 (1922).

17. A notable exception to the foregoing statement is E. Colby, "War On Crimes," 23 Mich. L. Rev. 482-511, 606-634 (1925).

18. *See,* for example, the *Declaration of St. James,* London, 13 January 1942 (United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and The Development of the Laws of War* 89-90 (1948) (hereinafter cited as *United Nations History);* 144 B.F.S.P. 1072; the statement made at Moscow in 1943 *(For. Rel. of the U.S.,* 1943, Vol. 1, General, at 768-769); the agreement reached at Yalta in 1945 (Department of State), *The Conference of Malta and Yalta, 1945,* at 975, 979 (1955); and the Potsdam Communique (154 B.F.S.P. 366, 467). Germany also had plans for trials with respect to war crimes allegedly committed by its enemies. A. de Zayas, *Die Wehrmacht Untersuchungsstelle* (1979) (published in English under the title *The Wehrmacht War Crimes Bureau, 1939-1945.*

19. *United Nations History, supra note* 18, at 98.

20. *Idem* at 275.

21. *Idem* at 112-113 and 158-159. It should be borne in mind that here the term "United Nations" refers to the nations at war with Germany and Japan. The United Nations Organization was not yet in existence.

22. *Idem* at 279.

23. *Idem* at 280.

24. *Loc. cit.*

25. *Report of Robert H. Jackson, United Nations Representatives to the International Conference on Military Trials* 22, 24 (1949) (hereinafter cited as Jackson).

26. *Idem* at 28, 33.

27. *Idem* at 55, 58.

28. *Idem* at 119, 124.

29. *Idem* at 165, 181.

30. *Idem* at 194, 197.

31. *Idem* at 367-368.

32. *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, with the Charter of the International Military Tribunal Attached,* signed at London, 8 August 1945, 82 U.N.T.S. 279. Nineteen other States subsequently adhered to this Agreement.

33. *Judgment of the International Military Tribunal,* Nuremberg, 30 September-1 October 1946, 1 *Trial of Major War Criminals* 171, 224 (1947) (hereinafter cited as *T.M.W.C.*); *Nazi Conspiracy and Aggression: Opinion and Judgement* 53-54 (1947) (hereinafter cited as *Nazi Conspiracy).*

34. 1 *T.M.W.C., supra note* 33, at 226; *Nazi Conspiracy, supra note* 33, at 55-56.

35. In setting forth the reasons for the findings of guilty with respect to Field Marshal Wilhelm Keitel and Colonel General Alfred Jodl, the Tribunal referred to Article 8 and then made a passing reference to the fact that the provisions of that Article precluded resort to the defense of superior orders. As to each of these accused it specifically found nothing in mitigation. 1 *T.M.W.C., supra note* 33, at 2981 and 325; *Nazi Conspiracy, supra note* 33, at 118-119 and 151.

36. *1 T.M.W.C., supra note* 33, at 278-279; *Nazi Conspiracy, supra note* 33, at 107. The General Staff and the High Command were found not to be criminal organizations. 1 *T.M.W.C., supra note* 33, at 276-279;

Nazi Conspiracy, supra note 33, at 105-107. The Soviet member of the Tribunal dissented from this finding. 1 *T.M.W.C., supra note* 33, at 359-364; *Nazi Conspiracy, supra note* 33, at 183-188.

37. 1 *The Law of War: A Documentary History* 908, 909 (L. Friedman, ed., 1972); *Documents on Prisoners of War* 304, 305 (H. Levie, ed., 1979) (hereinafter cited as *Documents).* This Law was further implemented by the heads of military government in the four zones of occupation. Provisions to the same effect as that of Allied Control Council Law No. 10 will, for example, also be found in the regulations issued by the U.S. Commanders in the Mediterranean and in China. *See* United Nations War Crimes Commission, 1 *Law Reports of Trials of War Criminals* 120 (1947) (hereinafter cited as *Law Reports).*

38. *The Hostage Case (United States v. Wilhelm List et al.),* 11 *Trials of War Criminals* 1230, 1236 (1950).

39. *The Einsatzgruppen Case (United States v. Otto Ohlendorf et al.),* 4 *Idem* at 411, 470-471 (1950).

40. In a study in considerable depth of this problem, one international law scholar has made a proposal for a rule which parallels the reasoning of the Tribunals in these cases. His proposed rule is as follows:

> The fact that a defendant acted in obedience to superior orders shall not constitute a defence *per se,* but may be considered—in conjunction with other circumstances—within the scope of an admissible defence based on lack of *mens rea.*

Dinstein, *supra note* 1, at 252. A perusal of the opinions of the three judges of the United States Court of Military Appeals in the case of *United States v. William L. Calley, Jr.* [22 C.M.A. 534, 48 C.M.R. 19 (1973); habeas corpus granted 382 F. Supp. 650 (1974), *rev'd* 519 F. 2d 184 (1975), *cert. den.* 425 U.S. 911 (1976)] will reveal some of the difficulties encountered in attempting to establish the scale by which the knowledge of the illegality of the order is to be measured.

41. *The High Command Case (United States v. Wilhelm von Leeb et al.),* 11 *Trials of War Criminals* 462, 509 (1950).

42. *Idem* at 511.

43. 15 *Law Reports, supra note* 37, at 157-158 (Emphasis in original.)

44. *Special Proclamation by the Supreme Commander for the Allied Powers,* 19 January 1946, 4 *Treaties and Other International Agreements of the United States of America, 1776-1949,* at 20, 23 and 27, 28 (C. Bevens, ed., 1970); *Documents, supra note* 37, at 312. The amendment of this Charter on 26 April 1946 did not affect this provision.

45. *See The Tokyo Judgment* (B. Roling and C. Ruter, eds., 2 Vols., 1977).

46. *See* note 37, *supra,* and the text in connection therewith. For other representative examples, *see* 3 *Law Reports, supra note* 37, at 93, 96 (France); *idem* at 81, 85 (Norway); 4 *idem* at 125,129 (Canada); but *see* 11 *idem* at 86, 99 (Netherlands). In his much cited book, published during the course of World War II, Professor Trainin left no doubt that in the Soviet Union superior orders would not be a defense when the order "is not a military order but an incitement to crime." A.N. Trainin, *Hitlerite Responsibility under Criminal Law* 90 *(c. 1945).* In addition, the official Soviet position at the 1945 London Conference unquestionably fully supported the inclusion of Article 8 in the Charter of the International Military Tribunal. *See* pp. 9-10, *supra note* 25, at 61, 62.

47. G.A. Res. 94(1), 11 December 1946; 2 B. Ferencz, *An International Criminal Court* 127 (1980) (hereinafter cited as Ferencz); 1 J. Djonovich, *United Nations Resolutions* 175 (hereinafter cited as Djonovich).

48. *Formulation of the Nuremberg Principles,* (1950) *Y.B. Int'l L. Comm'n* 374; 2 Ferencz, *supra note* 47, at 235, 237; *Documents, supra note* 37, at 559, 560.

49. G.A. Res. 488 (V), 12 December 1950; 2 Ferencz, *supra note* 47, at 312; 3 Djonovich, *supra note* 47, at 151.

50. [1951] *2 Y.B. Int'l L. Comm'n* 43, 60; 2 Ferencz, *supra note* 47, at 331.

51. [1951] *2 Y.B. Int'l L. Comm'n* 123, 137; 2 Ferencz, *supra note* 47, at 335-336; 45 A.J.I.L. (Supp.) 123, 132 (1951).

52. [1951] *2 Y.B. Int'l L. Comm'n* 123, 137; 2 Ferencz, *supra note* 47, at 462-463.

53. G.A. Res. 897 (IX), 4 December 1954; 2 Ferencz, *supra note* 47, at 467; 5 Djonovich, *supra note* 47, at 166. *See also* G.A. Res. 1 186 (XII), 11 December 1957; 2 Ferencz, *supra note* 47, *at* 497; 6 Djonovich, *supra note* 47, at 243.

54. G.A. Res. 96 (I), 11 December 1946; 2 Ferencz, *supra note* 47, at 127, 1 Djonovich, *supra note* 47, at 175.

55. *Draft Convention on Genocide,* U.N. Doc. A/362 (25 August 1947); 2 Ferencz, *supra note* 47, at 131. The United States commented that the article should include the provision on mitigation of punishment contained in the London Charter. U.N. Doc. 402/Add.2 (30 September 1947); 2 Ferencz, *supra note* 47, at 143, 145.

56. *Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260* (III), 9 December 1948; 78 U.N.T.S. *277;* 2 Ferencz, *supra note* 47, at 174; 2 Djonovich, *supra note* 47, at 238. An attempt by

the Soviet Union to have the Sixth Committee restore this provision was rejected by a vote of 15 for, 28 against, and 6 abstaining. *Y.B. of the U.N.*, 1948-1949, at 954-955.

57. International Committee of the Red Cross, *Report of the Seventeenth (Stockholm) International Red Cross Conference* 94 (1948).

58. *1949 Geneva Conventions for the Protection of War Victims*, Geneva, 12 August 1949, 75 U.N.T.S. 31/85/135/287; 6 U.S.T. 3114/3217/3316/3516; 157 B.F.S.P. 234/262/284/355.

59. *Revised and New Draft Conventions for the Protection of War Victims: Remarks and Proposals Submitted by the International Committee of the Red Cross* 19, 34, 64, 85 (February 1949).

60. *Idem at* 21-22.

61. Swiss Federal Political Department, Fourth Report of the Special Committee of the Joint Committee, 12 July 1949, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. IIB, at 115 (n.d.). Article 40 was among those discussed by the Special Committee during the 29th-33rd Meetings but the term "superior orders" was not mentioned at any time. *Idem* at 85-91.

62. International Committee of the Red Cross, *Report on the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (First Session) (August 1971).

63. International Committee of the Red Cross, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Second Session), Basic Texts, 25 (January 1972).

64. International Committee of the Red Cross, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Second Session), Commentary (Part One) 155 (January 1972).

65. International Committee of the Red Cross, *Report on the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Second Session) Vol. 1, 188 (July 1972).

66. *Idem* at 189 (§ 4.126).

67. International Committee of the Red Cross, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949*, at 25 (June 1973).

68. International Committee of the Red Cross, *Commentary on the Draft Additional Protocols to the Geneva Conventions of August 12, 1949*, at 97 (October 1973).

69. 1977 Protocol Additional to the Geneva Conventions of August 12,1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Swiss Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974-1977)*, Vol. I, Part 1, at 115 (1978) (hereinafter cited as *Official Records)*; U.N. Doc. A/32/144, 15 August 1977, Annex I; 16 I.L.M. 1391.

70. *Official Records, supra note* 69, at 381, 387; *Protection of War Victims: Protocol I to the 1949 Geneva Conventions* (Supplement) (H. Levie, ed., 1985) 22-23 (hereinafter cited as *Protection)*. The Communist bloc voted solidly in favor of including such a provision, as did Belgium, Canada, France, Ireland, Japan, Netherlands, Norway, Portugal, and the United States; while Australia, India, New Zealand, Pakistan, and Switzerland voted against it. Denmark, the Federal Republic of Germany, Italy, and the United Kingdom abstained, as did a majority of the Third World countries.

71. *Official Records, supra* note 69, at 392; *Protection, supra* note 70, at 26.

72. *Official Records, supra* note 69, at 399-415; *Protection, supra* note 70, at 26-36.

73. *Official Records, supra* note 69, at 329-339; *Protection, supra* note 70, at 38-45. There was no roll-call vote in the Plenary Meeting. After its rejection by the Plenary Meeting, nine countries, including Canada, Spain, and the United States, explained their votes. VI *Official Records, supra* note 69, at 329-340; *Protection, supra* note 70, at 39-45.

74. Subsequent to writing the foregoing statement the author learned that the International Law Commission had not included a provision on superior orders in its latest *Draft Code of Crimes [sic] Against the Peace and Security of Mankind. See* S. McCaffrey, "The Fortieth Session of the International Law Commission," 83 A.J.I.L. 153, 155 (January 1989).

XVI

Submarine Warfare: With Emphasis on the 1936 London Protocol

The Law of Naval Warfare: Targeting Enemy Merchant Shipping 28 (Naval War College International Law Studies No. 65, Richard J. Grunawalt ed., 1993)

Part I
Early History of the Submarine

Although the idea of a submersible boat dates back at least to the early seventeenth century, and a number of efforts to perfect such a vessel had occurred over the subsequent years, it was not until the latter part of the eighteenth century that realistic attempts began to be made in this respect. During the American Revolution David Bushnell devised a one-man submersible known as the *American Turtle*. Its several attacks against British warships were, for one reason or another, all unsuccessful.[1] Then in 1797 Robert Fulton, who had been demonstrating his version of the submersible to the French Navy, submitted a proposal to the French Directory for the construction and the use by his "Nautulus Company" of a submarine against the ships of the British Navy. Paragraph Six of that proposal stated:[2]

> And whereas fire Ships or other unusual means of destroying Navies are Considered Contrary to the Laws of war, and persons taken in such enterprises are liable to Suffer death, it will be an object of Safety if the Directory give the Nautulus Company Commissions Specifying that all persons taken in the *Nautulus or Submarine Expedition* Shall be treated as Prisoners of War, And in Case of Violence being offered the Government will Retaliate on the British Prisoners in a four fold degree.

It can thus be seen that even in its earliest form, and even when it was to be directed solely against warships, the submarine was a controversial weapon. Fulton was unable to sell his idea to the French Government. Subsequently, he was equally unsuccessful in selling it to the British.[3]

From the very beginning of the idea of a vessel that would travel under the water instead of on the water, it was accepted that if it could be successfully

developed it would be an asset to small nations, nations which could not afford large standing navies. It was assumed that, because of its anticipated short range, it would be used primarily for coastal defense. It is, therefore, not surprising to find that during the American Civil War the Confederacy developed and built this type of vessel to be used against the blockading warships of the Union Navy.[4] It was called a *David* and altogether the Confederate Navy probably constructed more than a dozen of them. It was not truly a submersible, because, being propelled by a steam engine, it had to have a constant source of air. Accordingly, it moved with its deck awash and an open hatch—not exactly a recommended method for safe navigation, and one which resulted in a number of sinkings during its trials, with the loss of most of the members of the crews. However, on October 5, 1863, one of these boats attacked and damaged the *U.S.S. New Ironsides.*[5] The Confederates also built a true submersible, called the *Hunley,* propelled by eight members of the crew turning a crankshaft which ran down the center for most of the length of the vessel and which was connected to a propeller. Its claim to fame is that on February 17, 1864 it sank the *U.S.S. Housatonic*-and itself! It may be said that the *David* and the *Hunley* ushered in the era of the submarine in warfare—even though at this point the Confederate Navy appeared to lose interest in submersibles.[6]

In the quarter century which followed, numerous other inventions were being developed, and tested, in various countries, particularly in France, a country which had early exhibited great interest in such a weapon, even though it had rejected Fulton's proposal. The first really successful submersible, the forerunner of the submarine of today, was built by John P. Holland, an Irish-American who, after he had constructed several models, succeeded in selling the latest version of the Holland to the United States Navy in 1900, the first that it had acquired.[7] At that same period both the United States Navy and the Royal Navy placed orders with Holland for the construction and delivery of additional submarines; while a number of continental nations were placing similar orders with Holland and other inventors. Even Admiral von Tirpitz, head of the German Navy, was eventually convinced that the submarine was no longer solely a weapon of coastal defense.[8]

The 1899 Hague Peace Conference

When, on December 30, 1898, the Ministry of Foreign Affairs of Imperial Russia issued its proposed agenda for the 1899 Hague Peace Conference, one item thereof stated:[9]

> 4. Prohibition of the use in naval battles of submarine or diving torpedo-boats or of other engines of destruction of the same nature;

When the matter was discussed in the Second Subcommission of the First Commission of the Conference on May 31, 1899, the German representative indicated that "if all the other governments agreed not to adopt vessels of this kind, Germany would join in this understanding"; and the Italian and Japanese delegates concurred in that statement; the United States delegate indicated that his Government "wishes to preserve full liberty . . . to use submarine torpedo boats or not"; the delegate of Austria-Hungary gave his personal opinion that "this new invention . . . may be used for the defense of ports and roadsteads and render very important services"; the French delegate stated that "the submarine torpedo [boat] has an eminently defensive purpose, and that the right to use it should therefore not be taken from a country"; the British delegate thought that "his country would consent to the prohibition in question if all the great Powers were agreed on this point. It would concern itself little as to what decision the smaller countries reached"; the Dutch delegate and the delegate of Sweden and Norway believed that "the submarine torpedo [boat] is a weapon of the weak, and does not think its use can be prohibited."[10]

In his report the Rapporteur of the Subcommission said[11]

> After an exchange of personal views on the question of submarine torpedo boats which enabled several delegates . . . to formulate very clear and precise ideas regarding the future of this weapon, it is shown that, according to the declarations made by a majority of the delegates, a prohibition of the boats in question must be considered as very unlikely, at least for the time being.

His prognostication was confirmed when a vote on the proposal to ban the submarine was taken in the First Commission and resulted in five votes (Belgium, Bulgaria, Greece, Persia, and Siam) for the prohibition with reservations; five votes (Germany, Great Britain, Italy, Japan, and Rumania) for the prohibition on condition of unanimity; and nine votes (Austria-Hungary, Denmark, France, Netherlands, Portugal, Spain, Sweden and Norway, Turkey, and the United States) in the negative. Russia, Serbia, and Switzerland abstained.[12] That ended all efforts to ban the submarine at the 1899 Hague Peace Conference. It should be borne in mind that at this point in time most naval experts still considered that the submarine was a weapon to be used for coastal defense, particularly by the smaller and weaker nations which did not have strong navies.[13] Little or no consideration was given to the fact that the submarine might be valuable as a commerce destroyer and on the high seas. Moreover, having failed to ban the submarine, inexplicably, no attempt was made to obtain even minimum restrictions on its operations.[14]

The 1907 Hague Peace Conference

During the period between the Hague Peace Conferences of 1899 and 1907, the major international event in the military area was the Russo-Japanese War (1904–1905). No submarines participated in this conflict but, as one author has pointed out, even a few Russian short-range submarines could have done enough damage to the Japanese to have caused the latter to lift the blockade of Port Arthur and even a few of the longer-ranged ones could have effectively impeded the landing of Japanese troops in Korea.[15] At that time, however, neither Japan nor Russia had any submarines in their navies. That situation would soon change.[16]

The Russian agenda for the 1907 Second Hague Peace Conference called for the "framing of a convention relative to the laws and customs of maritime warfare," but contained no specific mention of the submarine.[17] When the Fourth Commission of that Conference met for the first time on June 24, 1907, its President, de Martens of Russia, said: "We must now do for naval warfare what the Second Commission of the last Peace Conference did for land warfare."[18] While the Conference did draft a number of conventions with respect to war at sea, some good and some not so good, the possibility of drafting rules with respect to the use of submarines was not even a subject of discussion. Although there is a tendency on the part of writers to refer to the inability of both of those Hague Peace Conferences to reach agreement on restrictions on the use of submarines,[19] the present author could find only one passing reference to the subject in the proceedings of the 1907 Conference. During the lengthy discussion of the United States proposal to exempt all private property from capture or seizure at sea the Belgian delegate said:[20]

> A torpedo-boat or a submarine can annihilate in a few moments a magnificent vessel representing an enormous outlay and a thousand lives. In 1899 Russia proposed that the employment of such engines of destruction be given up, just as the poisoning of arms and of springs had been prohibited, and most of the Powers seemed ready to adhere to the proposal provided it were accepted unanimously. But unfortunately I do not now see any indication among us of such an idea.

No further mention of submarines could be found. It will, however, be appropriate to point out that Article 3 of the 1907 Hague Convention No. VI provided that if an enemy merchant ship were to be destroyed "provision must be made for the safety of the persons on board as well as the security of the ship's papers."[21]

1909 Declaration of London

Article I of this Declaration stated that "the rules contained in the following Chapters correspond in substance with the generally recognized principles of international law."[22] As the Declaration was intended to be all-inclusive insofar

as restrictions on maritime trade during the course of a war were concerned and as it contained no special rules with respect to submarines, it must be assumed that there were at that time still no such rules.[23] That being the case, submarines would be bound by the general rules applicable to all warships. Customary international law prescribed that, while a warship could be attacked without warning, a merchant vessel was a noncombatant which could only be attacked after warning and which could only be sunk under exceptional circumstances and then only after the safety of the passengers and crew had been assured.[24] Although the then Lieutenant Rickover wrote in 1935 that "[i]n its official correspondence with the United States the German government appears not to have questioned the American contention that the rules of international law governing surface men-of-war applied also to the submarine,"[25] during World War I Germany actually did take issue with this conclusion. She contended that she had chosen to use "a new weapon, the use of which had not yet been regulated by international law and, in doing so, could not and did not violate any existing rules but only took into account the peculiarity of this new weapon, the submarine boat."[26] Contrariwise, Lauterpacht took the position that "[t]he novelty of a weapon does not itself carry with it a legitimate claim to a change in the existing rules of war."[27] Strange to relate, in a message of July 18, 1916 to the British Ambassador in Washington, the British Foreign Office said: "The first point to be established is that international law ought not to transfer without modification to submarines, rules and regulations which work fairly well as regards surface vessels."[28]

It was during the immediate pre-World War I period that Great Britain made a decision which was to have far-reaching consequences with respect to the use of the submarine as a commerce destroyer and the disregarding of the requirements of warning and of assuring the safety of the passengers and crew. On March 26, 1913 Winston Churchill, then First Lord of the Admiralty, announced in Parliament the intention of the British Government to arm its merchantmen, at the same time asserting that the armaments would be strictly defensive and would not change the status of these vessels as noncombatant merchant ships, to be distinguished from converted armed merchant cruisers.[29] As we shall see, this decision had serious consequences in both World Wars, one being the so-called "unrestricted submarine warfare" and the subsequent controversy as to whether the provisions of the 1936 London Submarine Protocol are still binding law.

Part II
World War I (1914-1918)

In World War I the inadequacy of the law of naval warfare with respect to the protection of merchant vessels proved to be a matter of prime importance

for both belligerents and neutrals. It may well be said that while the American Civil War was the beginning of the era of the submarine, it only received full recognition as a dangerous—and controversial—naval weapon system during World War I.

On August 6, 1914, just a few days after the outbreak of World War I, Secretary of State Bryan sent a circular message to the belligerents asking each if it would be "willing to agree that the laws of naval warfare as laid down by the Declaration of London of 1909 shall be applicable during the present conflict in Europe."[30] Most of the belligerents, including Germany, indicated that they would comply with the rules set forth in that Declaration, subject to reciprocity. However, Great Britain's decision to adopt these rules was made "subject to certain modifications and additions which they adjudge indispensable to the efficient conduct of their naval operations."[31] As a result of the British position, the United States withdrew its suggestion.[32] Primary among these British "modifications and additions" was a vast increase in the list of contraband items.[33] Historically, an enemy merchant ship was a noncombatant which could be stopped, visited, and searched in order to examine her papers and to determine whether she was carrying contraband, and captured if found to be carrying contraband, but which could not be attacked, nor destroyed, except under specific and limited circumstances—and then only after the safety of the persons aboard had been assured. The lifeboats were not considered to be a place of safety unless the weather was moderate and land was within a reasonable distance, or another vessel was available which could take the crew and passengers of the doomed vessel aboard. For some months after the outbreak of World War I German submarines were used almost exclusively in the capacity of warship against warship.[34] The few merchantmen which were sunk by German submarines during this period had suffered their fate in strict accordance with the customary law of naval warfare applicable to the sinking of merchant vessels by surface warships—they had been stopped by a warning shot, visited and searched, found to have contraband aboard, and the safety of passengers and crews had been assured before they were sunk.[35] That procedure was not to continue.

On November 3, 1914 the British gave notice that "the whole of the North Sea must be considered a military area."[36] The British sea blockade of Germany was so effective that the German Navy urged the need to counter it by a declaration of a war zone around the British Isles within which all ships would be sunk. The Foreign Office opposed such a procedure because of its anticipated effect on neutrals and the German Chancellor, Bethmann Hollweg, at first agreed with the Foreign Office. However, early in 1915 the German Government determined that it had no alternative but to use the submarine to stop the flow of food and essential munitions to the British Isles[37] and on

February 4, 1915 the German Admiralty issued a Proclamation declaring the waters around Great Britain and Ireland, including the entire English Channel, to be a "war zone" in which, after February 18, 1915, all enemy merchant ships would be destroyed without assuring the safety of the passengers and crews—in other words, they would be sunk without warning.[38] The Proclamation added that, because, on January 31, 1915, the British Admiralty had ordered British merchant vessels to fly neutral flags, even neutral merchant vessels would be at risk in the announced zone. A lengthy "Memorial", issued at the same time, justified the German action as retaliation for British disregard of the provisions of the 1909 Declaration of London and of the 1856 Declaration of Paris[39] and the British declaration of the North Sea between Scotland and Norway as being "comprised within the seat of war" combined with neutral acceptance of these British violations.[40] It was thus that first arose a problem which continues to plague the Governments and navies of the world and students of the law of maritime warfare to this day—the question of the legality of war zones, under any of the various names which have been given to such areas of the high seas by belligerents.[41]

The German Proclamation caused considerable consternation in the United States. Robert Lansing, then Counselor of the Department of State, prepared a reply to the German proclamation which he himself referred to as "sharp." It described the German intention as "a wanton act unparalleled in naval warfare."[42] However, after he had read the accompanying "Memorial" he relented considerably. Nevertheless, the United States protest may still be described as "strong."[43] The United States also protested to Great Britain the use of the American flag by British merchant ships.[44] As neither of these protests accomplished its purpose, the United States proposed that each side should, among other things, agree:[45]

> That neither will use submarines to attack merchant vessels of any nationality except to enforce the right of visit and search.
>
> That each will require their respective merchant vessels not to use neutral flags for the purpose of disguise or *ruse de guerre*.

Germany accepted this proposal with conditions. Great Britain rejected it on the ground that the German Proclamation of February 4, 1915 was, "in effect, a claim to torpedo at sight"; and that submarines did not, and could not, comply with the well-established rules of maritime warfare, such as bringing merchant ships before prize courts, sinking them only when extraordinary circumstances existed, distinguishing between neutral and enemy ships, assuring the safety of crews, etc.[46] Of course, the British position disregarded the fact that by accepting

the proposed agreement Germany would have, in effect, consented to give up any claimed right to "torpedo at sight" with all of its corollaries.

This began a campaign of submarines as commerce destroyers, a campaign that extended from February 1915 to September 1915, during which period strong protests were made to the German Government by the Government of the United States over attacks upon and the sinking of American merchant vessels and of other merchant vessels on which American citizens were traveling. The matter reached a peak with the sinking of the Lusitania on May 7, 1915 as a result of which over 100 American citizens were lost. The U.S. protest included the following statement:[47]

> The Government of the United States, therefore, desires to call the attention of the Imperial German Government with the utmost earnestness to the fact that the objection to their present method of attack against the trade of their enemies lies in the practical impossibility of employing submarines in the destruction of commerce without disregarding those rules of fairness, reason, justice, and humanity which all modern opinion regards as imperative. It is practically impossible for the officers of a submarine to visit a merchantman at sea and examine her papers and cargo. It is practically impossible for them to make a prize of her; and, if they cannot put a prize crew on board of her, they cannot sink her without leaving her crew and all on board of her to the mercy of the sea in her small boats.

After another strong protest by the United States when the Arabic was sunk on August 19, 1915, with American citizens aboard, German submarines were ordered not to attack passenger ships without a warning and an opportunity for the passengers and crew to be taken to a place of safety.[48] As this required the submarine to come to the surface, an extremely dangerous procedure in a confined area, all German submarines were soon recalled from the English Channel. One anonymous author believes that this seven-month period (February-September 1915) "saw the submarine come of age as the first modern weapon to make war a universal scourge, rather than a professional duel between rival armies and fleets."[49]

Thus, within the first year of World War I the use of the submarine had generated issues with respect to the arming of merchantmen, the use of false colors, the establishment of "war zones", the sinking of merchantmen without warning, and the failure to assure the safety of the passengers and crews. All of those issues continue to exist; only the latter two were addressed by the 1936 London Submarine Protocol.[50] The problem of the status of merchantmen under convoy did not arise until much later in the war.

Disputes with respect to submarine warfare continued to arise and finally, on April 18, 1916, the United States warned Germany that if the latter intended to continue "to prosecute relentless and indiscriminate warfare against vessels of

commerce without regard to what the United States must consider the sacred and indisputable rules of international law and the universally recognized dictates of humanity," it would have no choice but to sever diplomatic relations.[51] The German reply, dated May 4, 1916, notified the United States Government that the following instructions had been issued to German naval forces:[52]

> In accordance with the general principles of visit and search and destruction of merchant vessels recognized by international law, such vessels, both within and without the area declared as [a] naval war zone, shall not be sunk without warning and without saving human lives, unless these ships attempt to escape or offer resistance.

The following months were comparatively free of incidents but, understandably, the success of the U-boats was considerably reduced. Ultimately, the German Government decided that its only possibility of winning the war, which had reached a stalemate on land, was to embark on a program of unrestricted submarine warfare and an announcement of such a policy was suddenly made on January 31, 1917, to take effect the following day.[53] On February 3, 1917, the United States severed diplomatic relations with Germany;[54] on March 12, 1917, the United States announced its intention to arm its merchantmen;[55] on April 2, 1917, in a speech to Congress requesting a declaration of war against Germany, President Wilson stated: "The intimation [of the German Government] is conveyed that the armed guards which we have placed on our merchant ships will be treated as beyond the pale of the law and subject to be dealt with as pirates would be";[56] and on April 6, 1917, the United States declared war on Germany.

Because of the magnitude of the problem created by the arming of merchantmen during World War I, it is, perhaps, advisable to deal with it at some length at this point. It is a problem which was and is important to neutrals as well as belligerents inasmuch as Article 12 of the 1907 Hague Convention No. XIII,[57] provides that, in general, a warship may only remain in neutral waters for twenty-four hours. If armed merchantmen are warships, then this rule applies to them and if they remain in neutral waters beyond the twenty-four-hour period, they are, under Article 24 of the same Convention, subject to internment. If they were held to fall within the ambit of those provisions, their utility as cargo carriers would be completely nullified as none could accomplish unloading and reloading within that time frame. Germany demanded that the United States (and other neutrals) apply the provisions of this Convention to British armed merchantmen. The United States declined to do so.[58] It appears that The Netherlands was the only country that so interpreted and applied the cited provisions of the Hague Convention.[59] One author has taken the position that "neutrals are not justified in treating an armed merchant

vessel as an innocent peaceful carrier. By so doing they risk their neutrality."[60] A major work argues that neutral states "employed the convenient but elusive and tenuous distinction between 'offensive' and 'defensive' armament" because of their desire to avoid the need to apply the provisions of the 1907 Hague Convention No. XIII to armed belligerent merchantmen.[61]

The provisions of the 1907 Hague Convention No. VII[62] require, among other things, that merchant vessels converted into warships must be placed under the direct authority of the State and must have a commander who is "in the Service of the State and duly commissioned by the competent authorities" and a crew which is subject to military discipline. When the British ordered the arming of all of their merchant vessels, many of the captains and other officers of these vessels held commissions in the Royal Navy Reserves and many of the vessels were subsequently furnished with Royal Navy gun crews. Nevertheless, the British Government contended that these vessels were armed solely for defensive purposes and that, therefore, these facts did not make them armed auxiliary cruisers. The British were probably correct in contending that the status of the officers and men did not bring the vessel within the provisions of this Hague Convention. The vessels were not State vessels and the crews, other than the gunners, were not subject to military discipline. However, whether the fact that they were armed removed them from the category of vessels entitled to the protections of customary international law is an altogether different question.

It is often believed that the original decision of the British Government to arm its merchant ships was reached as a measure of protection against submarines. This is not so. In March 1913, when Churchill made his announcement in the House of Commons,[63] the British were not concerned with submarines, they were concerned with converted merchant auxiliary cruisers. Thus he said:[64]

> There is now good reason to believe that a considerable number of foreign merchant steamers may be rapidly converted into armed ships by the mounting of guns. . . . Our food-carrying liners and vessels carrying raw material following these trade routes would in certain contingencies meet foreign vessels armed and equipped in the manner described. If the British ships had no armament, they would be at the mercy of any foreign liner carrying one effective gun and a few rounds of ammunition. . . . Hostile cruisers, wherever they are found, will be covered and met by British ships of war, but the proper reply to an armed merchantman is another merchantman armed in its own defence.

Again, a year later, on March 17, 1914, he said:[65]

> The House will expect me to say a few words on the arming of merchant ships. Much misconception has arisen on this subject. . . . Forty ships have been armed with two 4.7 guns apiece, and by the end of 1914-1915 seventy ships will have

> been so armed. They are armed solely for defensive purposes. The guns are mounted in the stern and can only fire on a pursuer. Vessels so armed have nothing in common with merchant vessels taken over by the Admiralty and converted into commissioned auxiliary cruisers, nor are these vessels privateers or commerce destroyers in any sense. They are exclusively ships which carry food to this country. They are not allowed to fight any ship of war. . . . They are, however, thoroughly capable of self-defence against an enemy's armed merchantmen.

During the years that it was a neutral in World War I, the position of the United States with respect to armed merchantmen was so ambivalent as to leave much to be desired. However, as it was one of the main players with respect to the problem, it will be of interest to analyze the permutations and combinations which were encountered in the negotiations on this subject and the decisions which were made and unmade.

Within a few days after the beginning of the war the British Charge d'Affaires in Washington called the attention of the Secretary of State to the fact that "a certain number" of British merchant vessels were armed "solely for the purpose of defence."[66] Two weeks later, the British Ambassador advised the Secretary of State that he had been directed to give the United States:

> the fullest assurances that British merchant vessels will never be used for purposes of attack, that they are merely peaceful traders armed only for purposes of defence, that they will never fire unless first fired upon, and that they will never under any circumstances attack any vessel.[67]

Despite these assurances, it does not appear that the armed merchantmen used their guns solely for defense, nor that the British Government expected them to do so. Thus, confidential instructions to masters of armed merchant vessels stated:[68]

> If a submarine is obviously pursuing a ship by day and it is evident to the master that she has hostile intentions, the ship pursued should open fire in self-defence, notwithstanding the submarines [sic] may not have committed a definite hostile act, such as firing a gun or torpedo.
>
> Any submarine approaching a merchant vessel may be treated as hostile.[69]

Moreover, when they became available, merchant ships were supplied with depth charges, definitely an offensive weapon.[70]

In justification of the practice of arming merchant ships, and in support of their contention that this did not remove them from a noncombatant status, the British frequently referred to the long history of armed merchant ships, pointing out that this had been ordered by Royal Proclamation as early as the seventeenth

century and that this right had been recognized by Prize Courts during the Napoleonic Wars.[71] They omitted to mention that this procedure had been directed against pirates and privateers and that there were no longer pirates on the well-traveled trade routes which the British ships were traversing and that privateering had been prohibited by the 1856 Declaration of Paris.[72]

Lauterpacht, while a strong supporter of the right of a belligerent to arm its merchant ships for defensive purposes, added the following caveat:[73]

> At the same time it is clear that the arming of merchant vessels raises problems of substantial difficulty. In the first place, it is not easy to draw a line of distinction between offensive and defensive acts. Secondly, the encouragement of even defensive hostilities on the part of private vessels is fraught with danger inasmuch as it threatens to undermine the abolition of privateering by the Declaration of Paris of 1856 [and the distinction?] between commissioned and non-commissioned vessels. Thirdly, the fact that a merchantman is armed and that she is entitled to resist actual or anticipated attack makes it impossible for enemy submarines to exercise their right of visit and capture in accordance with International Law without running the risk of destruction by the superior armament of the merchant vessel or being rammed by her.

On September 19, 1914 the Department of State issued a memorandum, prepared by Robert Lansing, entitled "The Status of Armed Merchant Vessels," which provided that, while a merchant vessel might carry armament and ammunition for defensive purposes without becoming a warship, the presence of such items aboard would create a presumption that they were for offensive purposes, a presumption that could be overcome by showing that the vessel carried its armament for defensive purposes only. The memorandum then proceeded to list a number of "indications" that the armament would not be used offensively, including such items as the size and number of the guns, their location on the vessel, the status of the officers and crew, etc.[74] With one amendment which provided that the presence of any gun on a merchantman, no matter what its size, would create the presumption of offensive use,[75] this memorandum laid down the policy followed by the United States during 1914 and 1915.

On January 7, 1916, Lansing, now the Secretary of State, sent a memorandum to President Wilson in which he pointed out the potential danger to submarines of even a small caliber gun on an armed merchantman; that if submarines were to be required to give warning to merchant vessels, the latter should not be armed; and that armed merchantmen should, therefore, be treated as not possessing the immunities of private commercial vessels.[76] President Wilson concurred with these conclusions and, on January 18, 1916, Lansing circulated an informal letter to the belligerents in which he set forth the general rules of

international law and humanity understood to be applicable to noncombatant merchant vessels during a war. He called attention to the manner in which the submarine had changed maritime operations and the dangers it faced when compelled to stop and search an armed merchant vessel on the high seas. He then said:[77]

> Moreover, pirates and sea rovers have been swept from the main trade channels of the seas, and privateering has been abolished. Consequently, the placing of guns on merchantmen at the present day of submarine warfare can be explained only on the ground of a purpose to render a merchantman superior in force to submarines and to prevent warning and visit and search by them. An armament, therefore, on a merchant vessel would seem to have the character of an offensive armament.
>
> . . . .
>
> It would, therefore, appear to be a reasonable and reciprocally just arrangement if it could be agreed by the opposing belligerents that submarines should be caused to adhere strictly to the rules of international law in the matter of stopping and searching merchant vessels, determining their belligerent nationality, and removing the crews and passengers to places of safety before sinking the vessels as prizes of war, and that merchant vessels of belligerent nationality should be prohibited and prevented from carrying any armament whatsoever.
>
> . . . .
>
> I should add that my Government is impressed with the reasonableness of the argument that a merchant vessel carrying an armament of any sort, in view of the character of submarine warfare and the defensive weakness of undersea craft, should be held to be an auxiliary cruiser and so treated by a neutral as well as by a belligerent Government, and is seriously considering instructing its officials accordingly.

If the paragraph last quoted was intended to put pressure on Great Britain to agree to the basic suggestion, as it undoubtedly was, it did not accomplish its purpose. While the British Government's adamant opposition to the proposal of the United States had probably previously been conveyed orally, it was not until March 23, 1916 that the British Ambassador delivered to the Secretary of State a memorandum from the British Government setting forth in some detail, not always relevant, the reasons why that Government believed the proposal to be pro-German, why it could not rely on a "non-guaranteed German promise", and why it could not, therefore, accept the proposal made some two months earlier. It also presented its reasons why it did not consider that the action mentioned in the last paragraph of the American note would be in accordance with international law.[78] The Germans also rejected the proposal, asserting that it was pro-British.[79] The British won both battles: they continued to arm their merchantmen; and these armed merchantmen continued to be treated by the

United States as ordinary merchant vessels "armed for defense only." On March 25, 1916, just two days after the date of the British memorandum, the Department of State issued a new "Memorandum on the Status of Armed Merchant Vessels" which was even more lenient on the subject than the 1914 memorandum had been. Two pertinent paragraphs provided:[80]

> The *status* of an armed merchant vessel as a warship in neutral waters may be determined, in the absence of documentary proof or conclusive evidence of previous aggressive conduct, by presumption derived from all the circumstances of the case.
>
> . . . .
>
> Merchantmen of belligerent nationality, armed only for the purposes of protection against the enemy, are entitled to enter and leave neutral ports without hindrance in the course of legitimate trade.

In passing, it is worthy of note with respect to this problem that when, in 1928, the members of the then Pan American Union drafted a convention on the subject of maritime neutrality, Article 12(3) provided that the rules relating to warships would apply to armed merchantmen. The United States ratified the Convention with a reservation to that provision.[81]

In conclusion, it might be said that "defensively armed merchant vessels" were properly so-called in that, unlike auxiliary merchant cruisers, they did not go searching for enemy vessels; they were not properly so-called in that they usually opened fire immediately upon sighting a U-boat, before it had taken any offensive action other than to make its appearance. It should be obvious that the present author agrees with the following statement:[82]

> The criteria [for determining whether a merchant vessel is participating in the hostilities] should certainly include, *inter alia,* any armed merchant vessel and no consideration should be given to the purported distinction between "defensive" and "offensive" armament.

As we shall see, this same problem arose during the course of World War II.[83]

Part III
The Intra-War Period (1919-1939)

The Versailles Treaty

In the course of drafting a suggested basic document for the proposed League of Nations, to be submitted to the Peace Conference which met at the end of World War I, President Woodrow Wilson sought comments from David H. Miller, the Legal Adviser of the American Delegation to the Conference. In his

comments on Wilson's Second Draft, Miller suggested the inclusion of the following provision:[84]

> The Contracting Parties agree never to make use of armed submarines in naval operations, and further agree that they will hereafter build no submarines armed or capable of being armed and further agree that all submarines now in existence or under construction shall be dismantled and rendered incapable of being armed or shall be destroyed.

Wilson did not adopt this suggestion and while Article 191 of the *Treaty of Versailles*[85] which ended World War I as between Germany and the Allies, specifically prohibited "[t]he construction or acquisition of any submarine, even for commercial purposes" by Germany, the Covenant of the League of Nations contained no provision on the subject. As events proved, this provision of the Treaty, like many of the other provisions thereof, was of little value.[86]

The 1921-1922 Washington Conference

In 1921 a Conference on the Limitation of Armament met in Washington. The conferees represented the five major victorious Powers in World War I: France, Great Britain (and the Commonwealth countries), Italy, Japan, and the United States. When the discussion with respect to submarines began, the British Delegation took the position that "what was required was not merely restrictions on submarines, but their total and final abolition."[87] The French delegation was, as it had been in the past, particularly opposed to the banning of the submarine as an accepted naval weapons system, its delegate saying:[88]

> The French Government believes that every method of warfare may or may not be employed in conformity with the laws of war, and that the inhuman and barbarous use made of the submarine by a belligerent in the late war is a reason for condemning that belligerent, but not for condemning the submarine.

It quickly became obvious that the British proposal would not receive the necessary support. As one commentator on the 1922 Diplomatic Conference stated: "The British seem to hold that the submarine is an offensive weapon, while the others consider that it is a defensive weapon."[89] Elihu Root, one of the delegates of the United States and a former Secretary of State, then submitted several proposed resolutions to the Conference. These resolutions may be considered to have been the genesis of the 1922, 1930, and 1936 codifications of the rules relating to submarine warfare. Resolution I was said to be a statement of existing law, while Resolution II was said to constitute a change in the existing law.[90] An examination of the Root Resolutions, as minimally modified by the Conference, will enable us to determine what the rules of submarine warfare

were then considered to be and what the representatives of the nations present considered that they should be, it being an accepted fact that the submarine was here to stay.

Root's Resolution I[91] became Articles 1 and 2 of the treaty then in process of being drafted, with only one major change: the logical addition of a second condition under which a merchant vessel might be attacked (when it refused "to submit to visit and search after warning, *or to proceed as directed after seizure*").[92] As adopted and included in the Treaty which was ultimately drafted,[93] these articles stated:

> Art. 1. The Signatory Powers declare that among the rules adopted by civilized nations for the protection of the lives of neutrals and noncombatants at sea in time of war, the following are to be deemed an established part of international law;
>
> (1) A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized.
>
> A merchant vessel must not be attacked unless it refuses to submit to visit and search after warning, or to proceed as directed after seizure.
>
> A merchant vessel must not be destroyed unless the crew and passengers have been first placed in safety.
>
> (2) Belligerent submarines are not under any circumstances exempt from the universal rules above stated; and if a submarine can not capture a vessel in conformity with these rules the existing law of nations requires it to desist from attack and from seizure and to permit the merchant vessel to proceed unmolested.
>
> Art. 2. The Signatory Powers invite all other civilized Powers to express their assent to the foregoing statement of established law so that there may be a clear public understanding throughout the world of the standards of conduct by which the public opinion of the world is to pass judgment upon future belligerents.

The provisions of Article 1 have since been accepted as binding rules of the law of war at sea by reiteration in substance in international agreements subsequently drafted. It will become apparent that they formed the basis for the provisions of Part IV of the 1930 London Naval Treaty[94] and for those of its offspring, the 1936 London Submarine Protocol.[95]

There can be no question but that the provisions of Root's Resolution II[96] represented a major addition to the restrictions on the use of submarines in war at sea. It condemned the submarine for what a belligerent had done in World War I. It was adopted as Article 4 of the Treaty with only minor amendments which did not affect its substantive content. It read:

> Art. 4. The Signatory Powers recognize the practical impossibility of using submarines as commerce destroyers without violating, as they were violated in the recent war of 1914-1918, the requirements universally accepted by civilized nations for the protection of the lives of neutrals and noncombatants, and to the end that the prohibition of the use of submarines as commerce destroyers shall be universally accepted as a part of the law of nations, they now accept that prohibition as henceforth binding as between themselves and they invite all other nations to adhere thereto.

This Article, outlawing the use of submarines against merchant vessels, even if they complied with the provisions of Article 1, did not survive as a rule of the law of war. Had it done so, it would, as Root had indicated, have supplanted the rules set forth in Article 1, rules which codified then existing law.

Root's Resolution III[97] was adopted as Article 3 of the Treaty with only one major change. That change was the substitution of the words "rules declared by them with respect to attacks upon and the seizure and destruction of merchant ships" for the words "rules declared by them with respect to the prohibition of the use of submarines in time of war." Under either reading, the provisions cover violations of both Articles 1 and 4 of the Treaty. As Article 3 it now read:

> Art. 3. The Signatory Powers, desiring to insure the enforcement of the humane rules of existing law declared by them with respect to attacks upon and the seizure and destruction of merchant ships, further declare that any person in the service of any Power who shall violate any of those rules, whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy and may be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found.

During the discussion of this Resolution the Japanese delegate asked for an explanation of the meaning of the phrase "punishment as if for an act of piracy." The ambiguity of the phrase was demonstrated by the fact that the Chairman, Secretary of State Hughes, said that he assumed that it meant that a violation should be treated as an act of piracy. Root was quick to indicate that it merely meant that there would be universal jurisdiction, as in the case of piracy.[98] Inasmuch as the provision already specifically so provided, there was, in reality, no need for the reference to piracy which merely caused confusion and antipathy.

Like Article 4, Article 3 has not survived as a separate rule of the law of war. However, like any other violation of the law of war, violations of the provisions of the customary or conventional law of submarine warfare constitute universal war crimes and the violator may still "be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found"—depending, of course, on the domestic law of that Power. In fact, as

we shall see, after World War II two German Admirals, Doenitz and Raeder, were charged with and tried for having allegedly ordered illegal submarine warfare.

In its final form this 1922 Washington Treaty (which also contained a provision banning the use of noxious gases) included in its Article VI a provision which stated that it would "take effect on the deposit of all the ratifications." Inasmuch as France failed to ratify it, the Treaty never took effect.[99] Perhaps this was just as well. Admiral William V. Pratt, of the United States Navy, is quoted as having written, a few days after the Conference ended, that the treaty was not practical and that it would not work.[100]

This Diplomatic Conference created a Commission of Jurists with the task of determining the adequacy of certain rules of international law with respect to the law of war.[101] The Commission produced two sets of rules, one on wireless telegraphy in time of war and one on aerial warfare. Article 6, paragraph 1, of the former stated [102]

> The wireless transmission, by an enemy or neutral vessel or aircraft while being on or above the high seas, of any military information intended for a belligerent's immediate use, shall be considered a hostile act exposing the vessel or aircraft to be fired at;

As the Diplomatic Conference had adjourned sine die before the Commission completed its work, neither set of rules ever received codified international status. However, they undoubtedly represented the customary international law on the subjects and are worthy of and have received considerable attention, despite their informal status.[103]

Article 1, paragraph 1 of the Inter-American Convention on Maritime Neutrality[104] sets forth in considerable detail the rules with respect to the rights of belligerent warships towards merchant vessels, including a provision that a ship may not be rendered unnavigable before the crew and passengers have been placed in safety. Paragraph 2 makes these rules applicable to submarines with the specific proviso that "[i]f the submarine cannot capture the ship while observing these rules, it shall not have the right to continue to attack or to destroy the ship."[105]

The 1930 London Naval Conference

On January 21, 1930 another Conference on the Limitation of Armament convened, this time in London. It was officially known as the London Naval Conference of 1930. The participating Powers were the same as those which had been represented in Washington eight years earlier. At the very first Plenary Meeting at which the subject of submarines was discussed the British once again

proposed the abolition of the submarine, this time with the full support of the United States; and once again this proposal received the support of all of the Commonwealth countries, but the opposition of France, Italy, and Japan.[106] The United States had submitted a proposed resolution calling for the appointment of a committee to consider (1) the abolition of the submarine; and (2) regulation of the use of the submarine "through subjecting it to the rules of war governing the use of surface craft." France had submitted a proposed resolution "forbidding submarines to act towards merchant ships otherwise than in strict conformity with the rules, either present or future, to be observed by surface warships."[107] These resolutions were referred to a Committee of Experts and a Committee of Jurists. The latter produced a Declaration[108] which was approved unanimously by the First Committee and which was approved without discussion by the Plenary Meeting.[109] As incorporated into the Treaty,[110] it read:[111]

> Art. 22. The following are accepted as established rules of International Law:
>
> (1) In their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject.
>
> (2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed the passengers, crew, and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them aboard.

These rules were, in general, a rephrasing and amplification of the rules which had been included in Article 1 of the 1922 Washington Treaty.[112] It is important to note that while, pursuant to Article 23, the other provisions of the Treaty ceased to be effective on December 31, 1936, Article 22 was "to remain in force without limitation of time." Despite the fact that there was a provision for accession to Part IV of the Treaty by other Powers, no non-Conference Power ever acceded, perhaps because France and Italy did not ratify these provisions until 1936.

In addition to drafting the Declaration which became Article 22 of the Treaty, the Committee of Jurists made a statement which bears repeating. It said:

> The Committee wishes to place it on record that the expression merchant vessels where it is employed in the declaration, is not to be understood as including a

> merchant vessel which is at the moment participating in the hostilities in such a manner as to cause her to lose her right to the immunities of a merchant vessel.[113]

This would certainly include the merchant vessel which, when a submarine surfaces in its vicinity, immediately opens fire or radios that it has sighted a submarine, giving its longitude and latitude.[114]

The 1935-1936 London Naval Conference

In 1935 another Diplomatic Conference convened in London to draft a new treaty limiting naval armament prior to the expiration of the 1930 London Naval Treaty. The 1936 London Submarine Protocol[115] is frequently associated with the 1935-1936 London Naval Conference and with the Treaty for the Limitation of Naval Armament that was drafted at that Conference.[116] Its relationship to that Conference and Treaty is rather tenuous. At the opening session of the Conference Stanley Baldwin, the Prime Minister of Great Britain, said:[117]

> There is one further point that I should like to mention, because it appears to me very encouraging for our future deliberations. If it proves impossible to obtain agreement for the abolition of submarines, it is of vital importance to reach an agreement which will prevent their misuse. Part IV of the London Naval Treaty laid down rules for the treatment of merchant ships by submarines in time of war. These rules are already in force between the United States, Japan and the members of the British Commonwealth of Nations. But I am glad to be able to announce, as a result of the preliminary talks with representatives of other nations, that, once these rules have been incorporated in an instrument which will be distinct from the London Naval Treaty, the French and Italian Governments who were unable to ratify the London Treaty as a whole will be in a position definitely to accept such an instrument. We hope that this will be the signal for the acceptance of these rules by all the maritime Powers of the world and that, by this means, unrestricted submarine warfare may in the future be averted.

However, at the Fifteenth Meeting of the First Committee, held on March 13, 1936, the French delegate found it necessary to state:[118]

> I am surprised not to see on the Agenda a subject on which we appeared all to be agreed at the opening meeting of the Conference and which our First Committee has not yet examined, namely, the embodiment in the Acts which our Conference is to draw up of the rules of Part IV of the London Naval Treaty [of 1930], concerning the use of submarines against merchant vessels.

The British representative pointed out that the two treaties were quite separate (the Japanese had left the Conference and would not sign the Naval Treaty but would sign the Submarine Protocol) and that as another text had to be prepared

they could only hope that the two could be signed at the same time.[119] As a matter of fact they were not, the Treaty being signed on March 25, 1936, and the Protocol more than seven months later, on November 6, 1936. On the latter date it (the Protocol) was signed by the five nations which had participated in the drafting of both the 1930 and the 1936 London Naval Treaties: France, Great Britain (and the Commonwealth Nations), Italy, Japan, and the United States. Other nations were invited to accede to the Protocol and approximately 37 others had done so before World War II erupted, including all of the European belligerents in that war except Rumania. Japan was a Party, but China was not. Germany had acceded on November 23, 1936.[120]

The Nyon Agreements

The Spanish Civil War which began in 1936 was the first such conflict since the American Civil War in which submarines played a part. Because of their method of operation, which included attacks on and the sinking of merchant ships which did not belong to either side in the conflict, a number of concerned nations met at Nyon, Switzerland, in 1937 and drafted the Nyon Agreement. This agreement provided:[121]

> II. Any submarine which attacks such a ship [one not belonging to either side in the conflict] in a manner contrary to the rules referred to in the International Treaty for the Limitation and Reduction of Naval Armaments signed in London on April 22, 1930 and confirmed in the Protocol signed in London on November 6, 1936, shall be counter-attacked and, if possible, destroyed.

In effect, the Parties to this Agreement were demanding that the contestants in a civil war comply with the provisions of the 1936 London Submarine Protocol.[122] (A Supplementary Agreement, signed three days later, made the original agreement applicable to surface vessels and aircraft.) Nine European and Mediterranean States were Parties to these agreements. (Understandably, this did not include Germany and Italy, both of which were actively supporting the Franco insurgents who probably controlled all of the submarines involved.) Shortly thereafter, on 5 October 1937, the Council of the League of Nations adopted a Resolution which stated:[123]

> (7) Notes that attacks have taken place in violation of the most elementary dictates of humanity underlying the established rules of international law which are affirmed, so far as war time is concerned, in Part IV of the Treaty of London of April 22, 1930, rules which have been formally accepted by the great majority of Governments.

(8) Declares that all attacks of this kind against any merchant vessels are repugnant to the conscience of the civilised nations which now find expression through the Council.

It is strange that the League's Council referred to the 1930 Treaty, which had only a few ratifications, and not to the 1936 Protocol, which, by this time, had more than twenty-five ratifications and accessions.

Part IV
World War II and Its Aftermath (1939-1947)

As in the case of World War I, the British Admiralty had prepared for another conflict by ensuring that many of its merchant ships had been built with reinforced areas for the mounting of guns and by storing guns to be used for arming those ships.[124] Moreover, the 1938 British *Defense of Merchant Shipping Handbook* included the following provisions:[125]

As soon as the Master of a merchant ship realises that a ship or aircraft in sight is an enemy, it is his first and most important duty to report the nature and position of the enemy by wireless telegraph. Such a report promptly made may be the means of saving not only the ship herself but many others;. . .

Conditions under which fire may be opened:

(a) Against enemy acting in accordance with International Law—As the armament is solely for the purpose of self-defence, it must only be used against an enemy who is clearly attempting to capture or sink the merchant ship. On the outbreak of war it should be assumed that the enemy will act in accordance with International Law, and fire should therefore not be opened until he has made it plain that he intends to attempt capture. Once it is clear that resistance will be necessary if capture is to be averted, fire should be opened immediately.

(b) Against enemy acting in defiance of International Law—If, as the war progresses, it unfortunately becomes clear that, in defiance of International Law, the enemy has adopted a policy of attacking merchant ships without warning, it will then be permissible to open fire on an enemy surface vessel, submarine, or aircraft, even before she has attacked or demanded surrender, if to do so will prevent her gaining a favorable position for attacking.

According to a British history of World War II "between the outbreak of the war and November 4 [1939], thirty-two British and three Allied ships had been sunk illegally . . .; as many as thirty-three neutral ships had been attacked and at least sixteen sunk in circumstances which led to the conclusion that the sinking had been illegal."[126]

In his *Memoirs,* Admiral Doenitz, the Commander of the U-boat arm of the German Navy for a large part of the war, later the Commander-in-Chief of the German Navy, and, ultimately, Hitler's successor, asserts that these Instructions were "a contravention of the Submarine Agreement." He also indicates his belief that the convoy system was contrary to the same Agreement.[127] Neither arming merchant ships, nor ordering them to send by radio what can only be described as intelligence information, nor sailing them in convoy under the protection of warships, were acts contrary to the provisions of the 1936 London Submarine Protocol—but any of those acts removed the particular merchant ship involved from the limited category of ships protected by that Agreement.[128]

On November 27, 1939 the British Government issued an Order in Council Restricting Further the Commerce of Germany which was intended, among other things, to eliminate all German exports.[129] In response to neutral complaints of violation of the 1856 Declaration of Paris,[130] the British Government said in notes to the Dutch and Italian Governments that "the main basis of their actions is admittedly the right of retaliation the essence of which is a departure from the ordinary rules as reprisal for illegal action by the enemy."[131] This was, of course, an admission by the British that the Order in Council did, in fact, violate the 1856 Declaration of Paris and a claim that it was, nevertheless, legal because by definition a reprisal contemplates an illegal action by the party undertaking reprisal action.[132]

On May 8, 1940, Churchill, once again First Lord of the Admiralty, stated to the House of Commons that the Royal Navy had been instructed that in the Skagerrak (a narrow arm of the North Sea between Denmark and Norway leading into the Kattegat and the Baltic Sea) "all German ships by day and all ships by night were to be sunk as opportunity served."[133] This action was frequently referred to by the Germans as a basis for their subsequent actions.[134] Although the International Military Tribunal found Doenitz guilty of violating the 1936 London Submarine Protocol by establishing operational zones, it listed Churchill's order as one ground for not assessing punishment against Doenitz on the basis of German submarine warfare.[135]

On August 28, 1939, a few days before the outbreak of World War II, Germany had issued its Prize Ordinance[136] which included some of the protections provided by the 1936 London Submarine Protocol. A week later, on September 3, 1939, Hitler issued Fuehrer's Directive No. 2, which provided that offensive actions by the German Navy against Great Britain were permissible but that "warfare against merchant shipping is for the time being to be conducted according to the prize regulations, also by submarines."[137] Fuehrer's Directive No. 4, September 25, 1939, extended this directive to include the French.[138]

The minutes of a conference between Hitler and Admiral Raeder, Chief of the Naval Staff, held on September 23, 1939, reveal the following decisions:[139]

2. The intensification of anti-submarine measures by aircraft and armed merchant vessels will apparently make it impossible to search British merchantmen in the future. The Fuehrer approved the proposal that action should be taken without previous warning against enemy merchant ships definitely identified as such (with the exception of unmistakable passenger steamers), since it may be assumed that they are armed.

3. The expression 'submarine warfare' is to be replaced by the expression 'war against merchant shipping.' The notorious expression 'unrestricted submarine warfare' is to be avoided. Instead of this, the proclamation of the 'siege of England' is under consideration; such a military system would free us from having to observe any restrictions whatsoever on account of objections based on International Law.

Fuehrer's Directive No. 5, September 30, 1939, implemented these decisions. It provided:[140]

The war against merchant shipping is, on the whole, to be fought according to prize law, with the following exceptions.

(1) Merchantmen and troopships recognized beyond doubt as hostile may be attacked without warning.

(2) The same applies to ships sailing without lights in the waters around the British Isles.

(3) Armed force is to be employed against merchantmen which use their radio transmitters when stopped.

(4) As before, no attacks are to be made upon passenger vessels or large steamships as appear to be carrying passengers in large numbers as well as goods.

Even assuming that "hostile" merely meant "enemy," the first part of the first exception (merchantmen, not armed merchantmen) was a violation of the Protocol; the second part of that exception (troopships) was valid; the second exception was probably justified;[141] the third was undoubtedly justified;[142] and the fourth was intended to avoid incidents such as that of the *Lusitania* in World War I and of the *Athenia* in World War II.[143]

During World War II Germany contended that its use of the submarine as a commerce destroyer was a legal reprisal because of such British violations of the law of naval warfare as arming merchant vessels, ordering them to radio reports of submarine sightings, ordering them to navigate without lights at night, ordering them to ram submarines, violations of the rules pertaining to blockades, etc.[144] Thus, in his Memoirs, Doenitz wrote: [145]

> In the same way Naval High Command reacted only with extreme caution and step by step to the British measures which I have just described and which constituted a breach of the London Submarine Agreement. Slowly and one by one the restrictions on the conduct of U-boat operations were removed in a series of orders from Naval High Command—beginning with permission to fire upon vessels which used their wireless, which sailed without lights and which carried guns, followed (as a result of the instructions to ram given to British ships) by permission to attack all vessels identified as hostile and ending with a declaration of sea areas that would be regarded as operational zones. . . .
>
> It is, then, an established fact that from the very outset the German Naval High Command painstakingly adhered to the provisions of international law contained in the London agreements and that it was only step by step, in response to breaches of these provisions by the enemy, that we allowed ourselves more and more latitude, until finally, we reached the stage, as it was inevitable that we would, where the London agreement was abandoned completely and for good.

Actually, there was no need for Germany to place its actions on a reprisal basis.[146] The British *modus operandi* constituted their merchant vessels naval auxiliaries, subject to the same treatment as warships - that of being attacked without warning immediately upon being sighted. As one author has stated, the provisions of the 1936 London Submarine Protocol did not extend, and were not intended to extend, to the "warshiplike merchantmen" of the British merchant marine.[147] Many publicists are of the opinion that these, and other, British procedures changed the status of armed British merchantmen from noncombatants to combatants, that it integrated them into the British naval forces, and that the provisions of the 1936 London Submarine Protocol were, therefore, no longer applicable to them.[148] The *Commander's Handbook on the Law of Naval Operations,* issued by the United States Navy in 1987, states:[149]

> During World War II the practice of attacking and sinking enemy merchant vessels by surface warships, submarines, and military aircraft without prior warning and without first providing for the safety of passengers and crew was widespread on both sides. Rationale for these apparent departures from the agreed rules of the 1936 London Protocol varied. Initially, such acts were justified as reprisals against illegal acts of the enemy. As the war progressed, however, merchant ships were regularly armed and convoyed, participated in intelligence collection, and were otherwise incorporated directly or indirectly into the enemy's war-fighting/war sustaining effort. Consequently, enemy merchant vessels were widely regarded as legitimate military targets subject to destruction on sight.

Shortly after the beginning of World War II the United States Congress enacted a Neutrality Act which, among other things, authorized the President

to place restrictions "on the use of the ports and territorial waters of the United States by the submarines or armed merchantmen of a foreign state." It also made it unlawful for foreign vessels to fly the American flag (a rather difficult provision to enforce) and authorized the President to designate "combat areas" within which American flag vessels were forbidden to proceed.[150] A Presidential Proclamation issued immediately thereafter placed such restrictions on the use of American ports and territorial waters on submarines, but not on armed merchantmen![151] Unlike the situation during World War I, the entrance into the ports of the United States by armed British merchantmen from the early days of World War II did not seem to cause the Administration any concern and was completely uncontrolled. From the very beginning of the war these vessels were treated as peaceable cargo ships and Borchard's strong protest appears to have occasioned little comment and no change of policy.[152] This must be considered as one of the many indications of official American political policy favoring the British, rather than as a thoughtful interpretation of the applicable law.

In accordance with the authority granted by the Neutrality Act, President Roosevelt also issued a Proclamation designating a "combat area" within which American flag vessels were forbidden to navigate.[153] Germany availed itself of this combat zone and declared its zone, within which all vessels would be sunk without warning, to coincide with the American zone. During his cross-examination by Sir David Maxwell-Fyfe, the British prosecutor, before the International Military Tribunal, Doenitz testified:[154]

> I have already said that the neutrals had been warned not to cross the combat zones. If they entered the combat zones, they had to run the risk of suffering damage, or else stay away. That is what war is. For instance, no consideration would be shown on land either to a neutral truck convoy bringing ammunition or supplies to the enemy. It would be fired on in exactly the same way as an enemy transport. It is, therefore, quite admissible to turn the seas around the enemy's country into a combat area. That is the position as I know it in international law, although I am only a soldier.
>
> Sir David Maxwell-Fyfe: I see.
>
> Doenitz: Strict neutrality would require the avoidance of combat areas. Whoever enters a combat area must take the consequences.

During this cross-examination Doenitz was also asked, "If you sank a neutral ship which had come into that [declared operational] zone, you considered that you were absolved from any of your duties under the London Agreement to look after the safety of the crews?" To this, he replied: "In operational areas I

am obliged to take care of the survivors after an engagement, if the military situation permits."[155]

In finding Doenitz guilty of violating the 1936 London Submarine Protocol by virtue of the German establishment of "operational zones," the International Military Tribunal stated that the conferees in Washington in 1922, in London in 1930, and in London again in 1936, had had full knowledge of the fact that "operational zones" (or "war zones," or "exclusion zones," or "combat zones," under whatever name one may give to them), had been declared by both sides during World War I, "[y]et the protocol made no exception" for them.[156] It is of interest to note that there was no mention whatsoever of such zones during the discussions that accompanied the drafting of the provisions of the 1922 Washington Treaty, nor of those of the 1930 London Naval Treaty which became the 1936 London Submarine Protocol; and that there were no discussions whatsoever involved in the drafting of the Protocol itself. Would it not be just as logical to interpret all this as indicating that there was no intention on the part of the draftsmen of those agreements to legislate with respect to this problem, which went far beyond submarine warfare in the scope of its application, that there was no desire or authority on their part to establish rules in an area which did not relate exclusively to submarine warfare?[157] Moreover, while the Tribunal found Doenitz not guilty of waging unrestricted submarine warfare on what amounted to a *tu quoque* defense, it failed to find him not guilty of the use of operational zones on that same basis despite undisputed evidence that the British practice in this respect was identical with, and had preceded, that of the Germans.[158]

There is one aspect of submarine warfare which appears to warrant mention even though there can be no question as to the criminal liability of any person engaged in it: the murder of the shipwrecked crews and passengers of ships which have been sunk. This problem arose during World War II because of an incident involving the *Laconia,* a British ship which was sunk in September 1942 by a German submarine which then discovered that a large number of Italian prisoners of war had been among those on board. The submarine took in tow several lifeboats (as it happened, the occupants of the lifeboats included a substantial number of members of the British crew), with a large Red Cross displayed, and sent a message, in English in the clear, asking for assistance in the rescue efforts, promising to take no aggressive action against any vessel coming to render assistance as long as none was taken against his U-boat. Unfortunately, the only response was by an American bomber which attacked and damaged the U-boat, causing it to cast the lifeboats adrift and to submerge.[159] When this was reported to Doenitz he issued the so-called "Laconia Order" which provided:[160]

(1) No attempt of any kind must be made at rescuing members of ships sunk, and this includes picking up persons in the water and putting them in lifeboats, righting capsized lifeboats, and handing over food and water. Rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews.

(2) Orders for bringing back captains and chief engineers still apply.

(3) Rescue the shipwrecked only if their statements would be of importance for your boat.

(4) Be harsh, having in mind that the enemy has no regard for women and children in his bombing attacks on German cities.

At Nuremberg the British prosecutor contended that this was an order to destroy any survivors of the ships sunk by German submarines, contending that this had long been German submarine policy. Evidence was adduced of a conversation between Hitler and Oshima, the Japanese Ambassador to Germany, which the International Military Tribunal for the Far East reported as follows:[161]

> OSHIMA had a conference with Hitler on January 3, 1942. Hitler explained his policy of submarine warfare, which he was conducting against Allied shipping, and said that although the United States might build ships very quickly, her chief problem would be the personnel shortage since the training of seafaring personnel took a long time. Hitler explained that he had given orders for his submarines to surface after torpedoing merchant ships and to shoot up the lifeboats, so that the word would get around that most seamen were lost in torpedoings and the United States would have difficulty in recruiting new crews. OSHIMA, in replying to Hitler, approved this statement of policy and stated that the Japanese would follow this method of waging submarine warfare.

Concerning this matter the International Military Tribunal said:[162]

> It is also asserted that the German U-boat arm not only did not carry out the warning and rescue provisions of the protocol but that Doenitz deliberately ordered the killing of the survivors of shipwrecked vessels, whether enemy or neutral. The prosecution has introduced much evidence surrounding two orders of Doenitz, war order No.154, issued in 1939, and the so-called "Laconia" order of 1942. The defense argues that these orders and the evidence supporting them do not show such a policy and introduced much evidence to the contrary. The Tribunal is of the opinion that the evidence does not establish with the certainty required that Doenitz deliberately ordered the killing of shipwrecked survivors. The orders were undoubtedly ambiguous, and deserve the strongest censure.

> The evidence further shows that the rescue provisions [of the 1936 Protocol] were not carried out and that the defendant ordered that they should not be carried out. The argument of the defense is that the security of the submarine is, as the first rule of the sea, paramount to rescue and that the development of aircraft made rescue impossible. This may be so, but the protocol is explicit. If the commander cannot rescue, then under its terms he cannot sink a merchant vessel and should allow it to pass harmless before his periscope. These orders, then, prove Doentiz is guilty of a violation of the protocol.

To summarize, in passing upon the charges of illegal submarine warfare made against German Admiral Doenitz, the International Military Tribunal discussed and reached decisions on four aspects of the question: 1) waging unrestricted submarine warfare (not guilty);[163] 2) the proclamation of operational zones and the sinking of neutral merchant ships therein (guilty); 3) ordering that the shipwrecked be killed (not guilty); and 4) failure to rescue the shipwrecked (guilty). However, because of the evidence of a number of British and American practices, no sentence was assessed against Doenitz for the foregoing offenses of which he was found guilty.[164]

What were the reasons for the failure to comply with the rules of customary international law with respect to submarine warfare during the course of World War I and for the failure to comply with those rules, as codified in the 1936 London Submarine Protocol, during the course of World War II? One student of the problem has answered that question as follows:[165]

> The non-observance of the rules of the Protocol could be explained with the help of military considerations: impossibility for the aircraft to act in conformity with the rules, impossibility for the German surface warships to penetrate into and effectively control the waters surrounding the British Isles, and, as far as submarines were concerned, the unacceptable risk involved in the procedure of surfacing, ascertaining the character of the ship and cargo, ordering the ship to be abandoned and waiting until the order was carried out and those on board as well as the papers and mail were safe in the ship's boats, in an area where the superior enemy forces, warned with the aid of technical devices like radio and radar or by air reconnaissance, could arrive on the scene in very little time.

Part V
Post-World War II (1948-to date)

As the footnotes will have indicated, there has been much discussion of the question of restrictions on submarine warfare and the continued viability of the 1936 London Submarine Protocol since the end of World War II and the completion of the trial before the International Military Tribunal. However, unfortunately, there has been no attempt on the part of the international

community to clarify a very confused situation, something that should be avoided at all costs in the law of war. The only "official" action which has been taken in this respect during the past forty or more years is the issuance by the U.S. Navy of its *Commander's Handbook on the Law of Naval Operations*. That volume contains the following:[166]

> Although the rules of the 1936 London Protocol continue to apply to surface warships, they must be interpreted in light of current technology, including satellite communications, over-the-horizon weapons, and antiship missile systems, as well as the customary practice of belligerents that evolved during and following World War II. Accordingly, enemy merchant vessels may be attacked and destroyed by surface warships, either with or without prior warning, in any of the following circumstances:
>
> 1. Actively resisting visit and search or capture;
>
> 2. Refusing to stop upon being summoned to do so;
>
> 3. Sailing under convoy of enemy warships or enemy military aircraft;
>
> 4. If armed;[167]
>
> 5. If incorporated into, or assisting in any way, the intelligence system of the enemy's armed forces;
>
> 6. If acting in any capacity as a naval or military auxiliary to an enemy's armed forces;
>
> 7. If integrated into the enemy's war-fighting/war-sustaining effort and compliance with the rules of the 1936 London Protocol would, under the circumstances of the specific encounter, subject the surface warship to imminent danger or would otherwise preclude mission accomplishment.

In an earlier volume, entitled *Law of Naval Warfare,* sub-paragraph 4, above, had included the additional words "and there is reason to believe that such armament has been used, or is intended for use, offensively against an enemy."[168] In explanation of the deletion of those words, a proposed Annotated Supplement to the *Handbook,* which is unofficial and which is still in draft form, states:

> In light of modern weapons it is impossible to determine, if it ever was possible, whether the armament on merchant ships is to be used offensively against an enemy or merely defensively. It is unrealistic to expect enemy forces to be able to make that determination. Accordingly, this rule has been modified in this text from that previously appearing in NWIP 10-2, para. 503b(3).4.

In the 1987 volume we find a number of references to submarines and to submarine warfare. Having stated that "[t]he law of armed conflict imposes essentially the same rules on submarines as apply to surface warships (a paraphrase of the first paragraph of the 1936 London Submarine Protocol), the *Handbook* goes on to say:[169]

> 8.3.1. *Interdiction of Enemy Merchant Shipping by Submarines.* The conventional rules of naval warfare pertaining to submarine operations against enemy merchant shipping constitute one of the least developed areas of the law of armed conflict. Although the submarine's effectiveness as a weapons system is dependent upon its capability to remain submerged (and thereby undetected) and despite its vulnerability when surfaced, the London Protocol of 1936 makes no distinction between submarines and surface warships with respect to the interdiction of enemy merchant shipping. The London Protocol specifies that except in the case of persistent refusal to stop when ordered to do so, or in the event of active resistance to capture, a warship, "whether surface or submarine" may not destroy an enemy merchant vessel "without having first placed passengers, crew, and ship's papers in a place of safety." The impracticality of imposing upon submarines the same targeting constraints as burden surface warships is reflected in the practice of belligerents of both sides during World War II when submarines regularly attacked and destroyed without warning enemy merchant shipping. As in the case of such attacks by surface warships, this practice was justified either as a reprisal in response to unlawful acts of the enemy or as a necessary consequence of the arming of merchant vessels, of convoying, and of the general integration of merchant shipping into the enemy's war-fighting/war-sustaining effort.

The United States considers that the London Protocol of 1936, coupled with the customary practice of belligerents during and following World War II, imposes upon submarines the responsibility to provide for the safety of passengers, crew, and ship's papers before destruction of an enemy merchant vessel unless:

1. The enemy merchant vessel refuses to stop when summoned to do so or otherwise resists capture.

2. The enemy merchant vessel is sailing under armed convoy or is itself armed.

3. The enemy merchant vessel is assisting in any way the enemy's military intelligence system or is acting in any capacity as a naval auxiliary to the enemy's armed forces.

4. The enemy has integrated its merchant shipping into its warfighting or war-sustaining effort and compliance with this rule would, under the

circumstances of the specific encounter, subject the submarine to imminent danger or would otherwise preclude mission accomplishment.

In a learned discussion of this problem which arrives at conclusions closely resembling those reached by the draftsmen of the *Handbook,* one author states:[170]

Besides the two circumstances mentioned in Article 22 (2) of the London Naval Treaty of 1930—persistent refusal to stop on being summoned and active resistance to visit and search—there are other situations in which international law may allow the attack and destruction of merchant vessels. They include:

i) sailing under convoy of enemy warships or enemy military aircraft.

ii) if armed, and there is reason to believe that such armament has been used, or is intended for use offensively against an enemy.

iii) if incorporated into, or assisting in any way, the intelligence system of an enemy's armed forces.

iv) if acting in any capacity as a naval or military auxiliary to an enemy's armed forces

He immediately points out that "[m]any British writers question the validity of some of these situations."

Conclusions

Can it be said that, after the experiences of two World Wars, the mandates of the 1936 London Submarine Protocol, codifying customary international law, are still a valid and binding part of the law of war at sea? The International Military Tribunal, sitting after the conclusion of those two conflagrations, left no doubt that in its opinion the provisions of the Protocol had been, during World War II, and still were, after that conflict, very much alive and binding. A majority of the writers who have studied the problem are of a similar opinion.[171] Although it is unquestionably true that a rule of international law may be changed by evidence of a substantial change in the practice of States, the failure of one belligerent in World War I to comply with the applicable rules of customary international law, following which it was severely chastised for its action and the rules were codified, and the failure of three belligerents in World War II (Germany, Japan, and the United States), even though they may have been major maritime Powers, to comply with the provisions of the Protocol does not forever erase them from the rule book. During World War I all of the Entente Powers and the United States, both as a neutral and as a Power associated

with the Entente Powers, insisted that the rules with respect to submarine warfare, which were then a part of customary international law and are now set forth in the 1936 London Submarine Protocol, were valid and binding rules. During the interim between the wars a large number of the nations of the world, including in many cases those which later did not comply therewith, accepted these rules in conventional form in 1922, in 1930, in 1936, and in 1937. The failure of Germany, Japan, and the United States to comply with those rules during World War II did not result in their nullification. It must also be borne in mind that in both World Wars Germany contended that her failure to comply with the customary or conventional law of submarine warfare was an act of reprisal, i.e., an admittedly illegal act. The same argument may, perhaps, be made for the United States inasmuch as a Japanese submarine had already sunk an American merchantman without warning when the message ordering unrestricted submarine warfare by the United States Navy, concerning which Admiral Nimitz testified, was sent.[172] (No evidence could be found that Japan claimed that her unrestricted submarine warfare was an act of reprisal.)[173]

Which brings the present author to the following conclusions:

1. While, during World War II, the provisions of the 1936 London Submarine Protocol were largely not applied, this was frequently excused by the particular belligerent, not on the basis that they were no longer a part of the law of war at sea, but on the basis of reprisals against illegal actions on the part of the enemy (arming of merchant vessels with guns and depth charges, sailing them in warship-escorted convoys, ordering the immediate reporting by radio of submarine sightings, ordering merchant vessels to ram submarines, illegal mining, illegal expansion of the list of contraband, illegal blockades, declarations of war zones, etc.), in itself a recognition of the continuing validity of those provisions;

2. The 1936 London Submarine Protocol continues to be a valid and subsisting part of the law of war at sea;

3. If the establishment of zones (operations zones, war zones, exclusion zones, combat zones, etc.) is determined to be a legal method of making war at sea, the application of the rules of the 1936 London Submarine Protocol will be largely, but not entirely, nullified, at least in the zones so declared;

4. It is highly probable that in any World War III belligerents will again find reasons why the 1936 London Submarine Protocol should not be applied;

5. In any future armed conflict of lesser extent than a World War III the pressure of neutral Powers may be sufficiently strong to cause the belligerents to comply with the provisions of the 1936 London Submarine Protocol.

One cannot do better than to conclude a study of the submarine with a portion of the final conclusion reached by a noted expert in a book recently published:[174]

> The era of the submarine as the predominant weapon of power at sea must therefore be recognised as having begun. . . . Five hundred years ago, before the sailing-ship pioneers ventured into great waters, the oceans were an empty place, the only area of the world's surface in which men did not deploy military force against each other. In a future war the oceans might appear empty again, swept clear both of merchant traffic and of the navies which have sought so long to protect it against predators. Yet the oceans' emptiness will be illusory, for in their deeps new navies of submarine warships, great and small, will be exacting from each other the price of admiralty.

Notes

1. Frederick Wagner, Submarine Fighter of the American Revolution: The Story of David Bushnell 56-74 (1963).

2. Quoted in Cynthia O. Philip, Robert Fulton: A Biography 74 (1985). The author states: "He realized that the submarine would be considered an illegal weapon and that if he or any of his crew were taken prisoner by the British they would be executed as common criminals. The objection to submarine warfare . . . was that the submarine would attack with unscrupulous stealth." *Id.* at 75.

3. Admiral Earl St. Vincent, the British First Sea Lord in 1804, is reputed to have said of Fulton's submarine:

> Don't look at it, and don't touch it. If we take it up, other nations will; and it will be the greatest blow at our supremacy on the sea that can be imagined.

R. H. Gibson, The German Submarine War, 1914-1918, (1931).

4. The Union Navy made one attempt to construct a submersible to be used against the Confederate iron-clad *Merrimac.* This boat, the *Alligator,* was eventually lost, not through enemy action, without ever having been submerged. Bernard Brodie, Sea Power in the Machine Age 272 (1969).

5. One author says that *New Ironsides* "did not even need a major dockyard repair job." Edwin P. Hoyt, Submarines at War: The History of the American Silent Service 11 (1983); another author says that she was "out of action for a year." Alex Roland, Underwater Warfare in the Age of Sail 162 (1978).

6. Edwin P. Hoyt, *supra* note 5, at 10-13. The lessening of the interest of the Confederate Navy in submersibles may have been due to the difficulty of recruiting crews for what appeared to be suicide missions. However, it cannot be said that Confederate underwater activities (which included mines, another pioneering method) ceased. *See* Roland, *supra* note 5, at 162, where the following statistics are set forth:

> By the end of the war the toll from Confederate underwater warfare was impressive. Damage was found to have been sustained by forty-three Union vessels, twenty-nine of which were sunk. This was more damage than was effected by the rest of the Confederate Navy.

It is to be noted that all actions of the Confederate submersibles were directed against Union warships. For a fairly detailed history of the "David" and the "Hunley", *see* Milton F. Perry, Infernal Machines: The Story of Confederate Submarine and Mine Warfare 63-108 (1965).

7. Hoyt, *supra* note 5, at 15.

8. Edwyn A. Gray, The Killing Time, The U-Boat War, 1914-1918, at 17 (1972).

9. The Reports to The Hague Conferences of 1899 and 1907, at 2, 3 (James B. Scott ed., 1917).

10. The Proceedings of the Hague Peace Conference: The Conference of 1899, at 367-368 (James B. Scott ed., 1920).

11. *Id.* at 296.

12. *Id.* at 299.

13. As late as 1935 the then Lieutenant Rickover wrote: "The submarine is the weapon par excellence of the weak naval power." Hyman G. Rickover, *International Law and the Submarine*, 61 U.S. Nav. Inst. Proc. 1213, 1224 (September 1935).

14. A 1917 Grotius Society Committee pointed out that until World War I "the employment [of submarines] as commerce destroyers was not seriously considered." Report of a Committee of the Grotius Society, *The Legal Status of Submarines*, 14 Trans. Grot. Soc. 155 (1929) [hereinafter Grotius Committee Report]. A later author said: "Perhaps the major flaw in the naval thinking of the years preceding World War I was the apparent lack of appreciation of the economic facet of naval warfare." William H. Barnes, *Submarine Warfare and International Law*, 2 World Polity 121, 132 (1960). The effectiveness of the British blockade of Germany early in World War I was undoubtedly a major reason for the decision of Germany to retaliate in the only way open to it, by the employment of the submarine as a commerce destroyer. Gray, *supra* note 8, at 38.

15. Bernard Brodie, *supra* note 4, at 287.

16. In 1901 France had 6 submarines, Italy 2, the United States 1, and Great Britain none; while in 1907 France had 49, Great Britain 39, Russia 13, the United States 10, Italy 7, Japan 5, and Germanv 2. Barnes, *supra* note 14, at 121, 127-128. By 1914 Great Britain had 76 (with 20 under construction), France had 70 (23), the United States had 29 (21), Germany had 27 (12), Russia had 25 (18), and Italy had 18 (2). *Id.*, at 131.

17. The Proceedings of the Hague Peace Conferences: The Conference of 1907, at 1 (James B. Scott ed., 3 vols. "1", i.e. 1921) [hereinafter Scott, Proceedings].

18. 3 *id.* at 741. That Commission had drafted the 1899 Hague Convention No. II with Respect to the Laws and Customs of War on Land and its attached Regulations, *signed at* The Hague, 29 July 1899, 32 Stat. 1803; 1 Am. J. Int'l. L. (Supp.1907) 129; The Laws of Armed Conflicts 63 (Dietrich Schindler and Jiri Toman, eds., 3d ed., 1988) [hereinafter Schindler/Toman]. This Convention was readopted with only a few minor changes as the 1907 Hague Convention No. IV, *signed at* The Hague, 18 October 1907, 36 Stat. 2227; 2 Am. J. Int'l. L. (Supp. 1908) 90; Schindler/Toman, *supra*, and still constitutes a major portion of the conventional law of war on land.

19. *See*, for example, Pietro Verri, *Commentary on the 1913 Oxford Manual on Naval Warfare*, The Law of Naval Warfare 329, 331 (N. Ronzitti ed., 1988).

20. 3 Scott, Proceedings, *supra* note 17, at 792-793.

21. 1907 Hague Convention No. VI Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, *signed at* the Hague, 19 October 1907, 2 Am. J. Int'l. L. (Supp. 1908) 127; Schindler/Toman, *supra* note 18, at 791. The United States is not a Party to this Convention.

22. 1909 London Declaration Concerning the Laws of Naval Warfare, *signed at* London, 26 February 1909, 3 Am. J. Int'l. L. 179, 186 (Supp. 1909); Schindler/Toman, *supra* note 18, at 843. After an adverse vote in the British House of Lords, this Declaration received no ratifications and never became effective. One author has written

> For belligerents [in World War I] the Declaration of London proved a remarkably flexible weapon, the more so because it was unratified. Since the London Conference had maintained the fiction that it was not writing new law, but declaring law, it was easy to use the declaration. Since it was unratified it was simple to announce interpretations by proclamation, or ignore it.

Calvin D. Davis, The United States and the Second Hague Conference 343 (1975).

23. The 1913 *Oxford Manual on the Law of Naval Warfare Governing The Relations Between Belligerents*, Resolutions of the Institute of International Law 174 (James B. Scott ed., 1913); Schindler/Toman, *supra* note 18, at 857), while perhaps even more extensive in its coverage than the 1909 Declaration of London, *supra* note 22, likewise contained no mention of the submarine.

24. It is worthy of note that the provision in this regard contained in Article 50 of the 1909 Declaration of London, *supra* note 22, applied only to neutral merchant vessels and that there are no comparable provisions relating to enemy merchant vessels. Perhaps this was because of the provision of the 1907 Hague Convention No. VI. *See supra* text accompanying note 21.

25. Hyman G. Rickover, *supra* note 13, at 1217.

26. For. Rel. 198, 199 (Supp. 1916); 10 Am. J. Int'l. L. 178, 179 (Spec. Supp. 1916).

27. 2 Lassa Oppenheim, International Law: A Treatise 469 (Hersch Lauterpacht ed., 7th ed. 1952) [hereinafter Lauterpacht's Oppenheim]. Another British writer concluded that "the introduction of the submarine does not call for the making of new laws for naval warfare, but demands the rigid application of those hitherto accepted." A. Pearce Higgins, *Submarine Warfare*, 1 Brit. Y.B. Int'l L. 149, 164 (1920-1921). However, an expert in the field of the law of war has written:

> So in our own times, Professor Lauterpacht and the late Professor Oppenheim, Dr. Colombos and the late Professor Higgins and other Anglo-American publicists have regarded air and submarine craft as interlopers in naval warfare, which must play the game according to surface rules, or not at all, with no ground of complaint if the rules forbid their effective use. It is not believed that this is an adequate approach either for understanding the present state of international practice, or for moulding future practice.

Julius Stone, Legal Controls of International Conflict 603-604 (2d imp., 1959).

28. For. Rel. 768, 769 (Supp. 1916).

29. 50 Parl. Deb., H.C. (5th serv.) 1750 (1913). The 1907 Hague Convention No. VII Relating to the Conversion of Merchant Ships into War-Ships, 2 Am. J. Int'l. L. 133 (Supp. 1908); Schindler/Toman, *supra* note 19, at 797; 100 B.F.S.P. 377 had covered some, but not all, of the problems connected with such conversions, which created warships sometimes referred to as "armed merchant cruisers" and sometimes as "auxiliary cruisers." In particular, it had not solved the problem as to where such conversions could be accomplished.

30. For. Rel. 216 (Supp. 1914); 9 Am. J. Int'l. L. I (Spec. Supp. 1915).

31. For. Rel. 216-220 (Supp. 1914); 9 Am. J. Int'l. L. 1-6 (Spec. Supp. 1915).

32. For. Rel. 257-258 (Supp. 1914); 9 Am. J. Int'l. L. 7-8 (Spec. Supp. 1915).

33. Although food and clothing remained on the conditional contraband list, as Lauterpacht pointed out this was "a distinction without a difference" as, contrary to the provisions of the 1909 Declaration of London, *supra* note 22, British prize courts applied the doctrine of continuous voyage to items of conditional contraband. Hersch Lauterpacht, *The Problem of the Revision of the Laws of War,* 29 Brit. Y.B. Int'l L. 360, 375 (1952). Concerning problems with respect to contraband during World War 1, *see* H. Reason Pyke, The Law of Contraband of War 178-190 (1915).

34. On 5 September 1914, the British light cruiser *Pathfinder* became the first victim of a submarine's torpedo in World War I. As some indication of the naiveté of the time with respect to submarines, on 22 September 1914 a German submarine sank another British cruiser, the *Aboukir*—and then sank two more such cruisers, the *Hogue* and the *Cressy,* which engaged in rescuing the crew of the first one, in complete disregard of the possible presence of the submarine. R.H. Gibson, *supra* note 3, at 6-7.

35. On 20 October 1914 a German U-boat sank the *Glitra,* a small merchant vessel, the first such to be sunk during World War I. This was accomplished in the manner prescribed for surface vessels and occasioned no outcry. Brodie, *supra* note 4, at 302.

36. For. Rel. 463, 464 (Supp. 1914); 11 Am. J. Int'l. L. 14, 15 (Spec. Supp. 1917).

37. Daniel P. O'Connell, *International Law and Contemporary Naval Operations,* 44 Brit. Y.B. Int'l L. 19, 46 (1970).

38. For. Rel. 94 (Supp. 1915); 9 Am. J. Int'l. L. 83-84 (Spec. Supp. 1915).

39. Declaration Respecting Maritime Law, *signed at* Paris, 16 April 1856, 1 Am. J. Int'l. L. 89 (Supp. 1907); 115 Perry C.T.S. 1 (1969); Schindler/Toman, *supra* note 18, at 787. One of the provisions of this Declaration, which the British were allegedly disregarding, stated: "The neutral flag covers enemy's goods, with the exception of contraband of war." Of course, the British would have denied any violation of the Declaration as they had included practically every conceivable item on their revised lists of contraband! For variously stated reasons, the United States is not a Party to this Declaration but can probably be said to recognize the applicability of its provisions.

40. For. Rel. 96-98 (Supp. 1915); 9 Am. J. Int'l. L. 84-85 (Spec. Supp. 1915). A memorandum to German U-boat commanders issued at the same time said:

> The first consideration is the safety of the U-boat. Rising to the surface to examine a ship must be avoided for the boat's safety, because, apart from the danger of a possible surprise attack by enemy ships, there is no guarantee that one is not dealing with an enemy ship even if it bears the distinguishing marks of a neutral.... Its destruction will therefore be justified unless other attendant circumstances indicate its neutrality.

Bernard Brodie, *supra* note 4, at 304.

41. While, for a complete overview of the problem of submarine warfare against merchantmen, it will be necessary to refer to the use of "operational zones," the question of their legality is beyond the scope of this article. The reader interested in this subject is referred to the definitive discussion thereof in *Maritime War Zones and Exclusion Zones* by L.F.E. Goldie, 64 International Law Studies 156 (1991). *See also* W.J. Fenrick, *The Exclusion Zone Device in the Law of Naval Warfare,* 1986 Can. Y.B. Int'l L. 91. At this point it will suffice to say that "[t]he German operational area may be justified as a legitimate reprisal to the British one." William T. Mallison, Jr., Submarines in General and Limited Wars, Studies in the Law of Naval Warfare (1966).

42. 5 Ray S. Baker, Woodrow Wilson, Life and Letters 247, 250-251 (1935) [hereinafter Baker].

43. For. Rel. 98-100 (Supp. 1915); 9 Am. J. Int'l. L. 86-88 (Spec. Supp. 1915). The United States note said, in part:

> To declare or exercise a right to attack any vessel entering a prescribed area without first certainly determining its belligerent nationality and the contraband character of the cargo would be an act so unprecedented in naval warfare that this Government is reluctant to believe that the Imperial Government of Germany contemplates it as possible. The suspicion that enemy ships are using neutral flags improperly can create no presumption that all ships traversing a prescribed area are subject to the same suspicion. It is to determine exactly such questions that this Government understands the right of visit and search to have been recognized.

44. For. Rel. 100-101 (Supp. 1915); 9 Am. J. Int'l. L. 88-89 (Spec. Supp. 1915).

45. For. Rel. 119-120 (Supp. 1915); 9 Am. J. Int'l. L. 97-98 (Spec. Supp. 1915).

46. For. Rel. 127-128 (Supp. 1915); 9 Am. J. Int'l. L. 99, 101, 106 (Spec. Supp. 1915).

47. For. Rel. 393 (Supp. 1915); 9 Am. J. Int'l. L. 129, 131 (Spec. Supp. 1915). It will be noted that this protest repeated many of the arguments which had been advanced by the British in rejecting the proposal made by the United States.

48. For. Rel. 530-531 (Supp. 1915); 10 Am. J. Int'l. L. 166 (Spec. Supp. 1916). One author construes this decision as:

> a significant admission by Germany that the right of unarmed belligerent merchantmen were recognized by international law, and that the duty with respect to warning and the saving of human life was as applicable to the submarine as to the surface warship.

Horace B. Robertson, Jr., *Submarine Warfare,* JAG. J. 3 (November 1956).

49. Submarines 14 (1983).

50. Proces-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930, *signed at* London, November 6, 1936, 3 Treaties and Other International Agreements of the United States of America, 1776-1949, at 298 (Charles I. Bevans ed.) [hereinafter Bevans]; 31 Am. J. Int'l. L. 137 (Supp. 1937); 173 L.N.T.S. 353; 140 B.F.S.P. 300; Schindler/Toman, *supra* note 18, at 883. Although it is officially a *"Proces-Verbal,"* it is generally referred to as a "Protocol."

51. For. Rel. 232-234 (Supp. 1916); 10 Am. J. Int'l. L. 185, 190 (Spec. Supp. 1916).

52. For. Rel. 257, 259 (Supp. 1916); 10 Am. J. Int'l. L. 195, 198 (Spec. Supp. 1916).

53. For. Rel. 100 (Supp. I, 1917); 11 Am. J. Int'l. L. 332, 333 (Spec. Supp. 1917). One well-regarded expert in this field concluded that "in international law Germany had a good case. She failed to exploit it effectively in neutral eyes and eventually roused the neutrals to anger." O'Connell, *supra* note 37, at 48.

54. For. Rel. 106 (Supp. 1, 1917); 11 Am. J. Int'l. L. 335-337 (Spec. Supp. 1917).

55. For. Rel. 171 (Supp. I, 1917); 11 Am. J. Int'l. L. 344-345 (Spec. Supp. 1917). The "Armed Ship Bill" passed the House by a lopsided margin but was successfully filibustered in the Senate. President Wilson then decided to exercise his authority as Commander-in-Chief to direct the Navy to furnish American merchantmen with guns and gun crews. Robert Lansing, War Memoirs of Robert Lansing 224-225 (1970 ed.).

56. For. Rel. 195, 197 (Supp. I, 1917); 11 Am. J. Int'l. L. 350, 352 (Spec. Supp. 1917).

57. 1907 Hague Convention No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War, *signed at* The Hague, October 18, 1907, 36 Stat. 2415; T.S. 545; 2 Am. J. Int'l. L. 202 (Supp. 1908); 100 B.F.S.P. 448; Schindler/Toman, *supra* note 18, at 951.

58. For. Rel. 613 (Supp. 1914); 9 Am. J. Int'l. L. 238-239 (Spec. Supp. 1915).

59. The Dutch reply to a British protest, stated:

> The observation of a strict neutrality obliges them to place in the category of vessels assimilated to belligerent warships those merchant vessels of the belligerent parties that are provided with an armament and that consequently would be capable of committing acts of war.

Brit. Parl. Papers, Misc., No. 14 (1917) Cd 8690, *quoted in* International Law Situations, 1930, at 14.

60. Edwin Borchard, *Armed Merchantmen,* 34 Am. J. Int'l. L. 107, 111 (1940).

61. Myres S. McDougal & Florentino Feliciano, Law and Minimum World Public Order 565 n. 117 (1962). The authors also point out that:

> The construction of this "right to resist" urged by the same writers and by the British Government was singularly liberal. Attack was said to include the attempt to capture, and the attempt to capture included the attempt to exercise visit and search. In net effect, an armed merchantman was, under this view, entitled to start firing upon being sighted and approached by an enemy force.

62. *See supra* note 29.

63. *See supra* text accompanying note 29.

64. 50 Parl. Deb., H.C. 1750 (5th ser. 1913). It will be noted that Churchill spoke of a British "armed merchantman" meeting a foreign "armed merchantman." Actually, he was undoubtedly referring to a foreign

"armed merchant cruiser." Moreover, he continued to fail to make this verbal distinction. On June 11, 1913, during a question period, he was asked: "Is it not a fact that these ships are armed for defence only and not for attack?" to which he replied: "Surely these ships will be quite valueless for the purpose of attacking armed vessels of any kind. What they are serviceable for is to defend themselves against the attack of another vessel of their own standing." 53 *id.* at 1599 (1913). (The question was undoubtedly "planted"!)

65. 59 *id.* at 1925 (1914). The extent of this operation is indicated by the fact that by the end of the war 4,139 merchant ships had been armed. Bernard Brodie, *supra* note 4, at 319. During World War I Germany had no "armed merchantmen" although it did have some "commissioned auxiliary cruisers"; and the guns to which Churchill referred were very much used against "ships of war" inasmuch as they were used against submarines. In a memorandum of October 13, 1914, the German Government stated that the purpose of the armament on the merchantmen was for armed resistance against German cruisers and that "[s]uch resistance is contrary to international law because a merchant vessel is not permitted to defend itself against a war vessel." (The issue of the right of such armed vessels to remain in neutral ports more than twenty-four hours was also raised.) For. Rel. 613 (Supp. 1914); 10 Am. J. Int'l. L. 321 (Spec. Supp. 1916).

66. For. Rel. 598 (Supp. 1914); 9 Am. J. Int'l. L. 223 (Spec. Supp. 1915). The British Privy Council has held that "it must be recollected that defence is not confined to taking to one's heels or even resuming a blow, but, in the jargon of strategy, may consist in an offensive-defensive, or in plain words in hitting first." International Law Situations, 1930, at 6, 8. And as one author stated: "[I]f a surprise shell which sent down a submarine and its crew had been fired in self-defence, the pity is that the drowning men would be unable to detect its difference from an offensive shell." Kenkichi Mori, The Submarine in War 86 (1931) [hereinafter Mori].

67. For. Rel. 604 (Supp. 1914); 9 Am. J. Int'l. L. 230 (Spec. Supp. 1915). In view of the provisions of the 1907 Hague Convention No. XIII, *supra* note 57, the British Ambassador also stated that "His Majesty's Government hold the view that it is not in accordance with neutrality and international law to detain in neutral ports merchant ships armed with purely defensive armaments." For. Rel. 606 (Supp. 1914); 9 Am. J. Int'l. L. 231 (Spec. Supp. 1915).

68. For. Rel. 196 (Supp. 1916); 10 Am. J. Int'l. L. 332 (Spec. Supp. 1916).

69. 10 Am. J. Int'l. L. 339, 340 (Spec. Supp. 1916). On a number of occasions the United States called attention to the use of guns on merchant ships for offensive purposes. *See, e.g.,* For. Rel. 849-850 (Supp. 1915).

70. The same procedure was followed in World War II. 13 International Military Tribunal, Trial of Major War Criminals 258 (1947) [hereinafter T.M.W.C.].

71. For. Rel. 607, 608 (Supp. 1914); 9 Am. J. Int'l. L. 232 (Spec. Supp. 1915).

72. *See supra* note 39.

73. Lauterpacht's Oppenheim, *supra* note 27, at 469. Elsewhere he states that: "An overwhelming weight of authority recognized that their defensive armament in no way altered the legal status of these vessels." *Id.* at 468. While this is probably true as to most British writers on the subject, it is probably not true in general. *See, e.g., infra* note 74, and the Borchard article cited *supra* in note 60.

74. For. Rel. 611-612 (Supp. 1914); 9 Am. J. Int'l. L. 234-235 (Spec. Supp. 1915). Secretary of State Bryan disagreed with this memorandum and in a letter to President Wilson he argued that "the character of the vessel is determined, not by whether she resists or not, but by whether she is armed or not . . . the fact that she is armed raises the presumption that she will use her arms." Baker, *supra* note 42, at 354. John Bassett Moore, one of the deans of international law in the United States, said of Secretary Bryan's position that "it was obviously founded in law and common sense." John B. Moore, *Fifty Years of International Law,* 50 Harv. L. Rev. 395, 439 (1937).

75. For. Rel. 749 (Supp. 1916).

76. Robert Lansing, *supra* note 55, at 100-101.

77. For. Rel. 146-148 (Supp. 1916); 10 Am. J. Int'l. L. 310,312-313 (Spec. Supp. 1916). Of the problem created by permitting merchant vessels to be armed and yet considering them to be noncombatants, while requiring the submarine to comply with the law applicable to surface warships, one expert in the law of submarine warfare has written:

> It soon became apparent [in World War I] that even a British armed merchant ship sailing alone presented a very real military danger to German submarines which attempted to comply with traditional law. The predictable result of the new situation was that consideration of military necessity, as well as simply self-preservation, led to the submarine remaining submerged and making torpedo attacks without warning.

William T. Mallison, Jr., *supra* note 41, at 107. A similar conclusion was reached by a number of other students of the problem. *See, e.g.,* the Grotius Committee Report, *supra* note 14, at 155; Hyman G. Rickover, *supra*

note 13, at 1223: Alex A. Kerr, *International Law and the Future Of Submarine Warfare,* 81 U.S. Nav. Inst. Proc. 1105, 1109 (October 1955).

78. For. Rel. 211 (Supp. 1916); 10 Am. J. Int'l. L. 336 (Spec. Supp. 1916). The other Allied Governments answered in the same vein.

79. In his *Memoirs,* Lansing, although strongly pro-British, said:

> Briefly, the British Government wished international law enforced when they believed that it worked to the advantage of Great Britain and wished the law modified when the change would benefit Great Britain.

Robert Lansing, *supra* note 55, at 111. The German response was a memorandum of 10 February 1916 in which it was stated that armed merchantmen were not entitled to the status of peaceable vessels of commerce and that German naval vessels were receiving orders "to treat such vessels as belligerents." For. Rel. 163-165 (Supp. 1916); 10 Am. J. Int'l. L. 314-318 (Spec. Supp. 1916).

80. For. Rel. 244-248 (Supp. 1916); 10 Am. J. Int'l. L.367, 369-370 (Spec. Supp. 1916). The vacillation of the United States on this matter and its ultimate improper decision was pointed out with vigor by Borchard when the same problem arose in the early years of World War II. He termed the March 1916 memorandum a "humiliating retreat." Edwin Borchard, *supra* note 60, at 107. *But see* Mori, *supra* note 66, at 86-87. Another expert in the field asserted that it "represented a return to a pro-Allied policy in the guise of a return to traditional law." William T. Mallison, Jr., *supra* note 41, at 111.

81. Inter-American Convention on Maritime Neutrality, *signed at* Havana, February 20, 1928, 47 Stat. 1989; T.S. 845; 2 Bevans, *supra* note 50, at 721. (There are only eight Parties to this Convention, all of the major Latin-American nations having failed to ratify it.) Article 2 of the Harvard Research in International Law, *Rights and Duties of Neutral States in Naval and Aerial War,* 33 Am. J. Int'l. L. 167, 224 (Spec. Supp. 1939) provides that belligerent merchant vessels "shall, if armed for defense or offense, be assimilated to warships." *See also* Articles 28 and 55 of that document. However, Article 3 (2) of the Scandinavian Declaration Regarding Similar Rules of Neutrality, *signed at* Stockholm, May 27, 1938, 188 L.N.T.S. 295, 32 Am. J. Int'l. L. 141 (Supp. 1938) states:

> 2. Access to [Danish] ports or to [Danish] territorial waters is likewise prohibited to armed merchant ships of the belligerents if the armament is destined to ends other than their own defense.

82. William T. Mallison, Jr., *supra* note 41, at 120.

83. It will have been noted that no mention has been made of the famous "Q-ships." These were warships disguised as unarmed merchant ships and were undoubtedly another reason why Germany elected to discontinue the practice of having a submarine surface and warn during the course of World War I. *Id.* at 67.

84. 2 David H. Miller, The Drafting of the Covenant 65, 74 (1928).

85. Treaty of Peace between the Allied and Associated Powers, of the One Part, and Germany, of the Other Part, *signed at* Versailles, June 28, 1919, 2 Bevans, *supra* note 50, at 43, 127; 112 B.F.S.P. 1, 94; 225 Perry C.T.S. 188, 276. (The United States did not ratify this Treaty because of the Senate's objections to the Convenant of the League of Nations which was a part thereof. However, Article 191 (in Part V) was carried over into the Treaty Between the United States and Germany for the Establishment of Friendly Relations, *signed* at Berlin, August 25, 1921, 42 Stat. 1939; T.S. 658; 114 B.F.S.P. 828.)

86. Within a few years of Versailles the German Navy was able to arrange to retain its expertise in the submarine field through the use of Dutch and Spanish connections. Erich Raeder, My Life 138-139 (1960); Francis L. Carsten, The Reichwehr and Politics 1918-1933, at 242-244 (1966); John Keegan, The Price of Admiralty 221 (1989).

87. Conference on the Limitation of Armament, Washington, November 12, 1921 - February 6, 1922, at 467 (1922) [hereinafter 1922 Washington Conference].

88. *Id.* at 486.

89. Yamato Ichihashi, The Washington Conference and After: A Historical Survey 81 (1928). World War I had already demonstrated the correctness of the British position and World War II confirmed it.

90. 1922 Washington Conference, *supra* note 87, at 610.

91. *Id.* at 596.

92. During the course of the discussion, the Italian representative stated that his delegation understood the term "merchant vessel" to refer to unarmed merchant vessels. *Id.* at 688. He adhered to this definition despite remonstrances from the British delegate. *Id.* at 690, 692. The Soviet text International Law 438 (F.I. Kozhevnikov ed., n.d.) indicates that the 1936 Protocol applies only to "unarmed merchantmen."

93. Treaty between the United States of America, the British Empire, France, Italy and Japan Relating to the Use of Submarines and Noxious Gases in Warfare, *signed* at Washington, February 6, 1922, *supra* note 87, at 1605; 16 Am. J. Int'l. L. 57 (Supp. 1922); Schindler/Toman, *supra* note 18, at 789. It must be emphasized that this Treaty never became effective. It required the unanimous acceptance of the drafting States and France refused to ratify it. Nevertheless, both the 1930 London Naval Treaty, *infra* note 94, and the 1936 London

Naval Treaty, *infra* note 116, refer to the 1922 Washington Treaty as though it were an effective international agreement.

94. Limitation and Reduction of Naval Armament (London Naval Treaty), *signed* at London, April 22, 1930, 46 Stat. 2858; T.S. 830; 2 Bevans, *supra* note 50, at 1055; 112 L.N.T.S. 65; 132 B.F.S.P. 603.

95. *See supra* note 50.

96. 1922 Washington Conference, *supra* note 87, at 596.

97. *Id.*

98. *Id.* at 728. He added: "The peculiarity about piracy was that, though the act was done on the high seas and not under the jurisdiction of any particular country, nevertheless it could be punished by any country." Unfortunately, he had previously stated that the Conference was "competent to declare that those who violated the laws of war were guilty of acts of piracy." *Id.* at 720. Most commentators seem to have reached the conclusion that Hughes did. *See, e.g.,* Herbert A. Smith, The Law and Custom of the Sea 93 n.3 (3rd ed., 1959) where the statement is made that "[t]he Washington text was objectionable by reason of provision that submarine officers who broke the rule should be treated as pirates." *See also infra* note 121.

99. One author calls attention to this by asserting that "the stipulation [in Article VI] dispels any misapprehension that the instrument would be obligatory as between the nations which have ratified it." Kenkichi Mori, *supra* note 66, at 118. *But see supra* note 93. In Mallison, *supra* note 41 at 43, the conclusion is reached that "the submarine came out of the Washington Conference with undiminished status as a lawful combatant."

100. Lawrence H. Douglas, *The Submarine and the Washington Conference of 1921,* 26 Nav. War Coll. Rev. 86, 92 (March-April 1974); *reprinted in* 62 International Law Studies 479, 488 (Richard B. Lillich & John N. Moore, eds., 1980).

101. 1922 Washington Conference, *supra* note 87, at 814, 816; 2 Bevans, *supra* note 50, at 346.

102. Rules Concerning the Control of Wireless Telegraphy in Time of War, 32 Am. J. Int'l. L. 2 (Supp. 1938); General Collection of the Laws and Customs of War 819, 821 (M. Deltenre ed., 1943). In his testimony before the International Military Tribunal after World War II, German Admiral Doenitz pointed out that reference to this provision was contained in a footnote to the German Prize Ordinance. 13 T.M.W.C., *supra* note 70, at 361. (Actually, it was in Article 39 (iii) of the Ordinance.)

103. In O'Connell, *supra* note 37, at 19, the author apparently takes the position that using a ship's radio to announce the appearance of a submarine and giving its location does not affect the ship's status as he calls the decision to sink vessels which follow that procedure a "dilution of Germany's standards" of submarine warfare.

104. *See supra* note 81.

105. The International Military Tribunal paraphrased this provision by stating that "[i]f the commander cannot rescue, then under its [the 1936 Protocol's] terms he cannot sink a merchant vessel and should allow it to pass harmless before his periscope." 1 T.M.W.C., *supra* note 70, at 313; Nazi Conspiracy and Aggression: Opinion and Judgement 140 (1947) [hereinafter Nazi Conspiracy].

106. Documents of the London Naval Conference, 1930, at 187-202 (1930) [hereinafter 1930 London Conference].

107. *Id.* at 411.

108. *Id.* at 444.

109. *Id.* at 238.

110. *See supra* note 94.

111. In a criticism of these provisions *(as reaff'd in* the 1936 London Submarine Protocol), one author has written:

> [T]he Protocol was much like an elegant carpet thrown over a littered and soiled passage, for it attempted reform with one sweeping gesture, while what was called for was a thorough airing and meticulous renovation of the laws governing submarine conduct. In essence the London Protocol was the product of an idealistic era which trusted in glib moralizing to right past wrongs and prevent future digressions.

Barnes *supra* note 14, at 189. However, another author takes the position that while the 1922 Washington Conference was influenced by the "spirit of Versailles," in the 1930 agreement "the tone of moral disapproval is wanting." Hyman G. Rickover, *supra* note 13, at 1220 and 1221.

112. *See supra* text accompanying note 93.

113. 1930 London Conference, *supra* note 106, at 443. Both the 1922 and the 1930 provisions have been properly criticized because "they attempt a regulation of submarine warfare without at the same time considering the question of the armed merchantman; yet the two problems are intimately connected." Rickover, *supra* note 13, at 1221.

114. *See supra* text accompanying note 102.

115. *See supra* note 50.

116. Treaty on the Limitation of Armament (Second London Naval Treaty), *signed at* London, March 25, 1936, 50 Stat. 1363; T.S. 919; 3 Bevans, *supra* note 50, at 257; 140 B.F.S.P. 243.

117. Documents of the London Naval Conference 1935, at 54 (1936) [hereinafter 1935 London Conference]. Prime Minister Baldwin's statement was confirmed by the French representative in his opening address. *Id.* at 63.

118. *Id.* at 741-742 and 104.

119. *Id.* at 742-743. For a discussion in depth of the background of the 1935 London Naval Conference, and its inevitable failure, *see* Stephen E. Pelz, Race to Pearl Harbor (1974).

120. 140 B.F.S.P. 300, 302. It is believed that Hitler did this as a political gesture and against the advice of his naval advisers. It is, perhaps, appropriate to note that when World War II began, the United Kingdom and France both took the position that these rules applied to aircraft as well as to surface warships and submarines. 1 For. Rel. 547-48 (1939).

121. The Nyon Agreement, *signed at* Nyon, Switzerland, Sept 14, 1937, 181 L.N.T.S. 137; 33 Am. J. Int'l. L. 550 (Supp. 1939); Schindler/Toman, *supra* note 18, at 887. The Preamble stated that the submarine attacks were "contrary to the most elementary dictates of humanity, which should be justly treated as acts of piracy." Thus, although the 1922 Washington Treaty, *supra* note 93, had never become effective, its provisions continued to be noted—and misinterpreted.

122. Antonio Cassese, *The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts,* Current Problems of International Law 287, 295-96 (A. Cassese ed., 1975).

123. League of Nations, Official Journal, December 1937, at 945–46; 33 Am. J. Int'l. L. 551 (Supp. 1939).

124. Bernard Brodie, *supra* note 4, at 341. He also states that by the spring of 1939 over 9,000 officers of the British merchant marine had received instruction in gunnery and in convoy tactics. The statistics in 1 Stephen W. Roskill, The War at Sea, 1939-1945, at 22 (1954) [hereinafter Roskill], disclose that by the end of 1940 some 3,400 ships had been fitted with low-angle guns for protection against submarines and some 20,000 members of the Royal Navy had been trained to use these "defensive" armaments, as well as a large number of the members of the merchant crews.

125. 40 T.M.W.C., *supra* note 70, at 88-89. The British moved to the implementation of paragraph (b) on 13 June, 1940. *Id.* at 90. It will be observed that the Handbook assumed that a merchant vessel had a right to use its arms to resist visit and search and capture by an enemy warship—an action that Churchill had once said a merchant vessel had no rights to take. *See supra* text accompanying note 65.

126. 1 William M. Medlicott, The Economic Blockade 113 (1952). On the other hand, it is reported that until late in 1943 the primary objectives of British submarines were the enemy's surface warships. 1 Roskill, *supra* note 124, at 334. However, restrictions on attacks by British submarines on enemy merchant shipping were relaxed in Norwegian waters in 1940, *id.* at 172, and were removed in the Mediterranean on February 5, 1941, *id.* at 439.

127. Karl Doenitz, Memoirs: Ten Years and Twenty Days 35 (1959). For a discussion of the Battle of the Atlantic and of the convoy system, see Keegan, *supra* note 86, at 213-65.

128. *See infra* text accompanying note 149, concerning the convoying of neutral merchant ships. *See* Frits Kalshoven, Belligerent Reprisals 139 (1971) where the following appears:

> On the other hand, neutral merchant vessels on their way to or from Great Britain in this period gradually took to sailing under the protection of the British navy and air force. Attacks on such escorted vessels could not be considered unlawful; by the voluntary acceptance of direct armed protection of one of the belligerents, the vessels in question assumed the character of legitimate objectives for the armed attacks of the other belligerent.

A fortiori, the same rule would apply to belligerent merchant vessels in convoy. Concerning neutral merchant vessels in a convoy escorted by neutral warships, see Articles 61 and 62 of the 1909 Declaration of London, *supra* note 22, which sets forth the customary rule in this respect. *See also* Article 64a, Harvard Research, *supra* note 81, at 653 and Kyriakides v. Germany, 8 Recueil des Decisions des Tribuneaux Arbitraux Mixtes 349, summarized in the Harvard Research at 679. In S.S. Hall, *Submarine Warfare,* 5 Trans. Grot. Soc. 82, 89 (1920), the author, a Rear Admiral in the Royal Navy, stated that merchantmen in convoys "appear to lose their non-combatant standing" and that "from the day we [the British] adopted the convoy system the German submarine campaign became legitimate."

129. Order in Council Restricting Further the Commerce of Germany, November 27, 1939, Stat. R. & O. 1939, no. 1709. For a full discussion of the contents of this Order and its effect, see Frits Kalshoven, *supra* note 128, at 118-19. For the reaction of the United States, see the U.S. note *British Blockade of German Exports,* 1 Dep't St. Bull. 651 (No. 24, December 9, 1939).

130. *See supra* note 39.

131. Cmd. 6191, 1940, at 5 (as quoted in Kalshoven, *supra* note 128, at 143). The preamble of the Order in Council asserted violations by Germany of, among others, the 1936 London Submarine Protocol, *supra* note 50. One expert in this field points out that at this stage German exports were Government controlled and that probably the provision of the 1856 Declaration of Paris, *supra* note 39, did not apply "to the public interests of the enemy State." Kalshoven, *supra* note 128, at 143. (A typographical error substituting "to" for "not" in the original text was corrected by letter from the author, May 25, 1989.)

132. Kalshoven, *supra* note 128, at 33.

133. 360 Parl. Deb., H.C., 5th Ser., colt 1351. (There has been considerable discussion as to whether Churchill (and the International Military Tribunal) said, and meant, "night" or "sight'). *See, eg.*, 10 Digest of International Law 663-64 (M. Whiteman ed., 1968). The Parliamentary reporter recorded it as "night" which in the context of the sentence, is much more logical than "sight": otherwise the sentence would read "all German ships by day and all ships by sight").

134. "This order went far beyond anything contained in German orders, since it meant that in these waters from then onward neutral ships sailing with full lights would also be sunk by British submarines." Doenitz, *supra* note 127, at 59.

135. 1 T.M.W.C., *supra* note 70, at 313; Nazi Conspiracy, *supra* note 105, at 140.

136. German Prize Ordinance, August 28,1939, at 149 B.F.S.P. 663. After providing that ships in convoy had no protection (Article 32), that forcible resistance could be overcome by force (Article 36), and that the use of the wireless constituted assistance to the enemy (Article 39), the Ordinance stated, in Article 74:

> (1) The destruction of vessels in accordance with articles 72 (enemy) and 73 (neutral) is only permissible if the passengers, the crew and the ship's papers are placed in safety before destruction.
>
> (2) The ship's boats are not deemed to be a place of safety unless under the prevailing conditions of the sea and weather the safety of the passengers and the crew is assured by the proximity of land or by the presence of another vessel which is capable of taking them on board.
>
> 48. The contents of this article correspond to the London Rules of Submarine Warfare (printed in the annex). (Note in original.)

The German Navy had proposed a "prohibited area" which would, in effect, have been a "free fire" zone but this proposal was apparently rejected at that time. 7 Documents on German Foreign Policy, 1918-1945, at 546, Series D (1956).

137. 7 Fuehrer's Directive No. 2, Documents on German Foreign Policy, 1918-1945, at 548, Series D (1956).

138. Fuehrer's Directive No. 4, Fuehrer's Directives for the Conduct of the War 53, 54 (1947). A British historian asserts that these decisions "were not issued in any altruistic spirit but in the hope that after Poland had been crushed, Britain and France—and especially the latter—would make peace. As soon as it was realised that this hope was vain, removal of the restrictions on the methods of waging war at sea started." 1 Roskill, *supra* note 124, at 103. He is undoubtedly correct.

139. 1 Fuehrer Conferences on Matters Dealing with the German Navy 9 (1947).

140. 8 Fuehrer's Directive No. 5, Documents on German Foreign Policy, 1918-1945, at 176, 177, Series D (1954). Fuehrer's Directive No. 7, October 18, 1939, *id.* at 316, authorized the Navy to "attack enemy passenger ships which are in a convoy or sailing without lights."

141. In his cross-examination before the International Military Tribunal, Doenitz stated:

> If a merchant ship sails without lights, it must run the risk of being taken for a warship, because at night it is not possible to distinguish between a merchant ship and a warship. At the time the order was issued, it concerned an operational area in which blacked-out troop transports were traveling from England to France.

13 T.M.W.C., *supra* note 70, at 357.

142. *See supra* notes 102 and 103. *See also* Doenitz's testimony before the International Military Tribunal, 13 T.M.W.C., *supra* note 70, at 253.

143. The *Athenia*, a passenger vessel, had been torpedoed without warning by a German U-boat on September 4, 1939. The Germans denied that its sinking had resulted from the action of a German U-boat and accused Churchill of having ordered a British submarine to sink the vessel in order to stir up feeling against Germany. When German officials learned that the *Athenia* had, indeed, been the victim of a German torpedo they continued to deny this and it was not until after the war had ended that the truth was learned. 1 T.M.W.C., *supra* note 70, at 316; Nazi Conspiracy, *supra* note 105, at 143.

144. In 2 George Schwarzenberger, International Law as Applied by International Courts and Tribunals 433 (1968), the following apt statement appears:

> It is always possible to maintain legal continuity on this issue [warfare at sea] by explaining the departures from the traditional law by way of reprisals and counter-reprisals. At least in the relations between the belligerents, this type of argument can claim a modicum of formal validity. In substance,

however, reasoning on these lines merely hides a breakdown of the law and the resumption by belligerents at sea of an almost complete freedom of action.

145. Karl Doenitz, *supra* note 127, at 58-59. The International Military Tribunal had found more or less to the same effect. 1 T.M.W.C., *supra* note 70, at 311-12; Nazi Conspiracy, supra note 105, at 138-139. Compare the enumeration of events leading to unrestricted warfare by Germany during World War II which appears in 1 Roskill, *supra* note 124, at 103-104.

146. In Mallison, *supra* note 41, at 66-67, the author takes the position that "the actual British blockade methods [such as including food on the list of contraband] also provided adequate justification for the submarine operational zones as a legitimate reprisal."

147. Frits Kalshoven, *supra* note 128, at 128. In his testimony before the International Military Tribunal Doenitz said:

> It is a matter of course that if a ship has a gun on board she will use it. It would have been a one-sided obligation if the submarine, in a suicidal way, were then to wait until the other ship fired the first shot. That is a reciprocal agreement, and one cannot in any circumstances expect the submarine to wait until it gets hit first. And as I have said before, in practice the steamers used their guns as soon as they came within range.

13 T.M.W.C., *supra* note 70, at 360.

148. *See, e.g.,* Edwin I. Nwogugu, *Submarine Warfare,* The Law of Naval Warfare 358-59 (N. Ronzitti ed., 1988) [hereinafter Nwogugu]. *See also* Robert W. Tucker, 50 International Law Studies 68 (1957). There does not appear to have been any dispute that merchant vessels, armed or unarmed, sailing in a convoy under the protection of warships, were beyond the ambit of the Protocol, even though the British did attempt to entice neutral ships into their convoys by claiming that such action "affords neutral merchant vessels greater protection and does not signify a breach of neutrality" and the Germans disagreed. 8 Documents on German Foreign Policy, 1918-1945, at 319-20, Series D (1954).

149. U.S. Department of the Navy, The Commander's Handbook on the Law of Naval Operations (NWP 9), 1987, para. 8.2.2.2. [hereinafter Commander's Handbook].

150. Joint Resolution to Preserve the Neutrality and Peace of the United States etc., November 4, 1939, 54 Stat. 4; 34 Am. J. Int'l. L. 44, 51 (Supp. 1940).

151. Presidential Proclamation of November 4, 1939, *Use of Ports or Territorial Waters of the United States by Submarines of Foreign Belligerent States,* 54 Stat. 2672 (1939); 1 Dep't St. Bull. 456 (No. 19, November 4, 1939); International Law Situations 1939, at 48 (Paul S. Wild ed., 1940).

152. Edwin Borchard, *supra* note 60, at 107. He pointed out that these ships were far more powerful than their World War I predecessors as they carried four six-inch guns, mounted fore and aft. *See supra* text accompaning note 65.

153. Presidential Proclamation of November 4, 1939, *Definition of Combat Areas,* 54 Stat. 2673 (1939); 1 Dep't St. Bull. 454-55 (No. 19, November 4, 1939); 1939 International Law Situations, *supra* note 151, at 146. Germany urged other neutrals to designate a similar zone.

154. 13 T.M.W.C., *supra* note 70, at 365. One author goes even further, asserting that: "There is no logical difference between the merchant ship on the one hand and the railroad train or the factory on the other." Alex A. Kerr, *supra* note 77, at 1108.

155. 13 T.M.W.C., *supra* note 70, at 367. Later answers indicated that he was referring to the provisions of Article 16 of the 1907 Hague Convention No. X for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, *signed at* The Hague, October 18, 1907, 36 Stat. 2371; 2 Am. J. Int'l. L. 153 (Supp. 1908); Schindler/Toman, *supra* note 18, at 313.

156. 1 T.M.W.C. *supra* note 70, at 312-13; Nazi Conspiracy, *supra* note 105, at 139.

157. Another argument criticizing the Tribunal's logic on this matter will be found in Mallison, *supra* note 41, at 80, where the author points out:

> There is no indication that the Tribunal gave careful consideration to the alternative interpretation that the Protocol was inapplicable in operational areas since there was no international agreement on this subject. Such an interpretation was advanced by Kranzbuhler [Doenitz's defense attorney] and it is at the very least as plausible as the interpretation selected by the Tribunal. It is more plausible if the operational area is evaluated as too important to be dealt with by implication.

The authors of two post-war studies of submarine warfare both recommend the affirmative legalization of "war zones" or "operational zones." Alex A. Kerr, *supra* note 77, at 1109; and Barnes, *supra* note 14, at 197-98.

158. *See, e.g.,* the testimony of Admiral Gerhard Wagner, 13 T.M.W.C. *supra* note 70, at 453. *See also supra* the text accompanying note 36.

159. 13 T.M.W.C. *supra* note 70, at 281-95; James McMillan, Five Men at Nuremberg 181-85 (1985).

160. 35 T.M.W.C. *supra* note 70, at 270.

161. Judgment of the International Military Tribunal for the Far East, November 4-12, 1948, at 1072-73 (mimeo, n.d.) [hereinafter Judgment]; 1 The Tokyo Judgment 412 (B.V.A. Roling & C.F. Ruter eds., 1977) [hereinafter The Tokyo Judgment]. It was definitely implemented by the Japanese. Judgment, 1073-74; The Tokyo Judgment, *supra*.

162. 1 T.M.W.C., *supra* note 70, at 313; Nazi Conspiracy, *supra* note 105, at 139-40. Concerning the *Laconia* order, one analysis states:

> The ambiguity of the order apparently was considered to stem from an uncertainty as to whether its intent was only to forbid submarine commanders from making any attempt to rescue survivors or was intended to enjoin them deliberately to kill survivors. The International Military Tribunal seemed to have been of the opinion that if the former interpretation was intended the order was a lawful one. But even this opinion is doubtful, since the rule in question allows only for circumstances of operational necessity. The most favorable interpretation of the Laconia Order was that it laid down a policy of no rescue, not solely—or perhaps not even primarily—for reasons of operational necessity, but because rescue was deemed to run "counter to the rudimentary demands of war for the destruction of enemy ships and crews." On this basis alone the unlawful character of the order would seem to be readily apparent.

Tucker, *supra* note 148, at 73.

163. One commentator construes this portion of the opinion as indicating that the Tribunal had found that "the British merchant marine was no longer entitled to be considered as non-combatant. It had become an auxiliary to the British naval forces." Horace B. Robertson, Jr., *supra* note 48, at 6-7.

164. 1 T.M.W.C., *supra* note 70, at 311-13; Nazi Conspiracy, *supra* note 105, at 138-40. The Tribunal made the same findings on these charges with respect to German Grand Admiral Raeder. 1 T.M.W.C. 317; Nazi Conspiracy 143.

165. Frits Kalshoven, *supra* note 128, at 139-40.

166. Commander's Handbook, supra note 149, at para. 8.2.2.2. Relevant quotations from this volume will also be found in the text accompanying notes 149, *supra*, and 168, *infra*. Earlier the U.S. Navy had issued Law of Naval Warfare (NWIP 10-2) (1955) [hereinafter Law of Naval Warfare]. Strange to relate, there is no mention of the submarine in that volume. The word "submarine" does not even appear in its Index!

167. A Soviet volume entitled The International Law of the Sea recently published in English in Moscow (I.P. Blishchenko, gen., 1988) states, at 229:

> The arming of merchant ships in contravention of the VII Hague Convention on the transformation of merchant ships into naval vessels, especially accompanied by a request of civilian status for armed ships, eliminates the difference between military and civilian objects. In this case such ships cannot be regarded either as noncombatants or as legitimate combatants, and therefore cannot be protected under international law. It is of interest to note that Russia never ratified the 1907 Hague Convention No. VII and that the Soviet Union is not a Party thereto.

168. Law of Naval Warfare, *supra* note 166, at para. 503b(3).

169. Commander's Handbook, *supra* note 149, at para. 8.3.1.

170. Edwin I. Nwogugu, *supra* note 148, at 355-56.

171. Of the publicists whose works have been reviewed who express an opinion on the subject, the following take the position that the 1936 London Submarine Protocol is still binding law: Eric Castren, The Present Law of War and Neutrality 289 (1954); C. John Colombos, The International Law of the Sea 388 (3d ed., 1954); Gerald I.A.D. Draper, *Rules Governing the Conduct of Hostilities—the Laws of War and Their Enforcement*, 18 Nav. War Coll. Rev. 22, 30 (November 1965), *reprinted in* 62 International Law Studies 247 (Richard B. Lillich & John Norton Moore eds., 1980); William T. Mallison, Jr., *supra* note 41, at 118-1221; Edwin I. Nwogugu, *supra* note 148, at 359-60; Daniel P. O'Connell, *supra* note 37, at 52; Horace B. Robertson, Jr., *Submarine Warfare, in* JAG.J. 7 (November 1956); Herbert A. Smith, The Law and Custom of the Sea 198 (3rd ed., 1959); and Robert W. Tucker, *supra* note 148, at 352. The United States Navy's position, as expressed in Commander's Handbook *supra* note 149, at para. 8.3.1, is to the same effect. *See supra* text accompanying note 169. The publicists taking the position that the 1936 London Submarine Protocol is no longer an effective part of the law of maritime warfare include Barnes, *Submarine Warfare and International Law*, 2 World Polity 121, 187 (1960); Kerr, *supra* note 77, at 1110; William O. Miller, *The Law of Naval Warfare*, 24 Nav. War Coll. Rev. 35 (February 1972), *reprinted in* 61 International Law Studies 263 (Richard B. Lillich & John Norton Moore eds., 1980); W. Hays Parks, *Conventional Aerial Bombing and the Law of War*, 108 U.S. Nav. Inst. Proc. 98, 106 (May 1982); and Julius Stone, Legal Controls of International Conflict 428 (2nd. imp., 1959). As quoted in O'Connell, *supra* note 37, at 51, the 1966 Manual of International Maritime Law of the Soviet Navy states that submarine warfare is regulated by the Protocol, among other treaties, and then says that all of these rules are obsolete.

172. Robert W. Tucker, *supra* note 148, at 66. In answer to interrogatories prepared by Doenitz's defense counsel, Admiral Chester Nimitz, Commander-in-Chief of the United States Pacific Fleet at the time of the attack on Pearl Harbor on December 7, 1941, stated that on that date he had received a message ordering unrestricted submarine warfare. 40 T.M.W.C., *supra* note 70, at 108-11. This could, of course, also be attributed to the nature of the attack on Pearl Harbor.

173. Japanese merchant ships acted very much the same as British merchant ships, being armed, reporting submarine sightings, attempting to ram, etc. William T. Mallison, Jr., *supra* note 41, at 89-90. This would have justified unrestricted submarine warfare in the Pacific by the United States. However, it would not be a justification for such action from the very first day of the war. Another author justifies the action of the United States on the basis that the Japanese merchant marine was integrated into the Japanese Navy (armed, sent radio sightings, etc.), that there was no danger to neutrals (there were no neutral vessels in the Pacific), and that there were no neutrals in the declared operational zones. Horace B. Robertson, Jr., *supra* note 48, at 8.

174. John Keegan, *supra* note 86, at 274–75. The final chapter of this book (266-75) contains a succinct discussion of the tremendous technical evolution which the submarine has undergone since the end of World War II.

XVII

The *1977 Protocol I* and The United States

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The failure of previous United States Administrations to send the *1977 Protocol I*[1] to the Senate for its advice and consent to ratification by the President was both a political and a military decision. Accordingly, it is possible, but unlikely, that different action will be taken by the Clinton Administration. Why, then, does the United States object to the provisions of this law-of-war treaty, the purpose of the drafting of which was to fill in the *lacunae* which had admittedly been found to exist in the *Regulations Attached to the 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land*[2] *(1907 Hague Regulations on Land Warfare)* and in the four *1949 Geneva Conventions?*[3] True, the United States has stated that it considers itself bound by the rules contained in the *1977 Protocol I* which represent customary international law—but only to the extent that they reflect customary international law as determined by United States legal advisers.[4]

A review of the provisions of the *1977 Protocol I* labeled as objectionable by officials of the United States in informal presentations will quickly demonstrate that there are actually no overpowering reasons to object to the vast majority of those provisions.[5] The finding of a need for two dozen or more reservations and two dozen or more understandings (as reported to have been demanded by the Joint Chiefs of Staff) can only have resulted from "nitpicking."[6] While there are unquestionably some really objectionable provisions, these could very easily be taken care of at the time of ratification. Other provisions may not be worded exactly as the United States would have desired, but this is not a valid reason for a reservation or an understanding unless the objectionable wording results in an ambiguous or unintended or unwanted meaning—and such instances are rare. President Reagan's statement in his message to the Senate that "Protocol I is fundamentally and irreconcilably flawed"[7] was a gross overstatement of the facts, resulting from overreaction to a very small group of provisions on one subject which, concededly, were flawed.

Because the document containing the specific objections to the *1977 Protocol I* registered by the Joint Chiefs of Staff is still classified, we must have recourse to other sources in order to ascertain what at least some of those objections may be. This information we have, to an abbreviated extent, in the letter from the

Secretary of State to the President submitting the *1977 Protocol II* for transmission to the Senate, and in more detail in presentations made at various meetings by representatives of the Department of State and of the Department of Defense.[8] Presumably, the objections stated by these officials are the major reasons for the non-ratification of the Protocol by the United States.[9]

To begin at the beginning, certainly the Preamble of the *1977 Protocol I* is clear and concise and leaves nothing to interpretation. After three paragraphs which, in sum, point out that the fact that the international community has drafted rules applicable during the course of international armed conflict in no manner legitimizes aggression or the threat or use of force, there appears a substantive provision which states that such rules

> must be applied in all circumstances to all persons who are protected by those instruments, *without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.*[10]

The importance of this statement cannot be overemphasized as it definitely lays to rest the "just war" doctrine espoused by some nations, including, particularly, a number of Third World nations as well as the nations which were Communist at that time period, under which the humanitarian law of war would be binding upon the "aggressor," always the enemy, while it would not be binding upon the victim of aggression, always oneself. The United States has expressed no objection to the Preamble which, in fact, states a proposition to which the United States has long adhered: that the provisions of the humanitarian law of war are equally applicable to both sides in any international conflict, no matter what the cause alleged.[11]

The United States objects strongly and, in the opinion of this author, properly so, to Article 1(4) of *1977 Protocol I.* [12] In addition to being objectionable in itself, that article lays the foundation for other objectionable provisions of the Protocol. The troublesome material in Article 1(4) reads as follows:

> The situations referred to in the preceding paragraph include armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination. . . .[13]

Obviously, this provision refers to civil conflicts, i.e., internal conflicts, which have always heretofore been considered to be governed by national law, not international law, except insofar as Common Article 3 of the *1949 Geneva Conventions* may be said to govern civil conflicts—something that rebels have heretofore steadfastly denied, or disregarded. Moreover, as we shall see, with its implementation by Article 44(3), the provision places members of so-called national liberation movements in a status superior to that of all other

combatants—exactly the end sought by its progenitors, but scarcely one acceptable to nations which believe that all *legal* combatants should be protected equally.

Article 9 of the *1874 Project of an International Declaration Concerning the Laws and Customs of War* established four requirements for an individual to be considered a legal combatant: He must (1) be commanded by a person responsible for his subordinates; (2) wear a fixed distinctive emblem recognizable at a distance; (3) carry his arms openly; and (4) conduct military operations in accordance with the laws and customs of war.[14] These requirements were restated in Article 1 of the *Regulations Attached to the 1899 Hague Convention No. II with Respect to the Laws and Customs of War on Land (1899 Hague Regulations on Land Warfare);*[15] they were stated again in Article 1 of the *1907 Hague Regulations on Land Warfare;*[16] they were incorporated by reference in Article 1(1) of the *1929 Geneva Convention Relative to the Treatment of Prisoners of War (1929 Geneva Prisoner of War Convention);*[17] and they were again restated in the first three *1949 Geneva Conventions.*[18] Despite this continuous acceptance of these four requirements by the international community for over a century, the 1977 Diplomatic Conference saw fit to discard them for the sole purpose of giving additional protection to members of national liberation movements.

Article 43(1) of the *1977 Protocol I* follows the foregoing historical precedent to the extent that it requires the armed forces of a party to a conflict to have a responsible commander and to enforce the law of war, even if that party does not recognize the government or authority of the adverse party. However, Article 44(3), which implements the objectionable Article 1(4) of the Protocol, has the effect of relieving members of national liberation movements from those requirements, as well as from others. It is here that the main United States objection to the Protocol lies—and, admittedly, not without justification.[19]

In a lengthy analysis of these provisions written some years ago, this author concluded:

> To summarize, paragraph 3 of Article 44 requires combatants (as defined in Article 43) to distinguish themselves from the civilian population "while they are engaged in an attack or in a military operation preparatory to an attack." They will fulfill that requirement if they carry their arms openly (a) during an actual military engagement and (b) when visible to the enemy while in the course of a military deployment preliminary to an attack. This appears to mean that these combatants may merge with the crowd, weapons concealed, until they are about to attack, at which time they move out of the crowd, disclose their weapons, and begin their attack.
>
> There seems little doubt but that the provisions of paragraph 3 of Article 44 will increase the dangers to the civilian population.[20]

Paragraph 4 of Article 44 provides that even if an individual fails to meet the limited requirements just mentioned and is, therefore, not entitled to prisoner of war status, he is entitled to all of the protection available to a prisoner of war, including those relating to any trial and punishment. With this there can be no quarrel. It merely ensures what any civilized nation would certainly provide: fair treatment of the captured person prior to trial for his alleged criminal acts and a trial with all the safeguards required for such a trial to be fair.[21]

The United States also seems to object to the provisions of Article 44(2) of the *1977 Protocol I* which provide, in effect, that a combatant who has violated the law of war is nevertheless entitled to prisoner of war status if captured.[22] But there is nothing novel about that provision. Article 85 of the 1949 Third Geneva Convention, to which the United States is a party, as is practically every other member of the international community, specifically provides that prisoners of war prosecuted for pre-capture offenses (violations of the law of war) "shall retain, even if convicted, the benefits of the present Convention."[23] There is no basis for the statement that this paragraph of the Protocol provides that "once a group qualifies as a national liberation movement protected by article 1(4), no conduct by members of the group can lead to the loss of its status as a protected organization." No place in the Protocol will there be found any provision for "qualifying" a group. Like Article 85 of the 1949 Third Geneva Convention, Article 44(2) of the *1977 Protocol I* merely provides that pre-capture violations of the law of war will not affect an individual's right to the status of being a prisoner of war—it does not prevent his captor from trying him and, if he is convicted, from punishing him for any pre-capture violation of the law of war.[24] Moreover, rather surprisingly, that paragraph excepts from its coverage those individuals who have not complied with the provisions of Article 44(3) and (4). This means that the member of the national liberation movement who fails to carry his arms openly during a military engagement or during a military deployment prior to an attack is not entitled to prisoner of war status. (However, under Article 44(4) he is, nevertheless, entitled to all the protections to which a prisoner of war is entitled, so this appears to be a distinction without a difference.)

In his presentation, the Legal Adviser of the Department of State emphasized his position that the provisions just cited have the effect of "granting terrorist groups protection as combatants."[25] There is no basis for such reasoning. Terrorists do not engage in "war" or in "armed conflict" as those terms are understood in either national or international law. They engage in isolated criminal acts. Terrorists do not have "an internal disciplinary system which, *inter alia,* shall enforce compliance with the rules of international law applicable in armed conflict" as required by Article 43(1). Any law is anathema to them. Terrorists do not participate in the "military engagement" or in the "military

deployment" specified in Article 44(3). They engage in hit-and-run or blind operations primarily against the civilian population.[26] While members of national liberation movements may, and frequently do, engage in acts of terrorism, when they do so and are thereafter captured they may legally be compelled to answer for such criminal acts, just as the uniformed soldier who commits the identical acts may be compelled to answer for his criminal acts. Terrorists may claim that they are entitled to prisoner of war status when captured, but their claims are rarely, if ever, recognized.[27] Statements to be found in the opinion of the United States District Court in the *Lopez* case,[28] the only relevant case of those cited by the Legal Adviser, are typical of the findings to be expected from courts on this issue. The court there said:

> There is no evidence in the record that defendant was a member of an organized military force which had a tribunal established for punishing violations of the rules and regulations of that force. To the extent that defendant is a member of any organization, this court can take judicial notice of the fact that that organization exists at least in part for the purpose of violating criminal statutes of the United States and that therefore such violations would conform to rather than violate the rules and principles of that organization.... There is no logic to the argument that an organization can be created for the purpose of violating the laws of this nation and overthrowing its government and at the same time declare its members to be exempt from prosecution for violation of the criminal laws of that same country, the United States of America.[29]

With the changes that have occurred in the political world since 1977, it is doubtful that many states which are party to the Protocol would find it necessary to take issue with a reservation to those few paragraphs of the Protocol mentioned above if such reservation were made by the United States at the time of ratification. Moreover, if a few parties did object and announced that they would not consider themselves bound by the Protocol vis-a-vis the United States, such action would be of little moment—and the United States would be in a better position with respect to the vast majority of parties and no worse off with respect to the few objectors. Of course, politically such an action would be a clear rebuff to the national liberation movements which have uncontrolled terrorist wings. But these are now few in number and the United States could live with that.[30]

Part II of the *1977 Protocol I* is entitled "Wounded, Sick and Shipwrecked" and does not appear to present any problems for the United States.[31] However, in Part III, "Methods and Means of Warfare; Combatant and Prisoner of War Status," objections are encountered, in addition to those already mentioned in connection with the discussion of Articles 1(4) and 44. Some of these objections

present real problems, while others do not. The first objection relates to the provisions of Article 35(3), which state:

> 3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.[32]

As to this provision, an official of the United States has said that it is "too broad and ambiguous and is not a part of customary law."[33] If it is truly ambiguous, certainly action should be taken to remove any ambiguity. But is it ambiguous? The United States and the larger part of the international community are parties to the *Environmental Modification Convention* which includes the following provision:

> 1. Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.[34]

In the first place, it should be noted that this latter provision, accepted by the United States, is drafted in the disjunctive, and is, therefore, even broader than that contained in Article 35(3) of the 1977 Protocol, which is drafted in the conjunctive. In the second place, when this provision was drafted, the drafting conference included "understandings" with respect to each of the three descriptive adjectives used. They said:

> It is the understanding of the Committee that, for the purposes of this Convention, the terms "widespread," "long-lasting" and "severe" shall be interpreted as follows:
>
> (a) "widespread": encompassing an area on the scale of several hundred square kilometres;
> (b) "long-lasting": lasting for a period of months, or approximately a season;
> (c) "severe": involving serious or significant disruption or harm to human life, natural and economic resources or other assets.[35]

While, of course, the understandings refer to those words as used in the *Environmental Modification Convention,* it would be extremely difficult for any state which is a party to the *1977 Protocol I* to assert that the words so defined had a different meaning in the Protocol; and it is rare, indeed, for the international community to have the benefit of agreed definitions of words of art included in an international convention. The conclusion is inescapable that

the United States has no valid reason for objecting to the substance or to the wording of Article 35(3) of the *1977 Protocol I*.[36]

The next provision to which objection is made is Article 39(2) which states:

> 2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.[37]

Concerning this provision the statement is made that "we [the United States] do not support the prohibition in article 39 of the use of enemy emblems and uniforms during military operations."[38] To say that the objection to this provision by the United States is astonishing is an understatement. The following has been the official policy of the United States since as long ago as 1863:

> 63. Troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.
>
> . . . .
>
> 65. The use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is an act of perfidy by which they lose all claim to the protection of the laws of war.[39]

Article 23 (f) of both the *1899* and the *1907 Hague Regulations on Land Warfare* prohibits "the improper use" of the enemy uniform or insignia,[40] and a current field manual of the United States Army interprets that term as meaning that "[i]t is certainly forbidden to employ them in combat, but their use at other times is not forbidden."[41] Wearing enemy uniforms "while engaging in attacks" would unquestionably fall within that manual's prohibition; and war crimes trials for the use of enemy uniforms in non-battle military operations were conducted in wars prior to World War I[42] and in World War II.[43] Finally, as noted above, one of the four requirements to be a legal combatant has uniformly been "the wearing of a fixed distinctive emblem, recognizable at a distance";[44] and the removal of that requirement by Article 44(3) of the *1977 Protocol I* is one of the major objections voiced by the United States to that instrument.[45]

The next provision of the *1977 Protocol I* to which objection is expressed is Article 47, which, in effect, denies humanitarian protection to most mercenaries. Why the United States should take up the cudgel on behalf of mercenaries is somewhat of a mystery, unless it fears that attempts might be made to place foreign military advisers and technicians in the category of mercenaries, despite the fact that they do not fall within the definition of mercenaries set forth in that article.[46] Moreover, there is a general belief, apparently entertained even by its sponsor, Nigeria, that the article will have little, if any, effect.[47] The objection made by the United States is apparently not directed at the substance of the

provision, or from a desire to protect mercenaries, but at the fact that it is another instance of politicizing the *1977 Protocol I* in favor of national liberation movements.[48] This provision of *1977 Protocol I* is, of course, the other side of the coin with respect to national liberation movements: full protection to members of national liberation movements no matter to what extent they violate the law of war; no protection to those who oppose national liberation movements even if they comply with the law of war.

Objection is made to Article 51(6) which prohibits attacks against the civilian population by way of reprisal. While there is much to be said for the use of reprisals as a method of compelling the adverse party who is violating the humanitarian law of war to return to compliance with that law, there is also much to be said in favor of prohibiting reprisals against certain categories of individuals, including the civilian population. The United States is a party to the *1929 Geneva Prisoner of War Convention,*[49] Article 2(3) of which prohibits reprisals against prisoners of war; and it is a party to the *1949 Geneva Conventions,* the first three of which include provisions prohibiting reprisals against the wounded and sick on land,[50] against the wounded, sick and shipwrecked at sea,[51] and against prisoners of war.[52] Article 33 of the 1949 Fourth Geneva Convention,[53] prohibits reprisals against persons protected by that convention, all of whom are members of civilian populations but whose categories are limited in number (primarily the civilian populations of occupied territories), and, in particular, does not include the civilian populations of the belligerents in their home territories. There does not appear to be any great difference between the wounded and sick and prisoners of war and the civilian population. All three categories are persons who are no longer, or were never, combatants. However, the United States' position would appear to be based on the belief that only the fear of the reprisal bombing of its own civilian population might serve as a basis for dissuading an enemy from bombing the civilian population of the United States—and there is considerable merit to that belief.[54] The bombing of civilian populations in Europe by both sides during World War II, claimed by both sides to be reprisals, caused innumerable deaths and created devastation which probably contributed to extending the duration of the hostilities. Here, mixed military-humanitarian reasons might well warrant a reservation to this provision. (It is worthy of note that no other objection was voiced to Article 51, paragraph 2 of which prohibits making the civilian population the subject of attack or the threat of attack, and paragraphs 4 and 5 of which prohibit indiscriminate attacks, including target area bombing.)

For military reasons the United States objects to the provisions of Article 56(1), which prohibits attacks on

> [w]orks or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, . . . if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.[55]

The Legal Adviser of the Department of State has indicated his belief that "under this article, civilian losses are not to be balanced against the military value of the target."[56] In other words, it is his position that this provision disregards the longstanding principle of proportionality and prohibits the attack if there are to be "severe" civilian losses no matter how important the target may be from a military point of view.[57] Accepting this as a valid possible construction of the provision, the United States could, upon ratification, merely "understand" that, as in other applicable cases, the principle of proportionality would apply in balancing the "severe" losses against the military advantage.[58]

The Legal Adviser of the Department of State further points out that during the drafting of this provision a United States representative had called attention to the difference between this prohibition and current international law.[59] The statement made by the United States representative indicated that his primary concern and the main thrust of his argument was not that the progress of international humanitarian law was removing from the category of military objectives installations which had previously been within that category, a procedure that has occurred with some degree of regularity during the past century (medical and religious personnel and units, military hospitals, hospital ships, civilian hospitals, medical aircraft, museums, places of worship, and cultural objects have all received this special protection), but that these specially protected installations might be used "as a cover to obtain military advantage."[60] One cannot help but conclude that the military decision to object to this provision may well be based on the experience in North Vietnam where, when it became apparent that for humanitarian reasons the United States would not bomb the dikes, these became havens for reserve fuel supplies and anti-aircraft artillery weapons. While Article 56(2) attempts to eliminate this problem by setting forth with particularity the circumstances which will result in the cessation of the special protection, it must be admitted that there are some loopholes in that paragraph of which a lawless belligerent could avail itself. However, the adverse party could also take advantage of the language of these provisions as a legal basis for asserting that the known facts warrant the cessation of the special protection accorded to these objects. (One objection made to Article 56(2) is to the distinction between the stated manner in which a dam or dike loses its protection and the stated manner in which a nuclear power plant loses it protection.[61] Understandably, in view of its projected effect, the latter is more restrictive.)

The United States complains that Article 5 (Protecting Powers) and Article 90 (International Fact-Finding Commission) do not go far enough because in both cases the consent of the parties to the conflict is required and all of the Communist countries have been adamant in refusing to allow any foreign or international body to operate or investigate on their territories.[62] This was a valid complaint when made, but is it still valid? And although Article 5 does not go as far as one might have wished, it does go a bit further in the right direction than its predecessors in the 1949 *Geneva Conventions*.[63] The provisions of Article 90 for an International Fact-Finding Commission are novel and offer great potential even though the "non-law-abiding" nations will unquestionably decline to permit the Commission to function in their territories. Once again, although Article 90 does not go as far as one might have wished by making the competence of the Commission compulsory for all parties, it does represent a considerable advance in the methods of enforcing the humanitarian law of war.[64] Moreover, it has been so successful that already more than the required twenty parties have filed the requisite statement recognizing the competence of the Commission, and the Commission has been established.[65]

It is believed that from the foregoing it can be seen that the few valid objections of the United States to the *1977 Protocol I* do not justify the refusal by the executive branch to send it to the Senate for its advice and consent to ratification. Rather than dozens of reservations and understandings, only a very few are required in order for the United States to remove from the Protocol, insofar as it is concerned, those provisions which it considers as politicizing that instrument, as well as the few provisions for which there are valid military objections.[66] The United States can then join the more than one hundred other members of the international community who are already parties to the *1977 Protocol I.*

Notes

1. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 16 I.L.M. 1391 [hereinafter *1977 Protocol I]; see also* 1 SWISS FEDERAL POLITICAL DEPARTMENT, OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 155 (1978) [hereinafter OFFICIAL RECORDS] (official record of the diplomatic conference which drafted *1977 Protocol I;* THE LAWS OF ARMED CONFLICTS 621 (D. Schindler & J. Toman eds., 3d ed. 1988) [hereinafter Schindler & Toman]. For a discussion of the historical context surrounding *1977 Protocol I,* see generally HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES (1993) [hereinafter LEVIE, TERRORISM].

2. Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; *see also* 1 CHARLES I. BEVANS, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, 1776-1949, at 631 [hereinafter BEVANS]; 2 AM. J. INT'L L. (Supp.) 90 (1908); Schindler & Toman, *supra* note 1, at 63; *see generally* LEVIE, TERRORISM, *supra* note 1.

3. The four 1949 Geneva Conventions, all signed on August 12, 1949, are: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter 1949 First Geneva Convention]; Convention for the Amelioration

of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter 1949 Second Geneva Convention]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 Stat. 3316, 75 U.N.T.S. 135 [hereinafter 1949 Third Geneva Convention]; and Convention for the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter 1949 Fourth Geneva Convention]. These Conventions are also reprinted in Schindler & Toman, *supra* note 1, at 373, 401, 423, and 495, respectively. *See generally* LEVIE, TERRORISM, *supra* note 1.

4. Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions,* 2 AM. U. J. INT'L L. & POL'Y 419, 420 (1987). In his presentation, Matheson, Deputy Legal Adviser of the Department of State, specifically affirmed that the United States "supported" the following articles: 5, 10, 11, 12-20, 21-23, 24-31, 32, 33, 34, 35(1)(2), 37, 38, 44 (a few parts), 45, 51 (except paragraph 6), 52, 54, 57-60, 62, 63, 70, 73, 74, 75, 76, 77, 78, 79, 80-85, and 86-89. Specific objections were stated with respect to Articles 1(4), 35(3), 39(2), 47, 55, and 56 by Matheson and other government officials. There is a passing mention of Article 90. No mention is made of the other articles of the Protocol.

5. *See* Howard Levie, *Pros and Cons of the 1977 Protocol I,* 19 AKRON L. REV. 537 (1986) [hereinafter Levie, *Pros and Cons]* (discussing some of the "good" and "bad" provisions of *1977 Protocol I).*

6. A good example of "nit-picking" is the objection made to Article 16, that it "establishes such a high level of protection for medical activities that it would protect the operation of clandestine hospitals in guerrilla warfare situations." Burras M. Carnahan, *Customary International Law Relative to the Conduct of Hostilities and the Protection of Civilian Population in International Armed Conflict,* 2 AM. U. J. INT'L L. & POL'Y 505, 509 (1987) [hereinafter Carnahan, *Customary International Law*]. In other words, the doctor who treats a sick or wounded guerrilla should be considered as having committed an illegal act; and the wounded or sick guerrilla patient should not enjoy the protection of the confidentiality of the physician-patient relationship which is otherwise universally applied, even with respect to the most vicious criminal.

7. President's Message to the Senate Transmitting Protocol II, 1987 PUB. PAPERS 88. This message was unusual in that it set forth the reasons why an international convention signed by the United States (the *1977 Protocol I)* was *not* being sent to the Senate for its advice and consent to ratification. Nevertheless, it "invite[d] an expression of the sense of the Senate that it shares this view." *Id.* To date the Senate has not accepted the invitation, nor has it acted on the 1977 Protocol II.

8. Abraham D. Sofaer, *The Position of the United States on Current Law of War Agreements,* 2 AM. U. J. INT'L L. & POL'Y 460 (1987) [hereinafter Sofaer, *Position].* Judge Sofaer, Legal Advisor to the U.S. Department of State also wrote the following article: Abraham D. Sofaer, *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims (Cont'd),* 82 AM. J. INT'L L. 784 (1988) [hereinafter Sofaer, *Agora*]. For the presentation made by Michael J. Matheson, Deputy Legal Adviser of the Department of State, see Matheson, *supra* note 4. For the presentation made by Douglas J. Feith, the Deputy Assistant Secretary of Defense for Negotiations Policy, see Douglas J. Feith, *Protocol I: Moving Humanitarian Law Backwards,* 19 AKRON L. REV. 531 (1986) [hereinafter Feith]. Feith had previously published the following article: Douglas J. Feith, *Law in the Service of Terrorism—The Strange Case of the Additional Protocol,* 1 NATIONAL INTEREST 36 (Fall 1985). For some of the remarks made by Lieutenant Colonel Burras M. Carnahan, USAF, a legal officer on the Staff of the Joint Chiefs of Staff, see Carnahan, *Customary International Law, supra* note 6; see also Burras M. Carnahan, *Additional Protocol I: A Military View,* 19 AKRON L. REV. 543 (1986) (this article includes a disclaimer statement).

9. Articles in support of the 1977 *Protocol I* include, among others, one by Ambassador George Aldrich, the head of the United States Delegation at the Diplomatic Conference, *see* George Aldrich, *New Life for the Laws of War,* 75 AM. J. INT'L L. 764 (1981); one by Waldemar A. Solf, a member of the U.S. Delegation, *see* Waldemar A. Solf, *A Response to Douglas J. Feith's Law in the Service of Terror—The Strange Case of the Additional Protocol,* 20 AKRON L. REV. 261 (1986); and one by Hans-Peter Gasser, Legal Adviser to the Directorate, International Committee of the Red Cross, *see* Hans-Peter Gasser, *An Appeal for Ratification by the United States,* 81 AM. J. INT'L L. 912 (1987). Regarding the latter article, Abraham Sofaer states that Gasser assumes "that the United States is somehow obligated to ratify or accede to *1977 Protocol I* simply because it was adopted by the Geneva Conference." Sofaer, *Agora, supra* note 8, at 784. However, no facts or arguments are presented which support that conclusion.

10. *1977 Protocol I, supra* note 1, preamble, 16 I.L.M. at 1391 (emphasis added).

11. This matter is mentioned here, despite the fact that the Preamble is not the subject of objection by the United States, because it is occasionally hinted by opponents to ratification of the *1977 Protocol I* that some of its provisions condone the just war doctrine. *See, e.g.,* Feith, *supra* note 8, at 532.

12. No objection is stated to Article 1(1), (2), and (3). Paragraphs (1) and (3) of that article merely restate provisions of the 1949 Geneva Conventions, *see supra* note 3, and paragraph (2) restates the DeMartens Clause

which originated in the Preamble to the 1899 Hague Convention No. 11 with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803; *see also* 1 BEVANS, *supra* note 2, at 247; Schindler & Toman, *supra* note 1, at 63; LEVIE, TERRORISM, *supra* note 1, at 17, 152, 366, 457, 492.

13. The United States has ratified the International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, at 2-3, 18 I.L.M. 1456. *See also* LEVIE, TERRORISM, *supra* note 1, at 247, 306. Article 12 of this Convention states:

> [T]he present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4 of Additional Protocol I of 1977 . . . .

Id. at 10. In other words, the United States has agreed that the doctrine of *aut punire, aut dedire* (punish or extradite) contained in that Convention will not apply to members of national liberation movements who take hostages, leaving that problem to the provisions of the 1949 Geneva Conventions and the 1977 Additional Protocols. *See supra* notes 1, 3. Article 147 of the 1949 Fourth Geneva Convention makes the taking of hostages a grave breach of that instrument with no exclusions. *See supra* note 3.

14. August 27, 1874, 65 BRITISH FOREIGN AND STATE PAPERS 1005 [hereinafter 1874 Declaration of Brussels]; *see also* LEVIE, TERRORISM, *supra* note 1, at 17, 444; Schindler & Toman, *supra* note 1, at 28; 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 194 (L. Friedman ed., 1972) [hereinafter Friedman]. Obviously, the uniformed member of the armed forces of a nation normally meets all of these requirements. On occasion, as an individual he will fail to meet the fourth requirement, and this will warrant his trial and punishment by his own force, if it is well-disciplined, or by the enemy, if he is thereafter captured.

15. *See supra* note 12.

16. *See supra* note 2.

17. July 27, 1929, 47 Stat. 2021, T.S. No. 846 [hereinafter 1929 Geneva Prisoner of War Convention]; *see also* 2 Bevans, *supra* note 2, at 932; 118 L.N.T.S. 343; 27 AM. J. INT'L. L. (Supp.) 59 (1933); Schindler & Toman, *supra* note 1, at 339; *see generally* LEVIE, TERRORISM, *supra* note 1.

18. *See* 1949 First Geneva Convention, *supra* note 3, art. 13(2); 1949 Second Geneva Convention, *supra* note 3, art. 13(2); 1949 Third Geneva Convention, *supra* note 3, art. 4(2).

19. Strangely, the United States delegation voted in favor of Article 44 in its totality in Committee III. 15 OFFICIAL RECORDS, *supra* note 1, at 155; 2 HOWARD S. LEVIE, PROTECTION OF WAR VICTIMS 485, 486 (1980) [hereinafter LEVIE, PROTECTION]. The United States delegation later gave an explanation of its vote. 15 OFFICIAL RECORDS, *supra* note 1, at 169, 179; 2 LEVIE, PROTECTION, *id.*, at 505-06.

20. Howard S. Levie, *Prisoners of War Under the 1977 Protocol I*, 23 AKRON L. REV. 55, 64 (1989).

21. The United States "supports" Article 75 of the *1977 Protocol I*, which sets forth the "Fundamental Guarantees" to which a person in the custody of the adverse party is entitled. Matheson, *supra* note 4, at 427-28.

22. Sofaer, *Position*, *supra* note 8, at 465-66.

23. The cited provisions of both of these instruments are international actions intended to establish an international rule contrary to the rule enunciated in the case of *In re Yamashita*, 327 U.S. 1, 20-21 (1946), which held that the provisions for the trial of prisoners of war set forth in the 1929 Geneva Prisoner of War Convention, *see supra* note 17, only applied to post-capture offenses. The Soviet Union and all of the other Communist states of the time made a reservation to Article 85 of the 1949 *Third Geneva Convention*, *see supra* note 3, under which the individual ceased to have those benefits once he had been finally convicted.

24. Of course, the individual who has prisoner of war status will have to be tried by the court that would be authorized to try members of the captor's armed forces—usually a court-martial—but that should present no great problem; and the terrorist, who has no military standing, would continue to be tried by civilian courts. *See infra* notes 25-28 and accompanying text.

25. Sofaer, *Position*, *supra* note 8, at 467. Douglas J. Feith, then the Deputy Assistant Secretary of Defense for Negotiations Policy, Department of Defense, labelled the *1977 Protocol I* "a pro-terrorist treaty that calls itself humanitarian law." Feith, *supra* note 8, at 534. This is because of two paragraphs of two articles of a convention containing ninety-one substantive articles, many of which include numerous numbered paragraphs!

26. Article 51(2) of the *1977 Protocol I* provides:

> The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

1977 Protocol I, *supra* note 1, art. 51(2), 16 I.L.M. at 1413. This provision prohibits the main activity of terrorists—the time bomb left in public places.

27. The cases cited by Sofaer, *Position*, *supra* note 8, at 465 n.136, merely indicate that when captured some terrorists claim that they are entitled to prisoner of war status—a claim not sustained by the courts.

Manuel Noriega asserted and was granted prisoner of war status by the United States, but he surrendered during the course of armed conflict in Panama.

28. United States v. Oscar Lopez, No. 80 CR 736-4 (N.D. Ill. July 14, 1981) (LEXIS, Genfed library, Dist file).

29. *Id.*

30. Fear has been expressed that the position of the United States would be viewed as "imperialist," or "racist." Sofaer, *Position, supra* note 8, at 470. While it would undoubtedly be so denominated by a few nations, it is extremely doubtful that this would have a momentous effect in the present era.

31. *See, e.g.*, Matheson, *supra* note 4, at 423-24; *but see supra* note 6.

32. For some reason the Diplomatic Conference elected to include in the *1977 Protocol I* provisions for the protection of the natural environment in two separate articles, Article 35(3) and Article 55(1). While the two provisions are worded somewhat differently, their substance and intent are the same. *See 1977 Protocol I, supra* note 1, art. 35(3), 55(1), 16 I.L.M. at 1408, 1415. Matheson refers to, but does not discuss, Article 55(1) in his presentation, perhaps because he considers the criticism of Article 35(3) to be equally applicable to Article 55(1). *See* Matheson, *supra* note 4, at 424.

33. Matheson, *supra* note 4, at 424. It is interesting to note that the wording of that paragraph was based on a proposal made by the Rapporteur of Committee III, who was the head of the United States Delegation, 2 LEVIE, PROTECTION, *supra* note 19, at 271, and that the United States delegation made no objection to the paragraph either after it was adopted in Committee III, 14 OFFICIAL RECORDS, *supra* note 1, at 408-14; 2 LEVIE, PROTECTION, *supra* note 19, at 273-75, or after it was adopted by the Plenary Meeting, 6 OFFICIAL RECORDS, *supra* note 1, at 99-101, 113-18; 2 LEVIE, PROTECTION, *supra* note 19, at 277-80. Presumably, he had been authorized to propose this wording.

34. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Dec. 10, 1976, 31 U.S.T. 333, 16 I.L.M. 88; *see also* Schindler & Toman, *supra* note 1, at 163; LEVIE, TERRORISM, *supra* note 1, at 190, 299. In signing the Convention in Geneva on May 18, 1977, Secretary of State Vance pointed out that the United States believed that "it is wise to outlaw what is commonly called 'environmental warfare' before it has a real chance to be developed significantly for military purposes, with potentially disastrous consequences." Statement by Secretary of State Vance at the Signing of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, *in* 1977 DOCUMENTS ON DISARMAMENT 326, 327 (1977).

35. Draft Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Sept. 2, 1976, *in* 1976 DOCUMENTS ON DISARMAMENT 577, 582 (1976).

36. It is probably these provisions that are sometimes claimed to have the potential of being interpreted as an unacceptable limitation on the use of nuclear weapons. If the United States fears this interpretation, it need only repeat on ratification the understanding that it stated at the time of signing: "[T]he rules established by this protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons." Schindler & Toman, *supra* note 1, at 718. The United Kingdom stated a similar understanding. *Id.*

37. *1977 Protocol I, supra* note 1, art. 39(2), 16 I.L.M. at 1409.

38. Matheson, *supra* note 4, at 425.

39. General Orders No. 100, Apr. 24, 1863, Instructions for the Government of Armies of the United States in the Field (also known as the Lieber Code), *reprinted in* Schindler & Toman, *supra* note 1, at 3, 12, and in Friedman, *supra* note 14, at 170.

40. *See supra* notes 2, 12.

41. 27-10 U.S. ARMY FIELD MANUAL ¶ 54 (1956). The British manual, THE LAW OF WAR ON LAND ¶ 320 (1958), is to the same effect. Of course, a spy has always been in violation of the law of war when caught behind enemy lines in the enemy's uniform.

42. COLEMAN PHILLIPSON, INTERNATIONAL LAW AND THE GREAT WAR 208 (1915).

43. UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION 490-91 (1948). Although the accused in the war crimes trial of Otto Skorzeny, *see* National Archives, RG 338, File M1217, Roll 1; UNITED NATIONS WAR CRIMES COMMISSION, 9 L. REP. OF TRIALS OF WAR CRIMINALS 90 (1948), were acquitted of entering into combat while wearing American uniforms, a number of other members of Skorzeny's unit who were captured by American units while wearing American uniforms during the Battle of the Bulge were immediately tried by court-martial, convicted of spying, and executed. Maximilian Koessler, *International Law on Use of Enemy Uniforms as a Stratagem and the Acquittal in the Skorzeny Case*, 24 Mo. L. Rev. 16, 29-30 (1959).

44. *See* Friedman, *supra* note 14; *see also* text accompanying notes 14-18, *supra*.

45. It should not be overlooked that Article 39(3) specifically exempts espionage and armed conflict at sea from the scope of the quoted provision. *See 1977 Protocol I, supra* note 1, art. 39(3), 16 I.L.M. at 1409.

46. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS ¶ 1806 (Yves Sandoz et al. eds., 1987).

47. There are a number of General Assembly resolutions dealing with mercenaries. The last well-publicized trial of mercenaries as illegal combatants was that held in Angola in June 1976. *See* Mike J. Hoover, Notes, *The Laws of* War *and the Angolan Trial of Mercenaries: Death to the Dogs of War, 9* CASE W. RES. J. INT'L L. 323 (1977). The provisions of Article 47(2)(b) of the *1977 Protocol I, see 1977 Protocol I, supra* note 1, art. 47(2)(b), 16 I.L.M. at 1412, require that to be a mercenary the individual must have taken direct part in the hostilities, something which several of the accused who were convicted in the Angolan trial had not done.

48. Sofaer, *Position, supra* note 8, at 469.

49. *See supra* note 17.

50. 1949 First Geneva Convention, *supra* note 3, art. 46.

51. 1949 Second Geneva Convention, *supra* note 3, art. 47.

52. 1949 Third Geneva Convention, *supra* note 3, art. 13, ¶ 3.

53. *See supra* note 3.

54. Article 20 of the *1977 Protocol I* prohibits reprisals against the persons and objects protected by Part II of the Protocol (wounded, sick, shipwrecked, medical units and personnel, and medical transportation); Article 52(1) prohibits reprisals against civilian objects; Article 53(c) prohibits reprisals against cultural objects and places of worship; Article 54(4) prohibits reprisals against objects indispensable to the survival of the civilian population; Article 55(2) prohibits reprisals against the natural environment; and Article 56(4) prohibits reprisals against works or installations containing dangerous forces. *See generally 1977 Protocol I, supra* note 1. No objection was raised in the presentations made by the officials of the United States to any of these provisions. *See supra* notes 4, 8.

55. *1977 Protocol I, supra* note 1, art. 56(1), 16 I.L.M. at 1415.

56. Sofaer, *Position, supra* note 8, at 468.

57. It should be noted that Article 57(2)(a)(iii), concerning reaching decisions to attack, refers to civilian losses "which would be excessive in relation to the concrete and direct military advantage anticipated"; and that Article 85(3)(c), concerning the specific attacks referred to in the article quoted in the text, makes such an attack a grave breach of the Protocol only if it "will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii)." *See* Protocol, *supra* note 1, art. 85(3)(c), 16 I.L.M. at 1430. Both of these provisions are applications of the rule of proportionality.

58. Frankly speaking, this author has never been able to understand how the balancing of civilian losses versus military advantage is to be accomplished. Is the bombing of a battalion of tanks found in a residential area justified if the civilian casualties will be in the range of 50? 100? 500? 1,000? How does one decide? Suppose that they are the only tanks available to support an impending enemy attack or to be used against an impending friendly attack. Does that increase the number of justified civilian casualties? If so, to what extent?

59. Sofaer, *Position, supra* note 8, at 468 n.146.

60. 14 OFFICIAL RECORDS, *supra* note 1, at 151, 158 ¶ 39; 3 LEVIE, PROTECTION, *supra* note 19, at 281, 284.

61. Carnahan, *Customary International Law, supra* note 6, at 506; Sofaer, *Position, supra* note 8, at 468.

62. Sofaer, *Position, supra* note 8, at 469-70. The present author has also taken the position that it is unfortunate that these provisions are not mandatory. Levie, *Pros and Cons, supra* note 5, at 541-42. The United States apparently does not object to these articles, but only to their failure to include provisions which would have ensured their effectiveness in all relevant cases. The United States affirmatively "supports" Article 5. See *supra* note 4.

63. *See* Articles 8-10 common to the first three 1949 Geneva Conventions, *supra* note 3, and Articles 9-11 of the 1949 Fourth Geneva Convention, *supra* note 3.

64. During the hostilities in Korea (1950-1953), the North Koreans alleged that the United States was using bacteriological weapons. The United States denied the charge and proposed an investigation by the World Health Organization and the International Committee of the Red Cross. The North Koreans refused to allow such an investigation to be made but had one conducted by other Communists who, naturally, found that the allegations were true. However, probably having decided that the conclusions of its own investigative body were not receiving the desired publicity and acceptance, the North Koreans dropped the matter. Such an investigation would now be a function of the Fact-Finding Commission, but only if its competence has been accepted, generally or specially.

65. 31 INT'L REV. RED CROSS 411 (1991). When Poland filed a declaration on October 2, 1992, recognizing the competence of the Commission, it was the thirty-second party to do so. 32 INT'L REV. RED CROSS 606 (1993).

66. The United Kingdom had no difficulty in setting forth ten understandings at the time of signing the *1977 Protocol I.* Schindler & Toman, *supra* note 1, at 717-18.

XVIII

Prohibitions and Restrictions on the Use of Conventional Weapons

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In 1980, a Diplomatic Conference convened by the General Assembly of the United Nations in Geneva was successful in drafting a Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects[1] ("Conventional Weapons Convention"). Three Protocols, each relating to a specific weapon or group of weapons, were attached. The Conventional Weapons Convention was opened for signature at the United Nations Headquarters in New York on April 10, 1981.[2] The United States did not sign it until April 8, 1982, and since then has ratified only the Convention and two of the Protocols.[3] The Conventional Weapons Convention and its Protocols received the necessary twenty ratifications and accessions by June 2, 1983,[4] and entered into force six months later on December 2, 1983.[5]

The purposes of this Article are (1) to determine why these instruments were considered necessary; (2) to analyze the provisions of the Convention and of the three Protocols; and (3) to ascertain in what manner ratification will be in the best interests of the United States.[6]

Introduction

As long ago as 1868, the Preamble of the Declaration of St. Petersburg set forth a number of "limits at which the necessities of war ought to yield to the requirements of humanity."[7] These limits included the following:

> That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;
>
> That the only legitimate objects which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
>
> That for this purpose it is sufficient to disable the greatest possible number of men;

> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their deaths inevitable; [and]
>
> That the employment of such arms would, therefore, be contrary to the laws of humanity.[8]

Articles 22 and 23(e) of the Regulations Attached to the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land,[9] and the same articles of the Regulations Attached to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land,[10] include the following humanitarian rules:

> Article 22: The right of belligerents to adopt means of injuring the enemy is not unlimited.[11]
>
> Article 23 (e): In addition to the prohibitions provided by special Conventions, it is especially prohibited[12] [or forbidden]: To employ arms, projectiles, or material of a nature [calculated] to cause unnecessary suffering.[13]

Unfortunately, despite the vast increase in the nature and lethality of weapons which occurred during the course of the subsequent seven decades, the only international agreement prohibiting or restricting specific conventional weapons which became effective during that period was the 1925 Geneva Gas Protocol,[14] prohibiting the use of asphyxiating gases and bacteriological weapons.[15]

Prior to the Diplomatic Conference that took place in Geneva between 1974 and 1977,[16] the work of which culminated in two additions to the four 1949 Geneva Conventions[17] (only one of which will concern this Article[18]), the International Committee of the Red Cross ("ICRC") had sponsored a number of preliminary conferences, the last of which was a Conference of Government Experts that met in 1972. Although those conferences were concerned with the reaffirmation and development of international humanitarian law applicable in armed conflicts, and not with prohibitions or restrictions on the use of specific conventional weapons, at the conclusion of the 1972 conference a group of the government experts suggested that the ICRC should arrange a special meeting to consult with legal, military, and medical experts on the question of express prohibitions or limitations of the use of such conventional weapons as may cause unnecessary suffering or be indiscriminate in their effect.[19]

Complying with this suggestion, the ICRC convened meetings of a selected group of experts in March and June 1973. These meetings of experts did not attempt to formulate concrete proposals, but sought merely to document the weapons which required consideration.[20] Five categories of weapons were classified as causing unnecessary suffering or being indiscriminate in their effects:

1) small-calibre projectiles; 2) blast and fragmentation weapons; 3) time-delay weapons (land mines and booby traps); 4) incendiary weapons; and 5) potential weapons development.[21] It will be found that these experts chose well and that the weapons in these five categories continued to constitute the subject of discussions in the various subsequent conferences on this matter, up to and including the conference that drafted the Conventional Weapons Convention and Protocols which were the ultimate result of these labors.[22]

The Diplomatic Conference that met in Geneva for the first time on February 20, 1974 (and did not complete its work until June 10, 1977), established an Ad Hoc Committee on Conventional Weapons, whose terms of reference called for it to "discuss weapons without making any substantive or drafting decisions.[23] This Committee functioned throughout the four sessions of the Diplomatic Conference.[24] While the Ad Hoc Committee made no substantive recommendations, during the final Plenary Meetings the Diplomatic Conference adopted a resolution recommending that a conference be held not later than 1979 to reach "agreements on prohibitions or restrictions on the use of specific weapons."[25]

The General Assembly of the United Nations took note of that resolution and adopted its own resolution, convening in 1979 a United Nations conference on prohibitions or restrictions on the use of specific conventional weapons.[26] Preparatory conferences met in 1978 and 1979, and the Conventional Weapons Conference met for the first time in Geneva from September 10, 1979, to September 28, 1979. The Conference met again from September 15, 1980, to October 10, 1980. At this latter session it completed the drafting of a Conventional Weapons Convention and three Protocols annexed to that Convention.[27] This Article will focus on the meaning and intent of the Conventional Weapons Convention and its Protocols in order to determine whether there are valid reasons for the United States and other major military nations to ratify such instruments which advance the humanitarian law of war—instruments that, moreover, such nations played a major role in drafting.

I. The Conventional Weapons Convention

The Conventional Weapons Convention itself may truly be termed an "umbrella" convention. It contains no substantive humanitarian provisions, those being the subject matter of the three Protocols which are annexed to it. It has several provisions, however, that are either controversial or unusual.

Article 1 makes the Conventional Weapons Convention and its annexed Protocols applicable in accordance with the provisions of Article 2 of the 1949 Geneva Conventions.[28] This is certainly not a controversial provision, although it would have been preferable to restate the article itself in full, a practice followed elsewhere in the Conventional Weapons Convention and its Protocols.[29] It then

proceeds to make them applicable in "any situation described in paragraph 4 of Article 1 of Additional Protocol I to these Conventions."[30] This provision of the 1977 Additional Protocol I, making an international law-of-war convention applicable in conflicts involving national liberation movements (theretofore considered to be internal in nature), is one of the major reasons why the United States has not ratified this latter instrument. Although the present author agrees with the objection of the United States to this provision in the 1977 Additional Protocol I, primarily because it was the basis for Article 44(3) of that Protocol which removed the historic requirements for distinguishing legal combatants from members of national liberation movements, the latter provision has no effect on the Conventional Weapons Convention or its Protocols. There is no question here of hiding one's personal weapons from view, concealing oneself among civilians preparatory to an attack, or wearing no visible distinguishing insignia. Anyone whose State or "authority" has agreed to be bound by any of these Protocols who thereafter violates the humanitarian provisions thereof will be guilty of a war crime, whether he be a uniformed soldier in an international or civil war, a rebel in a civil war, or a member of a national liberation movement in hostilities against the colonial power.[31] While ratifying the Conventional Weapons Convention, the United States could easily express its displeasure with this provision by way of an understanding[32] or, as France has done, by making a specific reservation.[33]

Article 2 is concerned with the relation of the Conventional Weapons Convention and its Protocols to other international agreements, affirming that they do not detract "from other obligations imposed upon the High Contracting Parties by international humanitarian law applicable in armed conflict." This provision appears to be superfluous inasmuch as there is nothing in these instruments which could possibly have that effect. If anything, they "add to," they do not "detract from" other obligations.[34]

Article 3 (Signature) is a part of the standard boilerplate of international agreements, as are Articles 5 (Entry into force), 6 (Dissemination), 9 (Denunciation), 10 (Depositary), and 11 (Authentic texts).[35] Naturally, some of these articles contain variations from the standard to meet the particular circumstances of the Conventional Weapons Convention.

Article 4 (Ratification, acceptance, approval or accession) begins in the standard fashion, but paragraph 3 requires discussion. It provides:

> Expressions of consent to be bound by any of the Protocols annexed to this Convention shall be optional for each State, provided that at the time of the deposit of its instrument of ratification, acceptance, or approval of this Convention or of accession thereto, that State shall notify the depositary of its consent to be bound by any two or more of these Protocols.[36]

Apparently, the United States construes this provision as authorizing reservations and understandings. At the time of signing, the United States said:

> In addition, the United States of course reserves the right, at the time of ratification, to exercise the option provided by Article 4(3) of the Convention, and to make statements of understanding and/or reservations, to the extent that it may deem necessary to ensure that the Convention and its Protocols conform to humanitarian and military requirements.[37]

Inasmuch as the Convention contains no prohibition against reservations or understandings, it is somewhat difficult to understand why the United States considered it necessary to announce its construction of Article 4(3) as specifically granting that right.[38]

Furthermore, paragraph 3 contains a rather unusual provision in that when a State becomes a Party to the Conventional Weapons Convention "that State shall notify the depositary of its consent to be bound by *any two or more of these Protocols*."[39] There was thought to be good reason for this provision. As shall be noted, the 1980 Protocol I, concerned with nondetectable fragments, was completely noncontroversial, and it could be expected that many States might ratify the Conventional Weapons Convention and Protocol I only. Article 4 compels States to give more consideration to the other two Protocols, and thus, it prevents States from ratifying only the Conventional Weapons Convention and Protocol I and thereafter claiming the status of Parties to the Convention.[40]

In addition to a provision rejecting the general participation *(si omnes)* doctrine contained in Article 7(1),[41] Article 7 contains a number of other provisions with respect to treaty relations between the Parties. Unfortunately, not content with the provision addressing national liberation movements (termed an "authority") contained in Article 1, the Conference found it necessary to include further lengthy special provisions on this subject in Article 7(4), in an attempt to link the Conventional Weapons Convention with the four 1949 Geneva Conventions and the 1977 Additional Protocol 1.[42] The 1949 Geneva Conventions and the 1977 Additional Protocol I are completely irrelevant to the Conventional Weapons Convention and its Protocols.[43] Those instruments do not contain prohibitions or restrictions on the use of specific conventional weapons.[44] Clearly, these special provisions were another attempt to secure for national liberation movements the benefits of all of the humanitarian law of war upon an undertaking by an "authority" that is rarely able to control the activities of the members of its movement and that uses the civilian population as a military objective rather than as something to be protected. France, like the United States, is not a Party to the 1977 Additional Protocol I and had no difficulty in making a reservation to Article 7(4)(b) of the 1980 Convention.[45] There is no reason why the United States should not make a similar reservation, if it is so minded.[46]

Moreover, it is of interest that, while Common Article 3(4) of the 1949 Geneva Conventions (with respect to armed conflicts not of an international character) and Article 4 of the 1977 Additional Protocol I both provide that the application of those instruments does not affect the legal status of the Parties, no such provision was included in the Conventional Weapons Convention.[47]

Notably, one subject that is missing from the Conventional Weapons Convention that is probably more important in a humanitarian law-of-war treaty than in most types of treaties (other than a disarmament treaty) is the question of verification. Efforts to include such a provision were strongly and successfully resisted.[48]

II. 1980 Protocol I

The 1980 Protocol on Non-Detectable Fragments ("Protocol I")[49] is a single sentence which provides that "[i]t is prohibited to use any weapon the primary effects of which is to injure by fragments which in the human body escape detection by X-rays."[50] This Protocol was directed primarily against weapons made of such materials as glass and plastic. The United States had become a cosponsor of the proposal for this Protocol, which was adopted unanimously.[51] One of the U.S. Delegates attributed the unanimity "in part to the fact that no one seems to have had any serious military interest in such a weapon."[52] Accordingly, the United States is justified in ratifying this Protocol.

III. 1980 Protocol II

The 1980 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices ("Protocol II")[53] is concerned with the "time-delay" weapons referred to by the 1973 Conference of Government Experts.[54] Such weapons include: 1) anti-vehicle and antipersonnel land mines, hand-buried or delivered by aircraft, artillery, or naval guns;[55] 2) booby traps; and 3) other devices. While the 1980 Protocol II was more controversial than Protocol I, it was without question of greater importance.

Article 1 of the 1980 Protocol II, entitled Material Scope of Application, makes clear that its subject matter is limited to the use of the aforementioned weapons on land only ("including mines laid to interdict beaches, waterway crossings or river crossings") and that it "*does not* apply to the use of anti-ship mines at sea or in inland waterways."[56] Although there appears to have been little controversy involved in the drafting of this article, its importance cannot be overestimated.[57]

Article 2, entitled Definitions, defines "mine," "booby-traps," and "other devices." It provides:

> 1. "Mine" means any munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle,[58] and "remotely delivered mine" means any mine . . . delivered by artillery, rocket, mortar or similar means or dropped from an aircraft.[59]
>
> 2. "Booby-trap" means any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.[60]
>
> 3. "Other device" means manually-emplaced munitions and devices designed to kill, injure or damage and which are actuated by remote control or automatically after a lapse of time.[61]

Inasmuch as this definition of "other devices" contains no examples and, unlike the procedure followed with respect to the other weapons covered by this Protocol, no additional article deals exclusively with "other devices," it is likely that there will be controversy regarding exactly which weapons were the intended target of this provision.

Article 2(4), defining "military objective," appears to have engendered no controversy. It reads:

> "Military objective" means, so far as objects are concerned, any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[62]

Article 2(5) was essentially unnecessary, as its content follows from Article 2(4). It defines "civilian objects" as "all objects which are not military objectives as defined in paragraph 4."[63]

Finally, Article 2(6) defines "recording" as "a physical, administrative and technical operation designed to obtain, for the purpose of registration in the official records, all available information facilitating the location of minefields, mines and booby-traps."

Articles 3, 4, and 5 of the 1980 Protocol II set forth general restrictions on the use of all of the weapons covered by the Protocol: mines, booby-traps, and other devices. The main objective of their provisions is to protect both the civilian population and individual civilians from the effects of these weapons.[64] There appears to be very little in their provisions that could be considered controversial. The provision of Article 4 requiring "the posting of warning signs" and "the issue of warnings" of the location of mine fields, however, is somewhat unrealistic.[65] To a large degree, the value of mines is that the progress of an attacking force is slowed up by the need to search for, locate, and neutralize

minefields and individual mines. This advantage is lost if the minelayer is obliged to make public to all, which necessarily includes the enemy, the location of mines that have been laid.[66] Moreover, the provisions of Article 5 presume an accuracy for remotely-delivered mines which may be incorrect. While the requirement for a self-actuating or remotely-controlled mechanism which renders a mine harmless (mechanisms which have long been employed on sea mines) would, in general, be a protection for the civilian population, one might wonder whether the safety of civilians is jeopardized when that mechanism is one which causes the mine to destroy itself by exploding without warning.[67]

Article 6 of the 1980 Protocol II, establishing prohibitions on the use of booby-traps,[68] is a very important provision for the protection of civilians, particularly children. It provides:

> 1. Without prejudice to the rules of international law applicable in armed conflict relating to treachery and perfidy, it is prohibited in all circumstances to use:
>
> (a) any booby-trap in the form of an apparently harmless portable object which is specifically designed and constructed to contain explosive material and to detonate when it is disturbed or approached,[69] or
>
> (b) booby-traps which are in any way attached to or associated with: (i) internationally recognized protective emblems, signs or signals; (ii) sick, wounded or dead persons; (iii) burial or cremation sites or graves; (iv) medical facilities, medical equipment, medical supplies or medical transportation; (v) children's toys or other portable objects or products specifically designed for the feeding, health, hygiene, clothing or education of children;[70] (vi) food or drink; (vii) kitchen utensils or appliances except in military establishments, military locations or military supply depots; (viii) objects clearly of a religious nature; (ix) historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; (x) animals or their carcasses.
>
> 2. It is prohibited in all circumstances to use any booby-trap which is designed to cause superfluous injury or unnecessary suffering.[71]

Introducing Article 6(1) with the phrase "Without prejudice to the rules of international law . . . relating to treachery and perfidy" was an unfortunate decision.[72] Despicable as many booby-traps have been, they have not generally heretofore been considered to be either treacherous or perfidious.[73] Obviously, it was not intended that this Protocol would declare *all* booby-traps treacherous and perfidious. Had that been the intention, the lengthy enumeration would have been unnecessary.[74] Notwithstanding, the quoted phrase will unquestionably be used, on occasion, as the basis for an argument that *any*

particular booby-trap is both treacherous and perfidious and, therefore, a violation of the law of war.[75]

Article 7 of the 1980 Protocol II amplifies the definition of "recording" contained in Article 2.[76] It includes some of the provisions which were exceedingly difficult to draft, primarily because of the technical problems involved.[77] In addition, there was strong support for a provision requiring the exchange of full information between belligerents concerning the location of minefields immediately upon the cessation of hostilities. Nevertheless, paragraph (3)(a)(i) of Article 7, requiring the belligerents "to take all necessary and appropriate measures" to protect civilians immediately after the cessation of hostilities,[78] represents a compromise reached because a number of nations were unwilling to require a belligerent, some of whose territory might still be occupied at the time of the cessation of hostilities, to make available to the occupier the location of minefields which might become valuable in the event that there was a resumption of hostilities. However, under sub-paragraphs (3)(a)(ii) and (iii) of that article, where there is no occupied territory, or where troops occupying enemy territory have withdrawn therefrom, there is no discretion involved—records of minefields and booby-trapped areas must be made available to the other Party and to the Secretary-General of the United Nations.[79] It is appropriate to point out here that, based on a proposal made by Morocco, there is a Technical Annex to Protocol II containing guidelines on recording which are to be "taken into account."[80] With regard to the Technical Annex the United States has said:

> (1) its provisions are not mandatory or uniformly applicable in all circumstances, but only "guidelines" which are to be "taken into account"; (2) the items of information listed in the Annex are of a sufficiently general character so as to be operationally practicable and to provide sufficient flexibility; (3) the Annex relates solely to information needed to establish the location of minefields and does not require disclosure of technical characteristics of the mines used; and (4) the addition of the Annex provides the assurance that the recording obligations of the Protocol would in any event be satisfied if the items of information Listed in the Annex are recorded.[81]

In view of the many, many casualties caused by mines after the cessation of hostilities, particularly among civilians, there should be no relaxation of the rules governing the maintenance of complete records with respect to mines laid during the course of hostilities and the availability of those records to all concerned at the earliest possible date.[82]

Article 8 of Protocol II deals with the protection of United Nations forces and missions from the minefields, mines, and areas of booby-traps established by the belligerent parties prior to the arrival of a United Nations peacekeeping,

observation, or other similar mission.[83] Its provisions appear to be completely reasonable and noncontroversial. When United Nations peacekeeping or observation forces are involved, extensive protection from minefields and booby-traps (removal, other measures, and providing the necessary information) is required; when a United Nations mission is involved, the belligerent party must provide it with protection from those weapons.[84]

Finally, Article 9 deals with the very important subject of international cooperation in the removal of minefields, mines, and booby-traps.[85] At the end of World War II an international organization was established for the removal of sea mines,[86] but the failure to take any concerted international action with respect to land mines and booby-traps resulted in accidental deaths and injuries to innocent civilians for many years thereafter.[87]

To summarize, while the 1980 Protocol II is not a perfectly drafted international agreement, there is nothing objectionable in its contents that, if deemed necessary, cannot be taken care of with simple statements of understanding.[88] There does not appear to be any reason why the United States should not accept it.[89]

IV. 1980 Protocol III

The 1980 Protocol on Prohibitions and Restrictions on the Use of Incendiary Weapons ("Protocol III")[90] is unquestionably the most controversial of the three Protocols. The early opposition of the United States to prohibitions or restrictions on the battlefield use of incendiary weapons was used by the Soviet delegation "to foster the impression in most quarters that this was the basic obstacle to a successful conclusion of the Conference."[91] Undoubtedly, it is the implications of this Protocol, rather than its content, that make the United States reluctant to ratify the Conventional Weapons Convention.[92] Despite the fact that Protocol III contains no prohibition or restriction on the use of napalm (other than the general prohibitions and restrictions on the use of incendiary weapons) or on the use of any incendiary weapons against combatants,[93] and despite the fact that the negotiating history is to the contrary, it may be considered inevitable that, when the occasion arises, the claim will be advanced that both of these are banned by Protocol III.

Article 1 of Protocol III sets forth a series of definitions. It is particularly notable that while the definition of incendiary weapons includes the enumeration "flame throwers, fougasses, shells, rockets, grenades, mines, bombs and other containers of incendiary substances," it also enumerates what are *not* such weapons: "illuminants, tracers, smoke or signalling systems . . . munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect . . . and similar combined effects munitions."[94]

Protocol III has only one other article. Drafting it was probably one of the most difficult tasks that the Conference and its organs encountered.[95] One major issue had been resolved by excluding combined-effects munitions ("CEMs") from the ambit of the term "incendiary weapons."[96] Although the word "napalm" was heard again and again during the discussions conducted with respect to this Protocol and was included in a number of proposals,[97] nowhere in Protocol III will one find that word used. This issue was resolved by eliminating all mention of napalm, thus permitting its use against combatants but not against civilians or civilian objects, which are protected against all incendiary attacks.[98]

Article 2 is of such importance that it warrants complete quotation:

> 1. It is prohibited in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons.[99]
>
> 2. It is prohibited in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons.
>
> 3. It is further prohibited to make any military objective located within a concentration of civilians the object of attack by means of incendiary weapons other than air-delivered incendiary weapons, except when such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.
>
> 4. It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.[100]

The prohibition contained in the second paragraph perhaps encompasses too much. It encourages the establishment of military objectives which are valid military targets within cities, towns, and villages, (all concentrations of civilians) thus immunizing the military objective from attack by air-delivered incendiary weapons, perhaps the only appropriate means of attack.[101] The drafters would have been better advised to use the provisions of Article 57(2)(a) of the 1977 Additional Protocol I as the basis for the provisions of this paragraph.[102] However, this is a problem which could be readily corrected by a reservation, or even by an understanding.

The insertion of the phrase "other than air-delivered incendiary weapons" in paragraph 3 of this article was unnecessary and renders the provision

ambiguous. It was probably meant to indicate that this paragraph was intended to cover all the possibilities not covered by paragraph 2 of the same article. However, this phrase could validly be construed to mean that under the stated circumstances (a military objective within a concentration of civilians) attacks by all types of incendiary weapons, except by ("other than" by) air-delivered incendiary weapons are prohibited—even though (or perhaps because) that procedure had been specifically prohibited by the previous paragraph. Was it intended thereby to exempt from the prohibition contained in the previous paragraph air-delivered incendiaries under the circumstances set forth in the "except" clause? Or was it intended thereby to exclude air-delivered incendiaries from the "except" clause itself? These are but a few of the interpretations to which that phrase lends itself. Any acceptance of Protocol III should include an understanding that clearly sets forth what the use of that phrase is believed to have been intended to accomplish.

To summarize, as far as it goes, the 1980 Protocol III is an extremely humanitarian agreement which contains nothing irreparable of either a political or a military nature that warrants the refusal of the United States and other major military powers to accept it.

Epilogue

When the United States signed the 1980 Conventional Weapons Convention in 1982 it stated:

> The United States Government welcomes the adoption of this Convention, and hopes that all States will give the most serious consideration to ratification or accession. We believe that the Convention represents a positive step forward in efforts to minimize injury or damage to the civilian population in time of armed conflict. Our signature of this Convention reflects the general willingness of the United States to adopt practical and reasonable provisions concerning the conduct of military operations, for the purpose of protecting noncombatants.[103]

More than a decade later, on March 21, 1994, the Secretary of State transmitted that Convention and Protocols I and II to the President with a recommendation for ratification by the United States with the four following conditions:

> 1. The United States considers that the fourth paragraph of the Preamble to the present Convention, which reproduces the subject of provisions of Article 35, Paragraph 3 and Article 55, Paragraph 1 of Additional Protocol I [to the 1949 Geneva Conventions], applies only to [s]tates which have accepted those provisions;

2. The United States declares, with reference to the scope of application defined in Article 1 of the present Convention, that it will apply the provisions of the present Convention to all armed conflicts referred to in Articles 2 and 3 common to the Geneva Conventions of 12 August 1949;

3. The United States declares that Article 7, Paragraph 4(b) of the present Convention will have no effect; and

4. The United States understands that Article 6, Paragraph 1(a) of Protocol II to the present Convention does not prohibit the adaptation of other objects for use as booby-traps.[104]

The President transmitted the 1980 Conventional Weapons Convention and its Protocols I and II to the Senate on May 12, 1994, recommending that the Senate give its advice and consent to their ratification subject to the above stated conditions.[105] He deferred action on Protocol III pending further examination concerning its acceptability from a military point of view.[106] On March 24, 1995, the Senate gave its advice and consent to the ratification of the Convention, Protocol I, and Protocol II.[107]

Notes

1. Final Act of the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, app. A, 19 I.L.M. 1523, 1524 [hereinafter "1980 Final Act"], *reprinted in* THE LAWS OF ARMED CONFLICTS 179 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988) [hereinafter Schindler & Toman].

2. *See* 1980 Final Act, *supra* note 1, app. A, art. 3, 19 I.L.M. at 1525, *reprinted in* Schindler & Toman, *supra* note 1, at 180.

3. *See* Schindler & Toman, *supra* note 1, at 192; S. Res. 4568, 104th Cong., 1st Sess., 141 CONG. REC. 4568 (1995).

4. Ratification is "[t]he affirmance . . . of a prior act which did not bind . . . whereby the act, as to some or all persons, is given effect as if originally authorized ...." BLACK'S LAW DICTIONARY 1261 (6th ed. 1990). Accession is "[t]he absolute or conditional acceptance by one or several nations of a treaty already concluded between other sovereignties . . . so that such nation becomes a party to it . . ." *Id* at 14.

5. *See* Schindler & Toman, supra note 1, at 179.

6. Items (2) and (3) will be discussed together.

7. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, Nov. 29-Dec 11, 1868, St. Petersburg, *reprinted in* 1 AM. J. INT'L L. SUPP. 95 (1907), *and in* Schindler & Toman, *supra* note 1, at 102.

8. *Id.*

9. 32 Stat. 1803, 1817 (1903), T.S. No. 403, *reprinted in* 1 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, 1776-1949, at 247 (C. Bevans, ed., 13 vols., 1968-1976) [hereinafter Bevans], *and in* Schindler & Toman, *supra* note 1, at 63.

> Secretary of State Warren Christopher has described the Hague Conventions of 1899 and 1907 as significant treaties attempt[ing] to reduce the suffering caused by armed conflicts and to provide protection to the victims of war, including the civilian population and members of the armed forces who have been wounded or captured. They are an attempt to reduce the inevitable suffering and damage present during any war in a manner consistent with legitimate military requirements.

88 AM. J. INT'L L. 748, 749 (1994). The first Conference in 1899 reduced a number of existing customs on the rules and laws of war to written form. Basically, the second Conference in 1907 made few changes in the 1899 Regulations. Today, these rules are collectively known as the Law of The Hague.

10. 36 Stat. 2277, 2301-02 (1911), T.S. No. 539; 2 AM. J. INT'L L. SUPP. 190 (1908); *reprinted in* 1 Bevans, *supra* note 9, at 631, *and in* Schindler & Toman, *supra* note 1, at 63.

11. *Id.*

12. *See* Schindler & Toman, *supra* note 1, at 82.

13. To the same effect, see 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I, Geneva, June 8, 1977, art. 35(1)-(2) [hereinafter 1977 Additional Protocol I] *in* 1 Swiss Federal Political Department, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed conflicts, Geneva, 1974-1977, Part 1, at 116 (1978) [hereinafter Official Records], 1125 U.N.T.S. 3, 16 I.L.M. 1391, *reprinted in* Schindler & Toman, *supra* note 1, at 621.

14. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65, *reprinted in* Schindler & Toman, *supra* note 1, at 115; *see also* 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 26 U.S.T. 583, 1015 U.N.T.S. 164, *reprinted in* Schindler & Toman, *supra* note 1, at 137 *(using* these weapons was not prohibited or restricted by the 1972 Convention—this was accomplished by the 1925 Geneva Gas Protocol).

15. Contrary to the beliefs of some, neither the four 1949 Geneva Conventions for the Protection of the Victims of War, *see infra* note 17, nor the 1977 Additional Protocol I has provisions containing prohibitions or restrictions on the use of specific conventional weapons.

16. The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts [hereinafter Diplomatic Conference] met from 1974 to 1977.

17. There are four 1949 Geneva Conventions. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3115, 75 U.N.T.S. 31, *reprinted in* Schindler & Toman, *supra* note 1, at 373 [hereinafter First Geneva Convention], Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, *reprinted in* Schindler & Toman, *supra* note 1, at 401 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135, *reprinted in* Schindler & Toman, *supra* note 1, at 423 [hereinafter Third Geneva Convention], Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3517, 75 U.N.T.S. 287, *reprinted in* Schindler & Toman, *supra* note 1, at 495 [hereinafter Fourth Geneva Convention].

18. *See* 1977 Additional Protocol I, *supra* note 13.

19. International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: 2 Report on the Work of the Conference, Annexes 115, 116 (July 1972).

20. International Committee of the Red Cross, Weapons that may Cause Unnecessary Suffering or have Indiscriminate Effects: Report on the Work of Experts, paras. 11 and 12 (1973). It must be borne in mind that, despite the occasional efforts of a few individuals, nuclear, chemical, or biological weapons were never considered to be areas open for discussion in any of the conferences to which this Article refers.

21. *Id.* at chs. III-VII.

22. "Small-calibre projectiles" was the only weapons category to fall by the wayside. A working paper on the subject (A/CONF.95/CW/5) was submitted at the Conventional Weapons Conference by Sweden. This was followed by a "Summary of the technical consultations in the Informal Working Group on Small-calibre Weapons Systems (A/CONF.95/CW/8); then this subject disappeared except for a resolution adopted near the end of the 1979 session of the Conventional Weapons Conference. *See* 1979 Report of the Conference to the General Assembly, (A/CONF.95/8), Oct. 8, 1979, at 51 [hereinafter 1979 Conference Report]; and Final Report of the Conference to the General Assembly, (A/CONF.95/15), and Corr. 1-5, Oct. 27, 1980, at 10 [hereinafter 1980 Final Report]. It is understood that actual field tests conducted by the experts failed to substantiate the Swedish thesis that small calibre weapons tumble and tear more than larger calibre weapons, and therefore, cause more suffering than the larger projectiles. Thus, further study was considered necessary before any action could be recommended with respect to these weapons. Of course, the category "potential weapons development" constituted an academic discussion of weapons not yet in the arsenal of any nation. Perhaps the weapons which fall within the ambit of the 1980 Protocol I to the Conventional Weapons Convention are in this category.

23. 16 Official Records, *supra* note 13, at 5. It will be found that these limitations on the activities of the Ad Hoc Committee were eventually disregarded. *See id.* at 551-627.

24. Concurrently, the ICRC sponsored two Conferences on the subject. *See* Report of the Conference of Government Experts on the Use of Certain Conventional Weapons, Lucerne, 1974 (1974) [hereinafter

Lucerne Conference]; Report of the Conference of Government Experts on the Use of Certain Conventional Weapons, Lugano, 1975 (1976).

25. Resolution 22(IV), Follow-up Regarding Prohibitions or Restrictions of Use of Certain Conventional Weapons, 1 Official Records, *supra* note 13, at Part One, 215-216 and Part Two, 52-53. Committee I of the Diplomatic Conference had adopted a provision on the subject for inclusion in the 1977 Additional Protocol I, CDDH/I/SR. 77, 9 Official Records, *supra* note 13, at 481-88, but that provision had been rejected by the Plenary Meeting, 7 Official Records, *supra* note 13, at 33.

26. G.A. Res. 32/152, U.N. GAOR, 32d Sess., Supp. NO. 45, at 57, U.N. Doc. A/32/45 (1977), *reprinted in* [1977] 31 Y.U.N. 43, U.N. Sales NO. E.79.I.1, *and in* 16 UNITED NATIONS RESOLUTIONS 529 (Dusan J. Djonovich, ed. 1984) [hereinafter Djonovich]. For some reason, despite the more specific title that the General Assembly gave to its agenda item, the resolution bears the title "Incendiary and other specific conventional weapons which may be the subject of prohibitions or restrictions of use for humanitarian reasons."

27. *See generally* 1980 Final Act, *supra* note 1.

28. 1949 Geneva Conventions, *supra* note 17, art. 2.

29. For example, Article 7(1) of the Conventional Weapons Convention is a restatement of the first sentence of Article 96(2) of the 1977 Protocol I.

30. Article 1(4) of the 1977 Additional Protocol I, *supra* note 13, states that "[t]he situations referred to in the preceding paragraph include armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination . . ." Once again, it would have been preferable to include the entire provision—but any attempt to do this would probably have increased the non-palatability of the provision tenfold!

31. It is possible that the claim will be made, as it has sometimes been made with respect to Common Article 3 of the 1949 Geneva Conventions, *supra* note 17, that if the State involved in a civil war, or a war of national liberation, is a Party to the Conventional Weapons Convention and some or all of its Protocols, the provisions of those instruments are automatically binding upon its adversary, whether or not an "authority" has taken any action with respect thereto. This is based on the theory that all of the nationals of a State Party to an international agreement are bound by the provisions thereof. On the other hand, rebels have generally denied that they are bound by the acts of a government that they are seeking to overthrow.

32. *See* S. Res. 4568, 104th Cong., 1st Sess., 141 CONG. REC. 4568 (1995) (declaring that "the United States will apply the provisions of the Convention, Protocol I, and Protocol II to all armed conflicts referred to in Articles 2 and 3 common to the Geneva Conventions for the Protection of War Victims of August 12, 1949"). The United States may contend, as it does with respect to the provision in the 1977 Additional Protocol I, that this provision will protect terrorists. Such a contention has no validity with respect to the 1977 Additional Protocol I—and it has even less validity here.

33. The French reservation (made upon signature) states, "with reference to the scope of application defined in article 1 of the [Conventional Weapons Convention], that it will apply the provisions of that Convention and its three Protocols to all the armed conflicts referred to in articles 2 and 3 common to the Geneva Conventions of 12 August 1949." MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL 833, 834 (1991), 20 I.L.M. 1287 (1981) [hereinafter MULTILATERAL TREATIES] (noting reservations, declarations, and statements of signatory nations), *reprinted in* Schindler & Toman, *supra* note 1, at 193-94. No Party to the Conventional Weapons Convention is known to have taken exception to the French reservation, though it excludes the reference to the 1977 Additional Protocol I and national liberation movements.

34. Nevertheless, one commentator has found it necessary to allocate three pages of discussion to this subject. Elmar Rauch, *The Protection of the Civilian Population in International Armed Conflicts and the Use of Landmines*, 24 GERMAN Y.B. INT'L L. 262, 264-66 (1981). The present author does concur with Rauch's finding that the Conventional Weapons Convention is *not* a supplement to the 1977 Additional Protocol I. *Id.* at 265. Another commentator states that "[t]he purpose of this Article is to exclude the *a contrario* line of argument whose adherents might claim that anything not specifically prohibited in the Convention is allowed." A.P.V. Rogers, *A Commentary on the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices*, 26 MIL. L. & L. WAR REV. 185, 188 (1987).

35. 1980 Final Act, *supra* note 1, app. A, arts. 3, 5, 6, 9-11.

36. 1980 Final Act, *supra* note 1, app. A, art. 4.

37. MULTILATERAL TREATIES, *supra* note 33, at 832, 835, *reprinted in* Shindler & Toman, *supra* note 1, at 192, 196.

38. Perhaps the United States was making two separate statements: one setting forth its intent to exercise the option of not ratifying all three protocols, and another reserving the right to make statements of understandings and/or reservations. Indeed, if this were so, the U.S. could have made its intent much clearer—e.g., by the use of a semi-colon instead of a comma after the words "article 4(3) of the Convention."

39. 1980 Final Act, *supra* note 1, app. A art. 4 (emphasis added).

40. The United States had suggested mandatory acceptance of all three Protocols. 1980 Report of the United States Delegation to the Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects 13 [hereinafter 1980 Report of the United States Delegation]. The actions of States in ratifying or acceding to the 1980 Conventional Weapons Convention would seem to indicate that the fear which engendered this provision was unwarranted. As of January 1, 1992, thirty-one States had ratified or acceded to the Convention. MULTILATERAL TREATIES, *supra* note 33, at 832-33. Every State had also ratified or acceded to all three Protocols, with the exception of Bonin, which did not approve 1980 Protocol II, and France, which did not ratify 1980 Protocol III. *Id.*

41. This provision, contained in Article 7, is similar to the provisions of Common Article 2(3) of the 1949 Geneva Conventions. *See supra* note 17. It continues the practice of reversing the procedure contained in the 1907 Hague Conventions which were not effective if *any single* belligerent was not a Party to a particular Convention—a provision erroneously applied by Justice Pal in his dissent in the trial before the International Military Tribunal for the Far East. *See* HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES 152 (1993).

42. The provisions adopted were actually mild compared to those sought by the African group of nations. Interestingly, the United States did not object to these provisions at the Conventional Weapons Conference. Instead, the United States insisted that the Convention only apply to internal conflicts if the "authority" of the liberation movement "had accepted and applied the rules of warfare which already apply to States as a result of various international agreements." 1980 Report of The United States Delegation, *supra* note 40, at 14. This meant that an "authority" could not take advantage of the Convention unless it had accepted and applied certain rules of warfare concerning, among other things, the treatment of prisoners and the protection of noncombatants." *Id.*

43. It is suggested that it would have been more appropriate merely to make the Conventional Weapons Convention and the Protocols, which were previously approved by the State involved in the conflict, applicable when the "authority" had agreed to accept and apply them.

44. The Assistant Director of the ICRC's Department of Principles of Law, Yves Sandoz, has stated that the Conventional Weapons Convention and its Protocols "are valuable, or rather indispensable, supplements to the 1977 Protocols." Yves Sandoz, *A New Step Forward in International Law: Prohibitions or Restrictions on the Use of Certain Conventional Weapons*, 21 INT'L REV. RED CROSS 3, 16 (Jan.-Feb. 1981). Absent in the Conventional Weapons Convention is a provision similar to Article 1(3) of the 1977 Additional Protocol I, specifically stating that it supplements the 1949 Geneva Conventions. While the Convention and its Protocols supplement the 1977 Additional Protocol I in the sense that they contain law-of-war provisions not contained in that Protocol, they are completely independent and have no other relationship thereto. States can be Parties to the Conventional Weapons Convention and some or all of its Protocols without being Parties to the 1977 Additional Protocol I. States cannot be Parties to the 1977 Additional Protocol I without being Parties to the 1949 Geneva Conventions. *See* 1977 Additional Protocol I, *supra* note 13, art. 92.

45. Upon signing the Conventional Weapons Convention, France made a reservation stating:

> [A]s regards the Geneva Conventions of 12 August 1949, the declaration of acceptance and application provided for in article 7, paragraph 4(b), of the Convention on Prohibitions or Restrictions . . . will have no effects other than those provided for in article 3 common to the Geneva Conventions, in so far as that article is applicable.

MULTILATERAL TREATIES, *supra* note 33, at 833-34, 20 I.L.M. at 1287 (1981), reprinted in Schindler & Toman, *supra* note 1, at 193-94. Once again, no Party is known to have taken exception to France's reservation. Article 3 common to the Geneva Conventions sets forth rules applicable in wars "not of an international character"—i.e. civil wars.

46. Indeed, the Senate made such a reservation when it ratified the Convention. S. Res. 4568, 104th Cong., 1st Sess., 141 CONG. REC. 4568 (1996).

47. Upon signing the Convention, France made an interpretive statement that the application of the Convention would have no effect on the legal status of the parties to the conflict. MULTILATERAL TREATIES, *supra* note 33, at 833, 20 I.L.M. at 1287 (1981), *reprinted in* Schindler & Toman, *supra* note 1, at 193.

48. France, Italy, the United States, and the People's Republic of China made statements deprecating this omission upon signing the Conventional Weapons Convention. MULTILATERAL TREATIES, *supra* note 33, at 833-35, *reprinted in* Schindler & Toman, *supra* note 1, at 192-96.

49. Protocol I Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects, 1980 Final Act, *supra* note 1, app. B, 19 I.L.M. 1523, 1529 (1980), *reprinted in* Schindler & Toman, *supra* note 1, at 185 thereinafter "Protocol I"].

50. *Id.*

51. 1979 Report of the United States Delegation to the United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects 5 [hereinafter 1979 Report of the United States Delegation]. The 1980 Report of the United States Delegation, *supra* note 40, at 5, states: "The proposal does not, however, preclude nonmetallic casing materials or other parts or components which are not designed as the primary wounding mechanism."

52. Matheson, *Remarks*, 1979 PROC. A.S.I.L. 156, 157. *See also* W.J. Fenrick, *The Law of Armed Conflict: The CUSHIE Weapons Treaty*, 11 CAN. DEF. Q. 25 (Summer 1981). The then Major Fenrick states flatly that this Protocol "bans a weapon which does not exist." *Id.* at 27. He also explains that "CUSHIE is an unofficial Canadian acronym derived from the words 'Causing Unnecessary Suffering or Having Indiscriminate Effects'." *Id.* at 30 n.2.

53. Protocol II Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects, 1980 Final Act, *supra* note 1, app. C, 19 I.L.M. 1523, 1529 (1980), *reprinted in* Schindler & Toman, *supra* note 1, at 177, 185 [hereinafter "Protocol II"].

54. *See supra* note 19 and accompanying text. The 1956 Draft Rules are the source of many of the provisions of both Protocol II and Protocol III. Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War (2d Ed. 1958), *reprinted in* Schindler & Toman, *supra* note 1, at 251.

55. It is important to note that while land mines are primarily a defensive mechanism intended to impede enemy movement, the infliction of casualties being an incidental result, such mines are now also used offensively. Burrus M. Carnahan, *The Law of Land Mine Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons*, 22 MIL. L. & L. WAR REV. 117, 120-22 (1983) (citing Lucerne Conference, *supra* note 24, at 229).

56. Protocol II, 1980 Final Act *supra* note 1, app. C, 19 I.L.M. at 1529, *reprinted in* Schindler & Toman, *supra* note 1, at 185. It is unfortunate, that advantage was not taken of the opportunity to draft international legislation restricting the use of sea mines, particularly on the high seas, restrictions which are long overdue. *See* HOWARD S. LEVIE, MINE WARFARE AT SEA 52-53 (1992).

57. Despite the fact that Article 49(3) of the 1977 Additional Protocol I, *supra* note 13, specifically states that the provisions of that Section apply "to all attacks from the sea . . . against objectives on land *but do not otherwise affect the rules of international law applicable in armed conflict at sea,*" (emphasis added), one author has found that the provisions of the Section "apply to all acts of naval warfare which may affect the civilian population." RAUCH, THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS: REPERCUSSIONS ON THE LAW OF NAVAL WARFARE 57-60 (1984). The quoted provisions should preclude any such contention with respect to the 1980 Protocol II.

58. 1980 Final Act, *supra* note 1, 19 I.L.M. at 1530, *reprinted in* Schindler & Toman, *supra* note 1, at 180.

59. *Id.* One commentator hazards the opinion that in the future most land mines will be laid by aircraft, rockets, or artillery. Carnahan, *supra* note 55, at 123.

60. 1980 Final Act, *supra* note 1, 19 I.L.M. at 1530, *reprinted in* Schindler & Toman, *supra* note 1, at 180.

61. *Id.* This provision appears to consider as being inhumane manually-emplaced "other devices" which include exactly the mechanisms which are required in remotely-delivered mines. *See supra* text accompanying note 59. The logic of the distinction is difficult to understand.

62. 1980 Final Act, *supra* note 1, 19 I.L.M. at 1530, *reprinted in* Schindler & Toman, *supra* note 1, at 185. This provision obviously had as its basic source paragraph 2 of the Resolution adopted by the Institute of International Law in 1969, entitled *The Distinction Between Military Objectives and Non-Military Objects In General and Particularly the Problems Associated With Weapons of Mass Destruction*, 66 AM.J.INT'L. L. 470, 470-71 (1972), *reprinted in* Schindler & Toman, *supra* note 1, at 265. Its immediate source was Article 52(2) of the 1977 Additional Protocol I, *supra* note 13.

63. 1977 Additional Protocol I, *supra* note 13, art. 52(1).

64. *See* Rogers, *supra* note 34, at 187. One commentator, a member of the United Kingdom Delegation at the Conventional Weapons Conference states: "The Conference was concerned, therefore, with finding ways of protecting the innocent from the dangers of mines and booby traps while at the same time preserving this important means of self-defence." *Id.*

65. 1980 Final Act, *supra* note 1, 19 I.L.M. at 1531(1980), *reprinted in* Schindler & Toman, *supra* note 1, at 186.

66. Rogers, *supra* note 34, at 193 (labeling provision as "merely hortatory").

67. These various mechanisms are frequently used when the armed force which delivers the mines from a remote source anticipates that its troops will need to traverse the mined area in the near future.

68. 1980 Final Act, *supra* note 1, app. C, art. 6(1)(b)(v), 19 I.L.M. at 1532 (1980), *reprinted in* Schindler & Toman, *supra* note 1, at 187.

69. *See* Rogers, *supra* note 34, at 199. With respect to this provision: "There is no reason why booby-traps should not be prefabricated so long as they are not in the shape of a harmless, portable object. What the Conference had in mind to prohibit were booby-traps made to look like watches, cameras, pens or other attractive items. It did not prohibit the booby-trapping of existing attractive items." *Id.* In other words, a belligerent may booby-trap a camera, but it may not manufacture booby-traps which appear to be cameras.

70. The Working Group proposal referred solely to "children's toys." A/CONF.95/3, Annex II, at 9; 1979 Report of the United States Delegation, *supra* note 51, app. D. The Committee of the Whole added the rest of item 1(b)(v), probably having in mind events in Afghanistan where the booby-trapping of objects intended for children's care caused countless children to be killed or maimed.

71. 1980 Final Act, *supra* note 1, app. C, art. 6, 19 I.L.M. at 1532 (1980), *reprinted* in Schindler & Toman, *supra* note 1, at 187.

72. *Id.*

73. During World War II the Germans were particularly adept at preparing booby-traps; but no German was tried on the charge that such an act was treacherous or perfidious and a violation of the law of war.

74. An example of a booby-trap that would be legal, even under the 1980 Protocol II, is one made as part of a land mine which would cause the mine to explode if attempts were made to move it or to deactivate it before its own internal mechanism causes it to deactivate or self-destruct. These would not fall within the definition of "other devices." 1980 Final Act, *supra* note 1, app. C, art. 3(1)(C), 19 I.L.M. at 1530 (1980), *reprinted in* Schindler & Toman, *supra* note 1, at 185. The Germans used such booby-traps in their sea mines and in various types of aerial bombs dropped on Great Britain during World War II, and no charge was ever made that such action had been treacherous or perfidious.

75. Article 37 of the 1977 Additional Protocol I states "[a]cts inviting the confidence of an adversary . . . shall constitute perfidy." 1977 Additional Protocol I, *supra* note 13, art. 37, 16 I.L.M. at 1409 (1977), *reprinted in* Schindler & Toman, *supra* note 1. The rare cases in which a booby-trap might be used in connection with such an invitation are certainly covered in Article 6(1) of Protocol II.

76. 1980 Final Act, *supra* note 1, app. C, art. 7, 19 I.L.M. at 1532-33 (1980), *reprinted in* Schindler & Toman, *supra* note 1, at 187-88.

77. 1980 Report of The United States Delegation, *supra* note 40, at 6-7.

78. *Id.*

79. *Id.* During the 1982 conflict in the Falklands (Malvinas) the Argentines sowed plastic mines indiscriminately and without recording their locations. This resulted in many casualties occurring after the cessation of hostilities. V. ADAMS, THE FALKLANDS CONFLICT 60 (1988).

80. 1979 Conference Report, *supra* note 22, at 22-23. Morocco was plagued with explosions of World War II mines and booby-traps for many years after the termination of that conflict, as were other North African countries. Cf. G.A. Res. 35/71, U.N. GAOR 2d Comm., 35th Sess., 83rd plen. mtg., U.N. Doc. A/35/592/Add.4 (1980), *reprinted in* 19 Djonovich, *supra* note 26, at 311 (recognizing that most developing countries exposed to wars waged by colonial powers suffer loss of life and property as a result of mines).

81. 1980 Report of the United States Delegation, *supra* note 40, at 7-8.

82. *See, e.g.*, Cauderay, *Anti-Personnel Mines*, 33 INT'L REV. RED CROSS 273 (JulyAugust 1993). *See also* ARMS PROJECT OF HUMAN RIGHTS WATCH, LANDMINES: A DEADLY LEGACY, *passim* (1993).

83. 1980 Final Act, *supra* note 1, app. C, art. 8, 19 I.L.M. at 1533 (1980), *reprinted in* Shindler & Toman, *supra* note 1, at 188.

84. *See* L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 133 (1993). Following the Gulf War, military personnel, under the auspices of the Security Council resolutions, sustained severe casualties during cleaning operations as Iraq failed to keep proper records of the locations of minefields. *Id.* Negligence in keeping such records also resulted in numerous injuries to civilians after the cessation of hostilities in Cambodia and the Falklands. *Id.*

85. 1980 Final Act, *supra* note 1, app. C, art. 9, 19 I.L.M. at 1534 (1980), *reprinted in* Shindler & Toman, *supra* note 1, at 188.

86. International Agreement for the Clearance of Mines in European Waters, Nov. 22, 1945, *reprinted in* 3 Bevans, *supra* note 9, at 1322. Following World War II, German prisoners of war were used to remove land mines laid by the Germans in France. This resulted in a number of casualties. Because of that experience, Article 52(1) of the 1949 Third Geneva Convention provides that prisoners of war may not be compelled to undertake dangerous labor and specifically states that the removal of mines falls within this category. *See* Third Geneva Convention, *supra* note 17, at art. 52(1)(3). During the Falklands (Malvinas) War it was alleged that the British were violating this provision. Howard S. Levie, *The Falklands Crisis and the Laws of War*, *in* THE FALKLANDS WAR: LESSONS FOR STRATEGY, DIPLOMACY AND INTERNATIONAL LAW 64, 73 (Alberto R. Coll

& Anthony C. Arend, eds., 1985). Investigation revealed that Argentine prisoners of war had volunteered to mark a stock of Argentine mines which had been stored at a location close to their prisoner-of-war camp.

87. Carnahan, *supra* note 55, at 126, cites three post-World War II treaties containing provisions with respect to the removal of land mines: Agreement Between the Commander-in-Chief, United Nations Command, on the One Hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, on the Other Hand, Concerning a Military Armistice in Korea, Panmunjom, Korea, July 27, 1953, art. II(13(a), 4 U.S.T. 235, T.I.A.S. No. 2782, *reprinted in* 4 MAJOR PEACE TREATIES OF MODERN HISTORY 2657 (Fred L. Israel, ed. 1967-1980) [hereinafter Israel] (calling for removal of all minefields by the commander of the side whose forces emplaced them); Agreement on Ending the War and Restoring Peace in Viet-Nam: Protocol Concerning the Cease-fire in South Viet-Nam and the Joint Military Commission, Paris, Jan. 27, 1973, art. 5, 24 U.S.T. 38, pt.1., 39; T.I.A.S. No. 7542, *reprinted in* 5 Israel 92, 93 (requiring each party to do its utmost to complete removal or deactivation of all mine-fields and traps within fifteen days after cease fire); Appendix to Annex I of the Treaty of Peace Between the Arab Republic of Egypt and the State of Israel, Washington, March 26, 1979, art. VI(4), 18 I.L.M. 362, 382-83, *reprinted in* 5 Israel 331, 349 (agreeing that Israel will make efforts to destroy or remove minefields in areas from which it withdraws).

88. *See* S. Res. 4568, 104th Cong., 1st Sess., 141 CONG. REC. 4568 (1996) (ratifying Protocol II with understanding concerning Article 6(1)). But *see* Rauch, *supra* note 34, at 286-287 (stating that provisions of 1977 Additional Protocol I and of 1980 Protocol II relating to mines are incompatible). It is submitted that Rauch's conclusion is based on an overly critical analysis. Nevertheless, this would not present a problem to a country such as the United States which has not ratified, and apparently does not intend to ratify, the 1977 Additional Protocol I.

89. *See* 1980 Report of the United States Delegation, *supra* note 40, at 8 ("The U.S. Delegation supported the adoption of this Protocol in the belief that it would substantially reduce collateral injury and damage to civilian populations, and would require other armed forces to observe the kind of prudent and orderly practices in the employment of mines which U.S. forces already observe.").

90. Protocol III Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects, Geneva, Oct. 10, 1980, 1980 Final Act, *supra* note 1, app. D, 19 I.L.M. 1534, *reprinted in* Schindler & Toman, *supra* note 1, at 190 [hereinafter "Protocol III"].

91. 1980 Report of the United States Delegation, *supra* note 40, at 9.

92. Of course, the United States could do as France has already done: ratify the Convention, but accept only Protocols I and II. However, this is certainly not a procedure to be recommended.

93. *See* Sandoz, *supra* note 44, at 13 (supporting notion that emphasis was placed on danger that incendiary weapons present to civilians).

94. 1980 Final Act, *supra* note 1, app. D, art. 1., 19 I.L.M. at 1534, *reprinted in* Schindler & Toman, *supra* note 1, at 190.

95. It is interesting to note that the Draft Protocol prepared by the 1979 Conference Working Group on Incendiary Weapons included an alternative proposal which read simply: "It is prohibited to use incendiary weapons." 1979 Conference Report, *supra* note 22, at 29.

96. *See* 1980 Final Act, *supra* note 1, app. D, 19 I.L.M. at 1534, *reprinted in* Schindler & Toman, *supra* note 1, at 190.

97. *See, e.g.,* Working Group's Draft Protocol, 1979 Conference Report, *supra* note 22, at 28; *see also* the proposal by Australia and the Netherlands, *supra* note 22, at 33.

98. 1980 Final Act, *supra* note 1, app. D, art. 2, 19 I.L.M. at 1534, *reprinted in* Schindler & Toman, *supra* note 1, at 190. It has also been strongly urged that the use of incendiaries against combatants be prohibited. *See, e.g.,* the proposals by the Soviet Union, Indonesia, Nigeria, and Jordan, 1979 Conference Report, *supra* note 22, at 31.

99. This will mean that there will be no more fire-bombing of cities such as Tokyo, Dresden, etc., in some of which more civilian lives were lost than at Hiroshima or Nagasaki.

100. Beginning with the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Techniques, Geneva, May 18, 1977, 31 U.S.T. 333, 167 I.L.M. 88, *reprinted* in Schindler & Toman, *supra* note 1, at 163; continuing with the 1977 Additional Protocol I, *supra* note 13, at arts. 35(3) and 55; and now with the Protocol III, *supra* note 90, the draftsmen of law-of-war conventions have taken a few small steps towards the protection of the natural environment from the havoc of war.

101. During the Vietnamese conflict, when the North Vietnamese became aware of the fact that a large area around Hanoi was "off-limits" for attacks by American aircraft, that area became the major collection area for military supplies.

102. That provision of the 1977 Additional Protocol I sets forth the precautions which must be taken when a military objective is to be attacked and includes the taking of all feasible precautions to minimize civilian casualties. *See* 1977 Additional Protocol, *supra* note 13, at art. 57(2).

103. MULTILATERAL TREATIES, *supra* note 33, at 833, 835, *reprinted in* Schindler & Toman, *supra* note 1, at 196.

104. S. TREATY DOC. NO. 25, 103d cong., 2d Sess. (1994) *reprinted in* 88 AM. J. INT'L L. 748, 751 (1994).

105. 88 AM. J. INT'L L. 749 (1994).

106. *Id.* At 748. "Further examination" when 14 years have elapsed since that Protocol was drafted!

107. S. Res. 4568, 104th Cong., 1st Sess., 141 CONG. REC. 4568 (1995).

Prohibitions and Restrictions On The Use of Conventional Weapons

Addendum

Protocol II to the *1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects* is entitled *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices*. While it contains a number of valuable provisions for the protection of civilians, its provisions were considered inadequate and it is estimated that there are, today, close to 100,000,000 land mines buried in countries around the world and that every day a number of innocent civilians are accidently killed or maimed by such weapons. Their value for both defensive and offensive purposes makes it difficult to convince the representatives of governments that they should be banned. One solution is to require that all land mines become inert after a specified period of time. In May 1996 an amended *Protocol* was drafted, which requires that they be detectable, and self-destructable or self-deactivating. Also, they must be removed at the cessation of hostilities. Perhaps another solution is to require that all land mines be so constructed that they will only explode when subjected to a pressure of a set number of pounds, one which will exceed the weight of an individual or a civilian automobile. (At the same time a *Protocol on Blinding Laser Weapons (Protocol IV)* was drafted placing restrictions on the use of laser weapons specifically designed to blind.)

XIX

Violations of Human Rights in Time of War As War Crimes

24 Israel Yearbook on Human Rights 119 (1995)

There is a tendency to consider the term "human rights" as being solely applicable to the peacetime protection of those rights and to consider the term "humanitarian law" as being applicable to the protection of human rights afforded by the law of war in time of war.[1] Without doubt, the humanitarian law of war includes much of the law which, in time of peace, would be termed human rights; and there is no reason why they should not continue to bear that title in time of war. However, it must be borne in mind that although all of the law of war is humanitarian, not all of the humanitarian law of war involves human rights. For example, while the provision of the law of war prohibiting the use of dumdum bullets[2] is unquestionably a humanitarian rule, it can scarcely be considered to be a human right.

In drafting the *1945 London Charter,* the instrument that created the International Military Tribunal which tried the major war criminals at Nuremberg, the draftsman included two provisions defining acts constituting violations of the humanitarian law of war and violations of human rights in time of war. Those provisions read as follows:

> *Article 6(b). War Crimes.* Namely, violations of the laws or customs of war. Such violations shall include, but shall not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.
> *Article 6(c). Crimes against humanity.* Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war or persecutions on political, racial or religious grounds...whether or not in violation of the domestic law of the country where perpetrated.[3]

The provisions of Article 5(b) and 5(c) of the Charter of the International Military Tribunal for the Far East which tried the major Japanese war criminals at Tokyo were substantially similar.[4]

The contention was frequently advanced that the provisions of Article 6(c) concerning *Crimes against Humanity,* and others like them, created new humanitarian rules, new war crimes, and were, therefore, *ex post facto* laws. This contention was uniformly rejected by the tribunals. In the case of *United States v. Otto Ohlendorf,* better known as The *Einsatzgruppen* case, the Military Tribunal stated:

> Although the Nuernberg trials represent the first time that international tribunals have adjudicated crimes against humanity as an international offence, this does not . . . mean that a new offence has been added to the list of transgressions of man. Nuernberg has only demonstrated how humanity can be defended in court, and it is inconceivable that with this precedent extant, the law of humanity should ever lack for a tribunal.[5]

In view of the judicial precedents and the numerous subsequent actions of the international community recognizing crimes against humanity as a wartime offence under international law,[6] the contention that crimes against humanity are not well-established violations of the humanitarian law of war now has no merit whatsoever.

A major example of a wartime violation of human rights occurred during World War I when the Imperial German Government caused the deportation from their homes in Belgium and France of a total of approximately 100,000 men, women and children, to be used as forced labour in Germany. This practice was discontinued, and many of the deportees were repatriated when the Imperial German Government responded to neutral indignation at this patent violation of human rights.[7] During World War II, the Nazis relentlessly followed the same practice, but on a far greater scale, with an estimated total of 12,000,000 persons moved from their various home countries to Nazi Germany to perform forced labour, for the most part in munitions factories.[8] In this instance, there were comparatively few neutral nations to express their indignation and, in any event, it is doubtful that such action on their part would have had any effect on Hitler's Nazi Government. The comparatively small percentage of deported persons who survived the extreme ill-treatment that they uniformly received were forced to remain in Germany as virtual slaves until rescued by Allied advances or until the German surrender. The prohibition of this practice has now been codified in Article 49 of the 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War,[9] the first paragraph of which states:

> Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.[10]

While the Japanese also engaged in this practice of deportation of foreign civilians to Japan for labour purposes, they did so on a much smaller scale.[11]

One major violation of human rights that occurred in Nazi Germany prior to, and on a greatly increased scale, during World War II, was the incarceration of individuals, both German and foreign, citizens of both friendly and enemy countries, in concentration camps, to which they were sent at the whim of the Gestapo, the SS and the other Nazi security organizations. No judicial proceedings were involved in these actions, either before or during the imprisonment. There was no way to challenge the action, no way to obtain a hearing before an impartial judge. This was obviously a gross violation of human rights both in time of peace and in time of war. Moreover, some of these concentration camps were basically extermination camps, places that were set up for the sole purpose of exterminating inmates on a wholesale scale, individuals whose only offences were that they were merely suspected of less than 100 percent support of the Nazi government, or they were Jews, or gypsies, or citizens of a foreign nation, even though the latter might have been a German ally.[12] For example, it is known that between four million and six million individuals were exterminated by the use of gas at the camp established by the Nazis in Auschwitz, Poland.[13] Exterminations on a large scale also took place at concentration camps located at Belsen (tried by the British),[14] at Buchenwald[15] and Dachau[16] (tried by the United States), at Natzweiler (tried by the French),[17] etc.

Another Nazi practice which was unquestionably a violation of human rights and which was conducted against both Germans and foreigners, was euthanasia—the killing of persons who were terminally or mentally ill—the individuals whom Hitler called "useless eaters." Based upon the evidence submitted to it, the International Military Tribunal estimated that some 275,000 individuals had been killed in this manner.[18] Allied war crimes tribunals tried a number of cases involving this blatant violation of human rights;[19] and long after World War II had come to an end, the Federal Republic of Germany succeeded in obtaining the extradition for trial of several individuals, including medical doctors, charged with this offence.[20]

A number of the post-World War II trials in Europe involved the use of enemy personnel for purposes of medical experiments, many of which completely lacked any merit and practically all of which resulted in the death of the victims.[21] Such a use of defenceless persons was certainly a violation of human rights and of the humanitarian law of war. At least one such case was

tried by the United States in Japan.[22] In addition, the Soviet Union tried a number of members of the Japanese Army on the charge that they had used human beings (Chinese, Russian, and, perhaps, American) to test the efficacy of bacteriological weapons.[23]

Two other Nazi practices that constituted violations of human rights, based on orders emanating directly from Hitler, were the so-called *Night and Fog Decree*[24] and the *Terrorist and Sabotage Decree.*[25] Under the former, the death penalty was to be applicable for all acts committed by non-Germans against the German State or its authorities in occupied territory. Such cases were to be tried in the occupied territory in which they had occurred only if it was probable that a death sentence would be adjudged. Otherwise the accused persons were to be taken to Germany where they were quickly executed without trial or, in rare cases, sent to a concentration camp. Inquiries concerning such persons were to be answered with the statement that "the state of the proceeding did not allow further information," thus keeping the families in ignorance concerning the status of the accused persons, the great majority of whom did not live to return to their homes. This procedure was inhumane and was a gross violation of human rights and of the humanitarian law of war.

The second practice mentioned was based on the *Terrorist and Sabotage Decree.* This decree provided that with respect to all acts of violence by non-Germans directed against German personnel or installations in occupied territory, the offenders were to be overpowered on the spot (this meant they were to be killed). If not apprehended until later, they were to be turned over to the Security Police (again, this meant that they were to be killed). No judicial proceedings to determine guilt were to take place. Death could result from the mere whim of the occupation authorities. Again, this procedure was inhumane and a gross violation of human rights and of the humanitarian law of war. (It is interesting to know that as a humanitarian gesture, women who did not themselves participate in such attacks were only to be given assigned work—and children were to be spared!)

If we consider, as we undoubtedly should, that many of the humanitarian protections to which prisoners of war are entitled, under both the customary and conventional laws of war, are human rights, then these were human rights that were violated on a vast scale by the Germans, by the Soviet Union and by the Japanese. Probably in excess of one million Soviet prisoners of war died from maltreatment in the hands of the Nazis; and approximately a similar number of German prisoners of war never returned from Soviet custody. Strange to relate, the Nazis substantially complied with the humanitarian law of war with respect to British and American prisoners of war, perhaps because they knew that German prisoners of war held by Great Britain and the United States were receiving appropriate humane treatment. There was no such reciprocity on the

part of the Japanese, where violations of the humanitarian law of war for the protection of prisoners of war were standard procedure. In this respect, it is worthy of note that while only four percent of the Americans known to have been in German custody died in captivity, more than 27 percent of the Americans known to have been in Japanese custody did not survive.[26]

With the possible exception of the Falklands (Malvinas) War between the Argentine and Great Britain,[27] incidents involving the denial of human rights and of the humanitarian law of war to enemy civilians and captured enemy personnel have occurred in every international conflict since the end of World War II. This despite the post-war war crimes trials, one of the purposes of which was to establish a precedent beyond dispute that such offences would not go unpunished. However, a number of those conflicts ended in negotiated settlements, that included a requirement for the return of all prisoners of war. That provision necessarily resulted in the repatriation of even those who had been identified as having committed offences, including violations of human rights and of the humanitarian law of war, for which they should have been tried and, if convicted, sentenced to appropriate punishment. Similarly, the leaders of the authoritarian governments which initiated these wars and frequently made violations of human rights a basic element of State policy during such conflicts have gone unpunished. This was true as to one or both of these factors in Korea (1950-53), in Vietnam (1965-72), in the India-Pakistan War (1972), in the Iran-Iraq War (1980-88) and in the Gulf Crisis (1990-91).

In Korea, the United Nations Command had identified and was prepared to try some 200 North Koreans and Chinese Communists charged with violations of the humanitarian law of war applicable to prisoners of war as well as violations of the human rights of South Korean civilians. Because of the provisions of the Armistice Agreement, all of these individuals were repatriated and went unpunished.[28]

In Vietnam, there were innumerable instances of violations of the humanitarian law of war and innumerable instances of violations of human rights. For example, captured American soldiers and airmen who were wounded received no medical treatment, they were subjected to solitary confinement, confined in prisons, and paraded before hostile crowds, the members of which were permitted and encouraged to assault them with sticks and stones. These were all violations of the humanitarian law of war by the North Vietnamese. Moreover, the Viet Cong executed innocent prisoners of war in reprisal for the execution after trial of Viet Cong terrorists, one of whom had been captured in Saigon while still in possession of a bomb set to explode just five minutes later. These gross violations of the humanitarian law of war by the North Vietnamese and by the Viet Cong received little or no publicity. Unfortunately, the only case that received widespread publicity was the slaughter of a group of

Vietnamese men, women and children by American soldiers, also a gross violation of human rights. Regrettably, because of unwarranted political interference only two trials by court-martial for this incident took place. While the major culprit, one Lieutenant William L. Calley, was convicted of murder by a United States Army court-martial and was sentenced to be punished, his punishment was manifestly inadequate for the offence committed.[29]

In the December 1972 India-Pakistan conflict, India charged the Pakistani Army with having committed genocide in what was then East Pakistan (now Bangladesh) during an attempt to suppress a revolt in that area. In 1974, India agreed to repatriate the more than 90,000 Pakistani prisoners of war whom they still detained, despite the fact that there had long since been a cessation of active hostilities between the two countries. However, it withheld 195 of them for trial by Bangladesh for the crime of genocide. Pakistan brought an action against India in the International Court of Justice, pointing out that both countries were parties to the Genocide Convention,[30] Article 6 of which provides that jurisdiction to conduct trials for violations thereof is limited to the sovereign in whose territory the alleged genocide had occurred (in this case Pakistan) or to an international criminal court (an institution that does not yet exist). By agreement, the 195 prisoners of war were eventually repatriated to Pakistan and the action in the International Court of Justice was discontinued. No trial was conducted by Pakistan. Without intending any criticism of Pakistan, and without passing judgment on the guilt or innocence of any of the 195 Pakistanis singled out by India for trial, this is indicative of the limitations of the Genocide Convention. In most instances, genocide is and will be government sponsored so that, lacking an international criminal court, unless the offence is committed on foreign territory, there will be no punishment of the offending persons. As already noted, during World War II, the Nazis maintained "extermination camps" for the killing of Jews, gypsies, and other persons considered to be "asocial", not only in Germany, but also in Poland and in the Soviet Union. Had the Genocide Convention been in effect at that time, only the subsequent German governments would have been competent to try those accused who had committed their offences in concentration camps located on German territory.[31]

Concerning the maltreatment of prisoners of war by both sides in the Iran-Iraq War, a Special Mission dispatched to those countries by the Secretary-General of the United Nations found that

> harsh treatment and violence in the camps [in both countries] were far from uncommon. POWs provided a large volume of information about their physical ill-treatment, by such means as whipping, beating with truncheons or cables, simultaneous blows on both ears, electric shocks, assaults on sexual organs and kicks often inflicted in parts of the body where POWs had suffered wounds.

> Physical violence appeared to be particularly common in POW camps in Iraq. We also received reports of collective punishment measures, such as lengthy confinement and deprivation of food and water. . .[32]

These actions were, of course, gross violations of the humanitarian law of war, specifically of various provisions of the 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War.[33]

Another violation of the humanitarian law of war which occurred in both Iran and Iraq is worthy of note. Thus, the United Nations Special Mission said:

> [W]e also heard allegations of religious pressure on non-Moslem POWs and of conversions to Islam by some Christian POWs. While we were not able to ascertain whether these conversions had taken place under duress, we could not but notice the atmosphere of missionary zeal that permeated some camps.[34]

If these conversions occurred as a result of duress, as they very probably did, this was contrary to the freedom of religion provisions of Article 34 of Geneva Convention (III) and constituted a violation of human rights and of the humanitarian law of war.

One other statement made by the United Nations Special Mission in its report bears repeating:

> Having noted that numerous POWs have spent three or more years in detention, we feel compelled to pose the question: is not prolonged captivity in itself inhuman treatment?[35]

During World War II, some prisoners of war spent as many as five years in captivity. During Vietnam, some prisoners of war spent as many as seven years in captivity. During the Iran-Iraq conflict, there were undoubtedly prisoners of war on both sides who spent similar lengthy periods in prisoner-of-war camps. These were not criminals serving a well-deserved punishment, but persons who had fought on behalf of their country. Whether their country fights as an aggressor or in defence of its territory and existence, there should be some method of securing the release and repatriation of prisoners of war more humane than awaiting the cessation of active hostilities.[36] Perhaps we should return to the processes of exchange and parole, which have not been used on a major scale since the American Civil War of more than a century and a quarter ago. However, if this is to be done, it must be accomplished by an international agreement such as the 1949 Geneva Conventions, negotiated in time of peace. Such a treaty must be complete in itself, as it is extremely difficult, and sometimes impossible, to secure agreements between opposing belligerents during the course of hostilities.[37]

The 1990-91 Gulf Crisis quickly disclosed that the two-year period which had elapsed since the end of hostilities in the Iran-Iraq War had not brought about any change in the attitude of Saddam Hussein's Iraq with respect to compliance with the humanitarian law of war in general and with human rights in particular. From 2 August 1990, the very first day of Iraq's invasion of Kuwait, violations by Iraq of the humanitarian law of war and of human rights occurred on a massive scale.

At the time of the Iraqi invasion, the members of the civilian population of Kuwait and foreigners in Kuwait were considered "protected persons" within the meaning of Article 4(1) of the 1949 Geneva Convention (IV).[38] Thousands of Kuwaiti civilians were murdered and thousands of others were deported to Iraq. Both of these actions constituted violations of human rights and of the humanitarian law of war. Under Article 47 of that Convention, their status was not changed by the announced annexation of Kuwait by Iraq on 8 August 1990, which, in any event, was illegal and ineffective.[39] Under Article 35(1) of that Convention, the foreigners had the right to leave Kuwait. The Iraqi authorities ordered that they be detained as hostages. This was a violation of the humanitarian law of war[40] and a violation of their human rights. Moreover, Iraq magnified the violations by placing hostages in military installations, including chemical weapons factories, in an attempt to immunize those installations from attack by the United Nations Coalition. This, too, was a violation of the humanitarian law of war which specifically provides that "[t]he presence of a protected person may not be used to render certain points or areas immune from military operations."[41] One well-informed author has listed the Iraqi violations of the humanitarian law of war in part as follows:

* inhumane treatment of protected persons, as prohibited by Article 27 of the Fourth Geneva Convention, including willful killing and the protection of women against rape;
* torture and brutality directed against protected persons, as prohibited by Article 32 of the Fourth Geneva Convention;
* the taking of hostages, as prohibited by Article 34 of the Fourth Geneva Convention;
* mass transfers, detention of protected persons in areas particularly exposed to the danger of war, or transfer of part of an occupying power's own population into the territory it occupies, as prohibited by Article 49 of the Fourth Geneva Convention;
* compelling protected persons to serve in the armed forces of the occupying power, as prohibited by Article 51 of the Fourth Geneva Convention;
* setting up places of internment in areas particularly exposed to the danger of war, as prohibited by Article 83 of the Fourth Geneva Convention.[42]

It is apparent from all of the foregoing that, despite the hundreds of provisions of the codified humanitarian law of war, provisions that establish minimum standards and provisions that specifically prohibit certain actions, in time of war the humanitarian law of war and the laws establishing human rights are all too frequently violated, sometimes by individual behaviour, but perhaps even more often by national policy. Regrettably, we cannot be overly optimistic in this regard with respect to the future conflicts with which our planet will undoubtedly be plagued. However, one great step in the right direction has been taken by the United Nations Security Council in the case of the rampant violations of human rights and of the humanitarian law of war committed by the government and the troops of the former Yugoslavia (Serbia and Montenegro) in the Republics of Bosnia and Herzegovina. Beginning as early as September 1991, a series of resolutions has been adopted by the Security Council with respect to the armed conflict taking place in Bosnia and Herzegovina. Thus, Resolution 771 contains the following preambular provision:

> *Expressing* grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina including reports of mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians in detention centres, deliberate attacks on noncombatants, hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property.[43]

Its operative paragraphs include the following:

> 1. *Reaffirms* that all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches;
>
> 2. *Strongly condemns* any violations of international humanitarian law, including those involved in the practice of "ethnic cleansing";
>
> 5. *Calls upon* States and, as appropriate, international humanitarian organizations to collate substantiated information in their possession or submitted to them relating to the violations of humanitarian law, including grave breaches of the Geneva Conventions, being committed in the territory of the former Yugoslavia and to make this information available to the Council.

A resolution adopted on 6 October 1992 went a step further, creating a Commission of Experts to examine the information submitted pursuant to the above quoted paragraph 5. The Commission could make its own investigations and was to provide the Secretary-General with its conclusions with respect to the evidence of the violations of international humanitarian law committed in the territory of the former Yugoslavia.[44]

By a resolution adopted on 22 February 1993, the Security Council decided that

> an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.[45]

This resolution requested the Secretary-General to submit proposals for the establishment of such an international tribunal. He did so on 3 May 1993[46] and by a resolution adopted on 25 May 1993 the Security Council approved the proposals made by the Secretary-General in his Report, including the proposed Statute of the International Tribunal attached to that Report.[47]

Article 1 of the Statute establishes the competence of the International Tribunal "to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."[48] Article 2 gives the Tribunal jurisdiction over "persons committing or ordering to be committed grave breaches of the Geneva Conventions;"[49] Article 3 gives the Tribunal jurisdiction over "persons violating the laws or customs of war" which include, but are not limited to, those enumerated;[50] Article 4 gives the Tribunal jurisdiction over genocidal crimes;[51] and Article 5 gives the Tribunal jurisdiction over crimes against humanity.[52]

While there is no question that major difficulties will be encountered in obtaining personal jurisdiction over individuals charged with violations of human rights and of the humanitarian law of war enumerated in the Statute of the International Tribunal,[53] and in collecting the evidence necessary for their convictions, the mere fact that such a Statute has been unanimously adopted by the Security Council augurs well for the future.[54]

In addition to the actions of the Security Council with respect to the violations of the humanitarian law of war by the former Yugoslavia (Serbia and Montenegro) in Bosnia and Herzegovina, on 20 March 1993 the latter two States instituted an action against the former in the International Court of Justice,[55] in which they asked for and obtained provisional measures of relief.[56] As there was no change in the activities of Serbia and Montenegro, no refraining from the policy of "ethnic cleansing" (genocide), Bosnia and Herzegovina returned to the Court seeking additional provisional measures of relief.[57]

Meanwhile, following the old adage that "the best defence is a good offence," Serbia and Montenegro countercharged that Bosnia and Herzegovina are themselves guilty of genocide, perpetrated against ethnic Serbs in the territory of the latter two States and, in turn, requested provisional measures of relief.[58] Unfortunately, there probably is at least some merit to this claim, as the Balkan ethnic groups have a long history of such actions, and there is little reason to believe that today's Bosnian and Herzegovinian Croats and Muslims are radically different from those who preceded them. However, the Court did not grant this request.[59]

It is believed that the foregoing summary clearly indicates that the international community of the twentieth century has, in general, consistently demonstrated a definite and sincere desire to ensure the protection of human rights in time of war. However, with all too great frequency, once hostilities have commenced, the legal protections so humanely granted have tended to be disregarded, often by nations which made great oratorical gestures during the course of drafting negotiations, but probably with no intention whatsoever, should the occasion arise, of complying with the humane provisions that they so strenuously supported. Nevertheless, the actions taken with respect to the former Yugoslavia may be interpreted as a small indication that the international community will no longer tolerate claims to the right of non-interference when a State engages in violations of human rights in time of war.

Notes

1. For early and extended discussions of this distinction, *see* J. Pictet, *The Principles of International Humanitarian Law* (reprinted from the September, October, and November, 1966, issues of the *International Review of the Red Cross*) (hereinafter: *I.R.R.C.*); J. Pictet, *Humanitarian Law and the Protection of War Victims* (1975); J. Pictet, *Development and Principles of International Humanitarian Law* (1985). *See also* A. Eide, "The Laws of War and Human Rights - Differences and Convergences;" Robertson, "Humanitarian Law and Human Rights," in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, 675, 793, respectively (C. Swinarski ed., 1984) (hereinafter: Swinarski). A recent special section devoted to this subject will be found in 293 *I.R.R.C.* 89-138 (1993).

2. Declaration Concerning Expanding Bullets, The Hague, 29 July 1899, 91 *Brit. Foreign & St. Papers* 1014; 187 *C.T.S.* 459; 1 *Am. J. Int'l L.* Supp. 155 (1907); *The Laws of Armed Conflicts* 109 (D. Schindler & J. Toman eds., 3rd ed., 1988).

3. Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, 8 August 1945, as amended: 82 *U.N.T.S.* 279; 3 C.I. Bevans, *Treaties and Other International Agreements of the United States* 1240. (hereinafter: Bevans); 145 *Brit. Foreign & St. Papers* 872; 39 *Am. J. Int'l L.*. Supp. 257 (1945); Schindler & Toman, *supra* note 2, at 913. Obviously, most of the offences falling within the definition of "war crimes" constitute violations of human rights and all of the offences falling within the definition of "crimes against humanity" constitute war crimes.

4. Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946, as amended: 4 Bevans, *supra* note 3, at 27; Department of State Publication No. 2613 *Trial of Japanese War Criminals* 39. Art. 5(b) contains only the first general sentence with no enumeration of specific offences. Art. 5(c) omits the word "religious".

5. 4 *Trial of War Criminals* 499 (1949-53) (hereinafter: *T. W. C.*). *See also* the Trial of Hans Rauter (Dutch Special Court of Cassation), 16 *Ann. Dig.* 533; H. Levie, *Terrorism in War: The Law of War Crimes* 395 (1993) (hereinafter: Levie).

6. *See, for example,* UN G.A. Res. 95(I), 16 February 1946, "Affirmation of the principles of international law recognized by the Charter of the Nurnberg Tribunal;" UN G.A. Res. 2712(24), 15 December 1970, "Question of the punishment of war criminals and of persons who have committed crimes against humanity," etc. The Statute of the International Tribunal established by the Security Council of the United Nations in 1993 to try violations of the law of war committed in territory of the former Yugoslavia since 1991 contains two articles on the subject: Article 4, *"Genocide,"* and Article 5, *"Crimes against Humanity."* UN Doc. S/25704, 3 May 1993, "Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808" (1993), Annex; S/RES/827, 25 May 1993; 32 *I.L.M.* 1192, 1193-94 (1993).

7. J.H.E. Fried, "Transfer of Civilian Manpower from Occupied Territory," 40 *Am. J. Int'l L.* 303, 309 (1946).

8. *Ibid.,* 313; Levie, 294-95, 352-56.

9. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, 75 *U.N.T.S.* 287; 6 *U.S.T.* 3516; 157 *Brit. Foreign & St. Papers* 355; 50 *Am. J. Int'l L.,* Supp., 724 (1956); Schindler & Toman, *supra* note 2, at 495.

10. Art. 147 of Geneva Convention (IV) makes the "unlawful deportation or transfer" of persons protected by the provisions of the Convention a grave breach thereof - a war crime. All four of the 1949 Geneva Conventions have been so widely ratified or adhered to as to represent universal law. As of September 1993, there were 184 State Parties to these Conventions. 296 *I.R.R.C.,* 465 (1993).

11. The *Trial of Kingoro Fukuda* involved the maltreatment of a number of Chinese civilians who had been brought to Japan to work in a coal mine. This case was tried by the United States Army (with a Chinese officer sitting as a member of the tribunal) in Yokohama as Case No. 74. It may be found in the United States National Archives, Record Group 331, File M1112, Roll 1. The present author was a member of the Board which reviewed the record of this trial.

12. United States v. Hermann Wilhelm Goering, 1 *Trial of Major War Criminals* 235 (1947-49) (hereinafter: *T.M.W.C.*).

13. *See, for example,* The Trial of Rudolf Hoess, 7 *Law Reports of Trials of War Criminals* 11 (1948) (hereinafter: *L.R.T. W. C.);* Levie, 284-85.

14. 13 *Ann. Dig.* 267 (1946); 2 *L.R.T.W.C.* 1 (1947); Levie, 276-77.

15. United States National Archives, Record Group 338, File M1217, Roll 5; Levie, 27879.

16. United States National Archives, Record Group 338, File M1217, Roll 3; Levie, 27981.

17. United Nations Archives, United Nations War Crimes Commission, Reel 50, France 136; Levie, 284.

18. 1 *T.M.W.C.* (1947).

19. Trial of Oswald Pohl, 5 *T.W.C.,* 971-72 (1950); Levie, 300; Trial of Alfons Klein (better known as The Hadamar Trial), 13 *Ann. Dig.* 253 (1946), 1 *L.R.T.W.C.;* Levie, 301.

20. The Gerhard Bohne Case, *London Times,* 16 December 1965, at 8, 2; Levie, 243; State v. Schumann, 39 *I.L.R.* 433 (1947); Levie, 243 n. 75.

21. *See, for example,* 1 *T.M.W.C.* 171, 231, 252 (1947); Trial of Karl Brandt (better known as The Medical Case), 2 *T.W.C.,* 171; Levie, 76-77, 322-24; Trial of Erhard Milch, 2 *T.W.C.* 773, Levie, 324-25. In the trial of Kurt Heissmeyer, the Democratic Republic of Germany tried and convicted a doctor who had arranged to have the SS murder twenty Jewish children from France, Holland, Italy, Poland and Yugoslavia in order to conceal the fact that he had been using them for medical experiments. *See* Levie, 441-42.

22. Trial of Kajuro Aihara (better known as The Kyushu University Case), Yokohama Case No. 290, United States National Archives, Record Group 331, File M1112, Roll 4; Levie, *supra* note 5, at 325-26. A brief summary of this case appears at 11 *Dig. Int'l L.* 1006 (M. Whiteman, ed., 1968). An Associated Press dispatch of 6 September 1993 contains admissions by a former Japanese military doctor of the widespread use of this practice by the Japanese in China, using Chinese civilians as the subjects of their experiments.

23. *The Khabarovsk Trial,* Anon., Materials on the Trial of Former Servicemen of the Japanese Army Charged with Manufacturing and Employing Bacteriological Weapons, *passim* (1950) Levie, 178-79.

24. 11 *T.M.W.C.* 527 (1950); Levie, 311-13.

25. 1 *T.M.W.C.* 239 (1950); Levie, 318-19.

26. 1 *The Tokyo Judgment* 385 (B. Röling & C. Ruter eds., 1977).

27. Even in this conflict, charges of violations of the humanitarian law of war have surfaced. A book by a former British paratrooper, published in 1991, alleged that several members of the Argentine armed forces had been shot after they had surrendered. V. Bramley, *Excursion to Hell* 144 & 177 (1991). In May 1993, Argentine President Menem ordered an investigation into allegations that Argentine prisoners of war captured at the Battle of Mount Longdon had been executed by British troops. American Embassy to the Secretary of State, R291041Z May 1993. The British Government dispatched a team of Scotland Yard detectives to

Argentina to investigate the allegations. A report of the results of this investigation was submitted. It was referred to the Public Prosecutor, who determined that the evidence was insufficient for prosecution.

28. Thirty-eight percent of the Americans captured by the North Koreans and Chinese Communists died in captivity, a figure almost ten times the number who had died in German hands during World War II and more than one-third greater than the number who had died in Japanese hands during that conflict. G. Lewy, *America in Vietnam* 340 (1978). *See* the text in connection with note 26.

29. The Army court martial found him guilty and sentenced him to imprisonment for life. He was released after serving three and one-half years under house arrest due to the unwarranted interference of the then President of the United States. *See* Levie, 206-208.

30. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 *U.N.T.S.* 277; 151 *Brit. Foreign & St. Papers* 682; 45 *Am. J. Int'l L.* Supp., 7 (1951); Schindler & Toman, *supra* note 2, at 231.

31. After World War II, trials for crimes against humanity committed in concentration camps located in Germany were conducted by Great Britain, the United States, and France. *For examples* of such trials, *see supra* notes 14, 15, 16, and 17. Of course, these trials were conducted by the Occupying Powers as successors to the German governments of Hitler and Doenitz. A current instance of genocide on its own territory as a matter of national policy is the action of Iraq against the Kurds. A current instance of genocide on foreign territory as a matter of national policy ("ethnic cleansing") is the action of Yugoslavia (Serbia and Montenegro) against the non-Serbs of Bosnia and Herzegovina.

32. Prisoners of War in Iran and Iraq, UN Doc. S/16962, 22 February 1985, at para. 273; Levie, 210.

33. Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949, 75 *U.N.T.S.* 135; 6 *U.S.T.* 3316; 157 *Brit. Foreign & St. Papers* 284; 47 *Am. J. Int'l L.* Supp., 119 (1953); Schindler & Toman, *supra* note 2, at 423. (*See* the parenthetical remark in *supra* note 10.)

34. UN Doc. S/16962, *supra* note 32, at para. 276; Levie, 211.

35. S/16962, *supra* note 32, at para. 285.

36. For a general discussion of this problem, *see* Y. Dinstein, "The Release of Prisoners of War," in Swinarski, *supra* note 1, at 37.

37. While a number of agreements with respect to prisoners of war were reached during the course of World War I, they have been practically non-existent during World War II and subsequent conflicts.

38. *See supra* note 9.

39. S/RES/662, 9 August 1990, 29 *I.L.M.* 1327 (1990); Levie, 213-16.

40. *See* Arts. 34, 48, 147 of Geneva Convention, *supra* note 9.

41. *Ibid.*, Art. 28.

42. J. Moore, *Crisis in the Gulf: Enforcing the Rule of Law* 53-54 (1992). For a detailed presentation of many of the specific incidents comprising those violations, *see also* Amnesty International, *Iraq/Occupied Kuwait: Human Rights Violations since 2 August, 1990, passim.*

43. UN S.C. Res. 771, 13 August 1992, 31 *I.L.M.* 1470 (1992). This Resolution was adopted unanimously.

44. UN S.C. Res. 780, 6 October 1992, *ibid.* 1476. This Resolution was adopted unanimously. *See also* UN S.C. Res. 787, 16 November 1992, *ibid.*, 1481. This Resolution was adopted by a vote of thirteen in favour with two abstentions. (Unfortunately, the Commission met with so little support from the European nations that its Chairman, Fritz Kalshoven of The Netherlands, resigned.)

45. S/RES/808, 22 February 1993.

46. *See supra* note 6. A number of countries submitted proposals for consideration by the Secretary-General in the drafting of the proposed Statute of an International Tribunal. *See, for example,* UN Doc. S/25266, 10 February 1993 (France); S/25300, 17 February 1993 (Italy); S/25307, 18 February 1993 (Sweden); etc.

47. UN S.C. Res. 827, 25 May 1993, 32 *I.L.M.* 1203 (1993). This Resolution was adopted unanimously. The members of the Tribunal were elected by the General Assembly, in accordance with the provisions of Article 13 of the Statute, and held their first meeting in The Hague.

48. It would have been more appropriate to state that the competence of the International Tribunal was "to hear and decide charges against persons alleged to have been responsible (etc.)." Courts do not (or, at least, should not) prosecute. The International Tribunal will not prosecute, it will try; Art. 16 of the Statute makes the Prosecutor "responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991." (This same inappropriate language appears in Arts. 2, 3, 4, and 5 of the Statute.)

49. This article is really based on Article 130 of the 1949 Geneva Convention III, *supra* note 33 and Art. 147 of Geneva Convention IV, *supra* note 9.

50. This article is based on various provisions of the Regulations Annexed to the Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, 1907, 36 *Stat.* 2277 (1910), 100 *Brit. Foreign & St.*

Papers 338; 1 Bevans, *supra* note 3, at 631; 2 *Am. J. Int'l L.* Supp. 190 (1908); Schindler & Toman, *supra* note 2, at 63.

51. This article is based on Art. 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 30. However, it should be borne in mind that the Statute of the International Tribunal does not purport to enforce the Genocide Convention directly. As we have seen, Art. 6 of that Convention provides that persons charged with its violation

> shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

The International Court of Justice has held that it has jurisdiction to make decisions "relating to the interpretation, application or fulfilment" of the Convention, as provided in Art. 9 thereof. [1993] *I.C.J. Rep.* 16, para. 26; ICJ Communique No. 93/28 bis, 13 September 1993, at 9. However, it would not have jurisdiction to conduct a criminal trial of an individual for a violation of the Convention. *(See* Art. 34(1) of the Statute of the Court.)

52. This article is based on Art. 6(c) of the 1945 Charter of the International Military Tribunal *(see* text in connection with *supra* note 3), with the addition of the offences of imprisonment, torture and rape.

53. Art. 29 of the Statute requires States to comply with requests for the arrest and detention of persons made by the International Tribunal. Unfortunately, any representatives of the new Yugoslavia who negotiate an end to the hostilities in Bosnia and Herzegovina in which the humanitarian law of war has been so frequently violated will probably be among the individuals who committed or ordered the commission of those violations—and it can be assumed that they will insist on including in the document ending the hostilities a provision relieving some or all of the violators of responsibility for their offences. Concerning this problem *generally, see* Levie, *supra* note 5, at 42. Moreover, the Statute, by implication, forbids trials in *absentia. See* its Art. 21(4)(d) and the Report of the Secretary-General, *supra* note 6, para. 101, 32 *I.L.M.* 1163, 1184.

54. It is worthy of note that not only does Art. 7(2) of the Statute eliminate "Head of State" and "Act of State" defences, and that Art. 7(3) provides for "command responsibility," provisions that have been generally accepted in law-of-war conventions, but that Art. 7(4) eliminates "superior orders" as a defence, something that several diplomatic conferences had declined to do. One cannot help but feel that States vote against a rule denying the defence of superior orders when it might be applied to their own nationals, but favour it here, where only nationals of the former Yugoslavia are involved.

55. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide; I.C.J. Communique No. 93/4, 22 March 1993.

56. *Ibid.,* Order of 8 April 1993, [1993] *I.C.J. Rep.* 3; 32 *I.L.M.* 890 (May 1933); I.C.J. Communique No. 93/9, 8 April 1993, and 93/9 *bis, 16* April 1993.

57. I.C.J. Communique No. 93/21, 28 July 1993.

58. I.C.J. Communique No. 93/23, 11 August 1993.

59. I.C.J. Communique No. 93/28, 13 September 1993. The new request by Bosnia and Herzegovina was, in effect, also denied, the Court holding that what was required was "immediate and effective implementation" of the provisional measures set forth in its earlier order of 8 April 1993.

XX

The Law of War Since 1949

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Introduction

During the two decades that followed the Diplomatic Conference which drafted the four 1949 *Geneva Conventions for the Protection of War Victims*[1] there was comparatively little activity directed towards the codification or extension of the reach of the law of war.[2] The only such activity in the 1950's was the drafting of the *1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.*[3] This Convention was undoubtedly a response to the rapacious actions of agents of Hitler and Goering in German-occupied territories during World War II.[4] Among other things, it specifically prohibits the pillage of objects of arts and the use of cultural objects for purposes exposing them to the dangers of damage or destruction. The United States has not ratified this Convention but there are indications that it is tending towards such action in the foreseeable future.

In 1967 the *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies* was opened for signature.[5] Article IV(1) of that Treaty prohibits the placing in orbit around the Earth of any nuclear weapons or other weapons of mass destruction or their installation on any celestial body. The second paragraph of that article, in effect, demilitarizes the moon and other celestial bodies.

The only other activity in this field in the 1960's was the 1968 *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.*[6] This Convention was approved by the General Assembly of the United Nations at a time when it was feared that the criminal statute of limitations of the Federal Republic of Germany would soon preclude that nation of continuing its program of prosecutions for war crimes committed by German nationals during the course of World War II.[7] It is of interest to note that in that Convention the definition of "crimes against humanity" was extended with the specific additions of apartheid and genocide.[8] Once again, the United States has not ratified this Convention and it would appear that it has no intention of so doing.

During the decade of the 1970's four conventions were drafted which resulted in major additions to the law of war.

There were:

1. *1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and the Subsoil Thereof* (better known as the *Seabed Convention)*;[9]
2. *1972 Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction* (better known as the *Bacteriological Convention)*;[10]
3. *1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques* (better known as the *ENMOD Convention)*;[11] and
4. *1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (better known as the *1977 Additional Protocol I)*.[12]

And while the decade of the 1980's, and the 1990's to date, have not been so prolific, the importance of the few decisions reached during those two periods cannot be overstated. In 1980 a *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (with three Protocols)* (better known as the *Conventional Weapons Convention)*[13] was drafted; and in 1993 agreement was finally reached on a *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.*[14] It is with these latter six Conventions that we will now concern ourselves. It is, perhaps, appropriate to point out at this time that several of these Conventions were drafted by the Conference on Disarmament which meets in Geneva on a more or less permanent basis and under a variety of titles. However, that does not lessen their impact on the law of war. The various *1907 Hague Conventions*[15] which contain much of the basic codified law of war were drafted by a so-called "Peace Conference"; and many law-of-war conventions, such as the *1925 Geneva Protocol,*[16] the 1936 *London Submarine Protocol,*[17] etc. were drafted by disarmament conferences—but this did not lessen their impact on the law of war.

Seabed Treaty

Article I of the *1971 Seabed Treaty* Provides that States Parties thereto

> undertake not to emplant or emplace on the seabed and the ocean floor and in the subsoil (thereof beyond the outer limit of a seabed zone) . . . any nuclear weapons or any other types of weapons of mass destruction . . . .[18]

This prohibition does not apply to the territorial waters of coastal States, but under Article II it does apply to the "seabed zone" which includes all places beyond the twelve-mile limit as measured in accordance with the provisions of the *1958 Convention on the Territorial Sea and Contiguous Zone.*[19] In effect, the *Seabed Treaty* prohibits the laying of nuclear mines or other nuclear weapons under the waters of the high seas.

Article III of this Convention contains the verification provisions. Every State Party to the Treaty has "the right to verify through observation" the activities on the seabed and the ocean floor and in the subsoil thereof of every other State Party "provided that observation does not interfere with such activities"; and a State Party may, if it deems it necessary, refer the matter to the Security Council of the United Nations. Inasmuch as such activities will necessarily be taking place on the seabed and ocean floor and in the subsoil thereof beyond the territorial waters of any coastal State, this means that it will be taking place under the waters of the high seas. The "right" thus granted appears to be more or less meaningless as it would exist even without the treaty grant. In fact, in view of the provision that the observation may not interfere with a State's activities on the seabed, it may even be argued that the provision, rather than assisting in verifying compliance, protects the State engaged in illegal activities from observation as it may label any such observation as "interference". Similarly, every State Party to the Treaty would have the right to have recourse to the Security Council of the United Nations if it had evidence that another State Party was violating the provisions of the Treaty even without a specific provision granting that right. It can be seen that in drafting this article the draftsmen were more concerned with ensuring that it could be said that the Treaty included a verification provision than with drafting a meaningful provision on the subject.

The United States is a Party to this Treaty. It will be necessary at some point to reach a decision as to whether it prohibits the use of nuclear warheads on such weapons as the CAPTOR of the United States Navy, a weapon which lies on the seabed and discharges a torpedo only when activated by the passage of a submarine, a torpedo which is capable of carrying a nuclear warhead.

Bacteriological Convention

While we usually refer to the *1925 Geneva Protocol* as the instrument prohibiting the use of asphyxiating gases, actually it prohibited the use not only of asphyxiating gases but also of "bacteriological methods of warfare". In 1972, being unable at that time to reach agreement on a more comprehensive

combined chemical-bacteriological weapons convention, a convention was signed by which the States Parties to it agreed to prohibit the "development, production and stockpiling" of bacteriological (biological) and toxin weapons, and further agreed to destroy all such weapons then in their arsenals.[20] With "use" already prohibited, this means that the States Parties have, in effect, agreed that no such weapons could be or would be available in any future war.

Once again, Article VI of this Convention, dealing with verification, leaves much to be desired. It provides for the lodging of a complaint with the Security Council of the United Nations with respect to any alleged violation of the provisions of the Convention and includes an undertaking by any State Party to the Convention to cooperate in any investigation thereafter initiated by the Security Council. Unfortunately, such an investigation can, of course, be prevented by a veto in the Security Council; and a number of States have heretofore found it expedient to disregard mandates of the Security Council and undoubtedly will do so in the future when they believe that such action is in their national interest—which, of course, it will be when they are the actual violators of the Convention and are being investigated.

The United States is a Party to this Convention. Strange to relate, all of the "non-law-abiding States", with the exception of Syria, have found it appropriate to became Parties to this Convention. To what extent they can be expected to comply with its provisions is debatable.[21]

ENMOD Convention

By Article I of the *1976 ENMOD Convention* a State Party thereto has undertaken

> not to engage in military or any other hostile use of environmental modification techniques having widespread long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.

Article II defines environmental modification techniques as "any technique for changing—through the deliberate manipulation of natural processes—the dynamics, composition or structure of the Earth." Although Article III of the Convention specifically provides that it does not apply to environmental modifications techniques for peaceful purposes, a number of States have apparently failed to ratify this Convention for fear that, despite that specific provision, they will be accused of a violation of the Convention and of a hostile act, if, for example, they seed a cloud in order to cause rain to fall over an arid area of their territory, when, had that action not been taken, the cloud might have provided much-needed rain on the territory of a neighboring State.

Problems with respect to the objectives and application of the Convention and with respect to charges of violations thereof are covered in Article V which provides for the establishment of a Consultative Committee of Experts to solve the former and for resort to the Security Council of the United Nations to pass on the latter. An Annex to the Convention sets out the functions and rules of procedure of the Consultative Committee. The provisions with respect to the Security Council are, with a few unimportant exceptions, identical with those contained in the *1971 Bacteriological Convention,* discussed above.

Because of the technical nature of this Convention, the draftsmen deemed it appropriate to reach a number of "understandings" which are not a part of the Convention itself.[22] These understandings include definitions of the terms "widespread", "long-lasting", and "severe" used in Article I; and an illustrative list of examples of the phenomena referred to in Article II.

The United States is a Party to this Convention.[23]

1977 Additional Protocol I

After negotiations conducted during 1974, 1975, 1976, and 1977, a Diplomatic Conference convened by the Swiss Government was finally successful in completing the drafting of the *1977 Additional Protocol I,* the primary purpose of which was to provide protection from the hazards of war to the persons not protected by the *1949 Geneva Conventions:* the civilian populations in the unoccupied territory of the belligerent States.[24] Unfortunately, primarily because of a certain group of provisions of that Protocol, many States, including France, Great Britain, and the United States, have not ratified it.

The Preamble to this Protocol contains a statement to which the United States fully subscribes. After referring to the international agreements containing the rules of the law of war, it states that these rules

> must be applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

This is a complete rejection of the doctrine of the "just war", espoused by some nations, under which the law of war is binding upon their enemy, always the aggressor, while it is not binding upon the victim of aggression, always oneself.

Article 1 of the Protocol is concerned with when it is applicable. Paragraph 4 of that Article states:

> 4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes. . . .

Prior to this provision the conflicts therein referred to had been considered to be internal conflicts, civil wars to which the international law of war did not apply. This provision, with its corollary provisions in Articles 43 and 44, is one of the main objections of the United States, and other States, to this Protocol.

Ever since the unratified *1874 Declaration of Brussels*[25] four requirements for a person to be a legal combatant have been repeated in convention after convention. He must:

1. be commanded by a person responsible for his subordinates;
2. wear a fixed distinctive emblem recognizable at a distance;
3. carry his arms openly;
4. conduct military operations in accordance with the laws and customs of war.[26]

Article 43(1) of the *1977 Additional Protocol I* only partially follows the historical precedent in that it requires the armed forces of a belligerent to have a responsible commander (Item 1 above) and to enforce the law of war (Item 4 above). Then Article 44(3), after stating that there are occasions when an armed combatant cannot distinguish himself from the non-combatant civilian population, permits him to retain his status as a legal combatant with the sole requirement that he carry his arms openly

1. during each military engagement; and
2. during such time as he is visible to his adversary while engaged in a military deployment preceding an attack. (This is a very limited application of Item 3 above).

There is no requirement that combatants wear "a fixed distinctive emblem recognizable at a distance"—or any other kind of distinctive marking (Item 2 above). Obviously, these provisions of the Protocol put the civilian population at risk in order to give additional protection to members of national liberation movements. And Article 44(4) provides that if a combatant (read that as "a member of a national liberation movement") fails to comply with the modest requirements of the provision concerning the carrying of arms openly, while he will not be entitled to the status of a prisoner of war, he will be entitled to all the protection to which a prisoner of war is entitled.[27] There is no explanation of the difference between 1. having the status of a prisoner of war; and 2. not having that status but, nevertheless, having all of the protection to which a prisoner of war is entitled. In their demand for the protection of members of

national liberation movements the Third World States gave these individuals, even when illegal combatants, more protection than the legal, uniformed combatant receives.[28]

Once again, problems arose when the Conference attempted to draft a verification provision. It ended with a very lengthy Article 90 entitled "International Fact-Finding Commission, the Commission being tasked with the chore of investigating complaints of grave breaches or other serious violations of the four *1949 Geneva Conventions* and of the *1977 Protocol I.* The main objection here is that it is applicable only to those States which have filed a statement accepting the jurisdiction of the commission.[29]

There are a number of provisions of this Protocol which are either a codification of the customary international law of war or are much-needed additions to that law. For example, Articles 35 and 55 are attempts to protect the natural environment from the effect of war.[30] Article 51 prohibits attacks on the civilian population; prohibits attacks which have as their primary purpose the spreading of terror among the civilian population; prohibits target-area bombing; and prohibits reprisal attacks against the civilian population. Article 52 prohibits attacks on civilian objects which are not military objectives, as well as reprisals against such objects which are not military objectives, as well as reprisals against such objects. Article 53 prohibits attacks on historic monuments, works of art, and places of worship, as well as reprisals against such places. Article 54 provides that "Starvation of civilians as a method of warfare is prohibited" and then lists specific sources of food and water supplies indispensable to civilian life which are not to be attacked, even by way of reprisal.

On a number of occasions officials of the United States Government at the policy-making level have indicated that this country accepts many of the provisions of the Protocol as binding law.[31] However, neither the Reagan nor the Bush Administrations sent the Protocol to the Senate for that body's advice and consent to ratification by the President.[32] Whether the Clinton Administration will do so remains to be seen—so far it has not done so but there are rumors that it is engaged in another review of the Protocol in order to determine whether it should be sent to the Senate for the latter's advice and consent to ratification and, if so, what understandings or reservations should be included.

Conventional Weapons Convention

During the early 1970's a conference of government experts convened by the International Committee of the Red Cross (ICRC) drafted a list of conventional weapons which were believed to require consideration because they appeared to cause unnecessary suffering or to be indiscriminate in their effect. There were:

1. Small calibre projectiles;
2. Blast and fragmentation weapons;
3. Time-delay weapons (land mines and booby traps);
4. Incendiary weapons; and
5. Potential weapons development.[33]

In 1977, near the conclusion of the Diplomatic Conference which ultimately drafted the *1977 Additional Protocol I*, that Conference adopted a resolution recommending that another conference be held to draft "prohibitions and restrictions on the use of specific conventional weapons".[34] The General Assembly of the United Nations thereafter convened such a Conference. It met in 1979 and 1980 and drafted the *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects*, to which three Protocols were attached.

The Convention itself is merely an "umbrella" convention containing administrative provisions applicable to all three of the substantive Protocols. Article 1 makes the Convention and the Protocols applicable in "any situation described in paragraph 4 of Article 1 of Additional Protocol I"; and Article 7(4) elaborates on that provision by providing how a State Party to this Convention may become bound by it *vis-à-vis* a national liberation "authority". Paragraph 4 of Article 1 of the *1977 Additional Protocol* is as we have already seen, one of the major reasons why the United States has not ratified that Protocol. However, with respect to the *1977 Additional Protocol I* a major objection was that it served as the basis for Article 44(3) of that instrument which removed from members of national liberation movements the historic requirements for legal combatants and it was argued that this gave protection to terrorists. That problem does not arise with respect to this Convention or its Protocols. When the United States ratified this Convention, it made a reservation with respect to Article 7(4)(b). (France made reservations to several of these provisions, including Article 7(4)(b)).[35]

Article 4 of this Convention, dealing with ratifications, is rather unique. It requires that in ratifying the Convention a State must also ratify at least two of the three attached Protocols. And, finally, Article 8 of the Convention provides for the calling of a review conference by the Parties thereto ten years after the effective date of the Convention if none has been called prior to that date. That ten-year period has now expired and it is expected that the review conference will meet in September 1995.

It is in the Protocols themselves that important provisions of the law of war are contained. Protocol I is entitled *Prohibitions or Restrictions on the Use of Non-Detectable Fragments*. It prohibits the use of any weapon "the primary effect of which is to injure by fragments which in the human body escape detection by X-ray". It was directed primarily against weapons made of such materials as

glass and plastic. It was completely non-controversial, probably because, as one of the United States Delegates has said, "no one seems to have had any serious military interest in such weapon".[36] A Canadian Delegate has stated that this Protocol "bans a weapon which does not exist".[37] It was the fear that States would only ratify the Convention and its Protocol I that caused the adoption of the provision in Article 4 of the Convention requiring the ratification of two or more of the Protocols. Actually, that fear does not appear to have been justified. As of 31 December 1992, thirty-five States had become Parties to the *Conventional Weapons Convention* and all but Benin and France had ratified all three Protocols. Benin approved Protocols I and III and France ratified Protocols I and II.[38]

Protocol II is concerned with *Prohibitions and Restrictions on the Use of Mines, Booby Traps and Other Devices.* It is to be noted that Article 1 makes it clear that its subject matter is limited to land mines only. That article specifics that its coverage includes "mines laid to interdict beaches, waterway crossings or river crossings" but that it "does not apply to the use of anti-ship mines at sea or in inland waterways".

Article 2 of this Protocol contains two very important definitions, among others:

> "mine" means any munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle; "remotely delivered mine" means any mine delivered by artillery, rocket, mortar or similar means or dropped form an aircraft.

Of course, the foregoing provision with respect to "remotely delivered mines" would also apply to the weapons of warships.

The second definition of interest is that relating to booby traps. It states:

> "Booby-traps" means any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.

Of particular interest is the fact that there is a list of ten categories of articles the booby-trapping of which is prohibited. These categories include objects specially designed for children, including toys, a type of booby trap widely used, with grim results, in Afghanistan.

Another category worthy of note is

> kitchen utensils, or appliances except in military establishments, military locations or military supply depots.

The unit cook is an important person. He must be warned of the possibility of legal booby traps so that he will take care in adding enemy kitchen utensils to his collection!

Other important provisions concerning mines are those requiring the recording of information with respect to the location of minefields. Not only is this subject covered in several articles of Protocol II, but there is a Technical Annex containing guidelines for such recording.

There are special provisions in Article 8 of Protocol II for the protection of United Nations forces and missions from minefields, mines, and booby traps. When one reads of the relief trucks which have been the victims of buried mines on much-traveled roads both in Somalia and in Bosnia, the need for such provisions becomes obvious—but that they will be complied with appears to be questionable.

One final provision which is of major importance is contained in Article 9. It provides for various procedures, both national and international, to be followed upon the cessation of hostilities in order to "remove or otherwise render ineffective, minefields, mines and booby traps placed in position during the conflict". After World War II there was an "*International Agreement for the Clearance of Mines in European Waters*",[39] but there was no equivalent agreement with respect to land mines. After those hostilities had ended the French kept well over one hundred thousand German prisoners of war engaged in the task of mine removal on French territory, with many casualties, as a result of which the *1949 Geneva Third Convention* specifically prohibits such action.[40] For many years after the end of World War II there were civilian mine casualties in North Africa. And even at this late date there are almost daily casualties caused by land mines in Afghanistan.[41]

It is clear that land mines have become one of the major problems of the world as we approach the Twenty-First century. It is also clear that this Protocol is entirely inadequate for the protection of mankind from a weapon that has assumed the role of the major hazard to the civilian population.[42] There is pressure for an international agreement for the complete prohibition of the use of land mines and at least some strong limitations on their use appears to be just over the horizon.

Let us now turn to Protocol III—*Protocol on Prohibitions and Restrictions on the Use of Incendiary Weapons*. This was undoubtedly the most controversial of the three Protocols. It contains only two articles, the first dealing with definitions and the second with the protection of civilians and civilian objects. (It should be emphasized that the primary objective of both Protocols II and III is protection of civilians.) Incendiary weapons are defined as

> any weapons or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combinations thereof, produced by chemical reaction of a substance delivered on the target.

The definition goes on to specifically exclude from its coverage weapons which have incidental incendiary effects and combined effects munitions (CEMs). Although the word "napalm" was heard frequently during the discussions, that word will not be found in the Protocol itself.

Article 2(1) states that

> it is prohibited in all circumstances to make the civilian population as such, individual civilians, or civilian objects the object of attack by incendiary weapons.

There can be no objection to this provision. Civilians, and civilian objects not being used for military purposes, should not be the objects of any type of attack, incendiary or non-incendiary.

Article 2(2) prohibits air-delivered incendiary attacks on military objectives located within a concentration of civilians. This provision is, perhaps, overly broad, as many important military objectives, such as national command and communication centers, are frequently located within a concentration of civilians; and many types of major military objectives, even when originally built away from concentrations of civilians, are soon to be found surrounded by concentrations of civilians. Decisions in this regard should be based on the principle of proportionality.[43] Of course, if, as a matter of military tactics, another type of air-delivered weapon can be just as effective in destroying such a military objective, for example, the so-called "smart-bomb", it should be the weapon selected.

Article 2(3) prohibits attacks on military objectives within a concentration of civilians by incendiary weapons, other than those which are air-delivered, "except when such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken."[44] As only a small number of military installations are "clearly separated" from concentrations of civilians, once again the doctrine of proportionality should be applied.

Article 2(4) is undoubtedly a throwback to Vietnam and the defoliation program employed there by the United States. It provides:

> It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.

There does not appear to be anything contained in this Protocol which would be so restrictive on military operations as to justify the refusal of the United States to ratify it; and if there is any such provision, surely it could be taken care of by an understanding or, if deemed necessary, by a reservation.[45] Nevertheless, the President transmitted only the Convention and Protocols I and II to the Senate for its advice and consent to ratification, accompanied by a statement to the effect that action on Protocol III was being deferred pending further examination.[46]

Chemical Weapons Convention

It will be recalled that in 1925 the Geneva Protocol was drafted and that it was subsequently widely accepted by States.[47] It is important to emphasize that this Protocol prohibited "use" only. As a result many States ratified it with what was known as the "First-Use Reservation". What this meant was that most nations engaged in the development, production, and stockpiling of chemical and bacteriological weapons in order to be prepared to retaliate in kind should a future enemy make first use of such weapons.

While, as we have seen, in 1972 it was found possible to draft a convention prohibiting the development, production and stockpiling of bacteriological weapons, the problem of chemical weapons long continued unsolved, primarily because of the difficult question of verification. It was not until September 1992 that a *Draft Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction* was finally submitted to the General Assembly of the United Nations. In February 1993 that organization approved the Convention and submitted it to the States for ratification or accession. It is far lengthier and more complex than its bacteriological brother. In fact, it is probably the most complex law-of-war convention ever drafted. Let us study a few of its highlights.

Article I is the heart of the Convention. By it each State party undertakes that it will never under any circumstances:

1. Develop, produce, or otherwise acquire or stockpile chemical weapons, or transfer such weapons to "anyone";
2. Use chemical weapons; or
3. Engage in any military preparations to use chemical weapons.

That article contains these further undertakings by each Party:

1. To destroy any chemical weapons that it owns or possesses or that are located within its jurisdiction;

2. To destroy any chemical weapons that it has abandoned on the territory of another State Party; and
3. To destroy any chemical weapons production facilities that it owns or possesses or that are located within its jurisdiction.

Finally, that Article provides that "Each State Party undertakes not to use riot control agents as a method of warfare"—and therein lies the problem as far as the United States is concerned. When the United States finally ratified the *1925 Geneva Protocol in 1975* there was an agreement between the President and the Senate that an Executive Order would be issued covering the subject of riot control agents. The Executive Order which was issued provides that the United States renounced the first use of herbicides except for certain limited purposes; and then lists four situations in which it will use riot control agents in war:

1. In riot conditions in areas under US military control including for the control of rioting prisoners of war;
2. In situations in which civilians are used to mask or screen attacks;
3. In rescue missions in remotely isolated areas of downed airmen and escaping prisoners of war; and
4. In rear echelon areas to protect convoys from civil disturbances, terrorists, and paramilitary organizations.[48]

It is to be assumed that in ratifying the Convention the United States will continue to insist on the legality of the use of riot control agents in those four situations despite the very adverse reception that such claim encountered during the drafting process.

Article II contains a large number of lengthy definitions. Of particular interest is the fact that research and development of methods of protection against toxic chemicals and chemical weapons is not prohibited. Article III is a rather unusual provision. Within thirty days of ratification or accession a State Party must make a number of declarations concerning its ownership of chemical weapons, their location, its program of destruction, etc. Articles IV and V are concerned with the destruction of chemical weapons and the closing and destruction of chemical weapons production facilities, respectively. Article VII establishes an elaborate permanent organization to oversee and verify compliance with the Convention. Article IX establishes the methods by which verification by an organ of the Organization may be obtained. These methods include what is termed "Challenge Inspections"—an on-site inspection by members of the Technical Secretariat of the Organization requested by any State Party which believes that there is non-compliance by another State Party. (There is also a 100-page "Verification Annex" which fleshes out various parts of the Convention proper).

Article XII is entitled "Measures to Redress a Situation and to Ensure Compliance, Including Sanctions".

Apparently, while the United States is not enamored with all of the provisions of the Convention or of the Verification Annex, and particularly with the wording of some of them, it will accept the entire document as written with a reservation with respect to riot control agents mentioned above. What action, if any, with respect to this Convention will be taken by the "non-law-abiding States" mentioned above remains to be seen—but it would probably be unwise to expect them to become Parties to it, or to comply with it if they do become Parties.[49]

Conclusion

It may safely be said that while law-of-war activity during the first half of the Twentieth Century was notable for the numerous *1907 Hague Conventions*, the *1925 Geneva Protocol*, and the four *1949 Geneva Conventions*, the second half of that century was characterized by a melange of much-needed international legislation relating to a variety of unrelated aspects of this field.[50] It is perhaps being overly optimistic to look forward during the balance of this century to the widespread adoption of a *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Nuclear Weapons and Other Weapons of Mass Destruction and on Their Destruction.* However, such an event is not as unlikely as it once was. On 3 September 1993 the World Health Organization (WHO) requested an advisory opinion from the International Court of Justice on the following question:

> In view of the health and environmental effects, would the use of nuclear weapons by a States in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?[51]

Then on 15 December 1994 the General Assembly of the United Nations adopted Resolution 49/75 entitled "Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons". The question posed by the General Assembly asks:

> Is the threat or use of nuclear weapons in any circumstance permitted under international law?[52]

Both of those matters are presently pending before the Court. Should the Court decide the former affirmatively, and the latter negatively, the possibility of an international convention implementing those decisions and totally prohibiting not only the threat or use of nuclear weapons, but their very

existence, would be greatly enhanced and the law-of-war activities of the latter half of the Twentieth Century would truly have a major place in history. Unfortunately, it can be assumed with more than a reasonable degree of certainty that were such a fortuitous event to occur, a number of present-day, or potential, possessors of nuclear weapons would fail to become Parties to such a convention—or would become Parties with the preconceived idea of violating their agreement and thereafter being in a position to hold the non-nuclear world hostage.

Notes

This article is a revision and updating of an article entitled "Some Recent Developments in the Law of War" which appeared in 25 *German Yearbook of International Law (Jahrbuch für Internationales Recht)* 252-272 (1982).

1. 6 U.S.T. 3114-3695; T.I.A.S. 3362-3365; 75 U.N.T.S. 31-468; 157 B.F.S.P. 234-423; *The Laws of Armed Conflicts* 373-594 (D. Schindler and J. Toman, eds., 3d ed., 1988) (hereinafter cited as Schindler and Toman).

2. Apparently in the belief that the words "war" and "law of war" have a pejorative connotation, many authors, led by the International Committee of the Red Cross (ICRC), now use the term "armed conflict", instead of the word "war" and the term "humanitarian law", instead of the term "law of war". At the XIIIth Congress of the International Society of Military Law and the Law of War a representative of the ICRC, said: "We use the term 'humanitarian law' to avoid using the word 'war'". The present author does not believe that it is possible to change the nature of things by the "gimmick" of word usage. (Fortunately, to date we have not been plagued with "PAC" or "POAC" in lieu of "POW"!).

3. *Records of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict* (Government of the Netherlands, The Hague, 1961); 249 U.N.T.S. 240; Schindler and Toman, *supra* note 1, at 745.

4. *See* 1 Trial of the Major War Criminals 241-243 (1947); *Nazi Conspiracy and Aggression: Opinion and Judgment* 71-72 (1947).

5. 18 U.S.T. 2419; T.I.A.S. 6347; 610 U.N.T.S. 205; 6 I.L.M. 386 (1967).

6. 754 U.N.T.S.; 8 I.L.M. 68 (1969).

7. Many of these prosecutions were not true war crimes cases as both the alleged culprit and the victim were German nationals. The Federal Republic elected to extend its appropriate statute of limitations by domestic statute and did not ratify this Convention.

8. The definition of crimes against humanity had originally been drafted in the Charter of the International Military Tribunal attached to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 59 Stat. 1554, 82 U.N.T.S. 280, 3 *Treaties and Other International Agreements of the United States of America, 1776-1949*, at 1238 (C. Bevans, ed., 13 vols., 1968-1976) (hereinafter cited as Bevans); Schindler and Toman, supra note 1, at 911. It was thereafter copied *verbatim*, or practically *verbatim*, in a number of other charters or laws.

9. 23 U.S.T. 701; T.I.A.S. 7337; 955 U.N.T.S. 115; 10 I.L.M. 146 (1971).

10. 26 U.S.T. 583; 1015 U.N.T.S. 164; 11 I.L.M. 309 (1972); Schindler and Toman, *supra* note 1, at 137.

11. 31 U.S.T. 333; 1108 U.N.T.S. 151; 16 I.L.M. 88 (1977); Schindler and Toman, *supra* note 1, at 163.

12. 1 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict*, Part 1, at 115 (Swiss Federal Political Department, Bern, 1978) (hereinafter cited as *Official Records*); U.N. Doc. A/32/144, Annex I; 72 A.J.I.L. 457 (1977); 16 I.L.M. 1391 (1977); Schindler and Toman, *supra* note 1, at 621.

13. *Final Report of the Conference to the General Assembly*, A/CONF. 95/15 and Corr. 1-5, 27 October 1980, Appendix A, 1342 U.N.T.S. 137; 19 I.L.M. 1524 (1980); Schindler and Toman, *supra* note 1, at 179. On 11 December 1989 the General Assembly adopted A/RES/44/34 to which was attached an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (29 I.L.M. 90 (1990)). It appears doubtful that this latter Convention will obtain wide acceptance apart from the African nations. (In effect, Article 47 of the 1977 Additional Protocol I, *supra* note 12, outlaws mercenaries by denying them status as combatants and as prisoners of war).

14. 32 I.L.M. 800, 804 (May, 1993). As of May 1993 there were 144 States signatory to this Convention. "Non-law-abiding" States believed to have chemical weapons potentially, such as Iraq, Libya, North Korea, and Syria, are not among the signers. Dalder, "Arms Control and Disarmament", in *A Global Agenda: Issues Before the 48th General Assembly of the United Nations* 140 (1993). As yet there are, of course, few ratifications or accessions.

15. 36 Stat. 2259-2441; T.I.A.S. 538-546; 1 Bevans, *supra* note 8, at 619-741; Schindler and Toman, *supra* note 1, at 57, 63, 201. 791, 797, 803, 811, 819, 825, 941, and 951.

16. 26 U.S.T. 571; 8061; 94 L.N.T.S. 65; 25 A.J.I.L. (Supp.) 94 (1931); Schindler and Toman, *supra* note 1, at 1154.

17. 173 L.N.T.S. 353; 3 Bevans, *supra* note 8, at 298; 31 A.J.I.L. (Supp.) 137 (1937); Schindler and Toman, *supra* note 1, at 883.

18. It is worthy of note that the parallel provision of Article IV (1) of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *supra* note 5, provides:

> States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies or station such weapons in outer space in any other manner.

19. 15 U.S.T. 1606; 516 U.N.T.S. 205; 52 A.J.I.L. 834 (1958).

20. Article IX of this Convention contains a rather unusual provision by which each State Party recognizes the need for a similar convention with respect to chemical weapons and undertakes to continue to negotiate on the subject in good faith. As will be seen, they did so for more than two decades before achieving success.

21. Even Syria may now be a Party to the Convention as the data contained in the latest edition of *Multilateral Treaties Deposited with the Secretary-General* is only through 31 December 1992. There are frequent reports that Iraq continues to engage in bacteriological-weapons research and that it has attained considerable success in this field.

22. *See* US Arms Control and Disarmament Agency, *1976 Documents on Disarmament* 582; Schindler and Toman, *supra* note 1, at 168.

23. The importance which the United States attaches to problems involving the effect of war on the environment is demonstrated by the fact that in September 1995 an international conference on The Protection of the Environment During Armed Conflict and Other Military Operations will take place at the United States Naval War College in Newport, Rhode Island.

24. While Part III, Section I, of the 1949 Civilians Convention, *supra* note 1, bears the title "Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories", the provisions thereunder really apply only to persons who are "in the hands of a Party to the conflict or Occupying Power of which they are not nationals", enemy aliens in the territory of a belligerent, internees, and the civilian populations of occupied territories.

25. Schindler and Toman, *supra* note 1, at 25; *General Collection of the Laws and Customs of War* 575 (M. Deltenre, ed., 1943; French, Dutch, German, English).

26. *See* Article 1, Regulations Attached to the 1899 Convention (No. II) with respect to the Laws and Customs of War on Land, 32 Stat. 1803; 1 Bevans, *supra* note 8, at 247; 1 A.J.I.L. (Supp.) 129 (1907), Schindler and Toman, *supra* note 1, at 75; Article 1, Regulation Attached to the 1907 Hague Convention (No. IV) with respect to the Laws and Customs of War on Land, *supra* note 15; Article 1, 1929 Geneva Convention Relative to the Treatment of Prisoners of War, 47 Stat. 2021; 2 Bevans, *supra* note 8, at 932; 27 A.J.I.L. (Supp.) 929 (1933); Schindler and Toman, *supra* note 1, at 339; Article 4, 1949 Geneva Convention Relative to the Treatment of Prisoners of War, 47 Stat. 2021; 2 Bevans, *supra* note 8, at 932; 27 A.J.I.L. (Supp.) 929 (1933); Schindler and Toman, *supra* note 1, at 339; Article 4, 1949 Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 1. For a detailed discussion of the four conditions, *see* Howard S. Levie, *Prisoners of War in International Armed Conflict* 44-59 (1979).

27. The United States takes the rather peculiar position that these provisions will protect terrorists. It is exceedingly difficult to find any justification for the arguments advanced in support of this position. Terrorists do not engage in pitched battles. Inasmuch as there are legitimate objections to these provisions, it is to be regretted that the United States choose to emphasize an insubstantial one.

28. Lest uniformed members of national armies find it appropriate to doff their uniforms and fight like members of national liberation movements, and, if captured, to demand the same treatment as that accorded to members of national liberation movements, Article 44(7) specifies that it was not the intention to change the practice of wearing uniforms by members of the regular forces. Apparently, should they remove their uniforms and dress in civilian clothes, they will be illegal combatants even if they comply with the provisions of Articles 43(1) and 44(3) and they will not be entitled to the protection accorded by Article 44(4).

29. As of 30 September 1994 there were 135 States Parties to the 1977 Protocol I, only 41 of whom had filed statements accepting the competence of the International Fact-Finding Commission. None of the "non-law abiding" States has done so. Hans-Peter Gasser, "Universal acceptance of international humanitarian law", *International Review of the Red Cross*, No. 302, at 450 (September-October 1994). For an in-depth discussion of the Commission, written by one of its members, *see* Erich Kussbach, "The International Humanitarian Fact-Finding Commission", 43 *Int'l and Comp. L. Q.* 174 (1994).

30. It is interesting to note that while the 1976 ENMOD Convention and the 1977 Additional Protocol I were being drafted in Geneva at the same time period, but by different bodies, Article 1 of the former uses the phrase "widespread, long-lasting or severe", while Article 35 and 55 of the latter use the phrase "widespread, long-term and severe". The use of the conjunctive makes the provisions of the Protocol much more restrictive in their coverage.

31. *See*, in particular, Michael J. Matheson, "The United States Position on the Relation of Customary International Law to the 1977 Protocol Additional to the 1949 Geneva Convention", 2 *Am. U.J. Int'l L. and Pol'y* 419 (1987). Mr. Matheson is the Senior Deputy Legal Adviser of the Department of State and was a member of the United States Delegation at the Diplomatic Conference which drafted the 1977 Additional Protocol I.

32. President Reagan sent the 1977 Additional Protocol II, dealing with non-international wars, to the Senate for its advice and consent to ratification of that Protocol. In his letter transmitting Protocol II, to the President, the Secretary of State explained at some length his reasons for not also transmitting the 1977 Additional Protocol I. *President's Message to the Senate Transmitting Protocol II*, 23 Weekly Comp. Pres. Doc. 91 (Jan. 29, 1987); Sen. Treaty Doc. 100-2, 100th Cong., 1st Sess., January 29, 1987.

33. International Committee of the Red Cross, *Weapons that may Cause Unnecessary Suffering or have Indiscriminate Effects: Report of the Work of Experts*, Chapters III-VII (1973).

34. Resolution 22(IV), Follow-up Regarding Prohibitions or Restrictions of the Use of Certain Conventional Weapons, 1 *Official Records*, *supra* note 12, Part One, at 215 and Part Two, at 252.

35. *Multilateral Treaties Deposited with the Secretary-General* 813, 814 (1992); 20 I.L.M. 1287 (1981); Schindler and Toman, *supra* note 1, at 193.

36. Michael J. Matheson, "Remarks", 1979 *Proc. A.S.I.L.* 156, 157.

37. William Fenrick, "The law of Armed Conflict: the CUSHIE Weapons Treaty", 11 *Can. Def. Q.* 25, 27 (Summer 1981). ("CUSHIE" is the Canadian acronym for Causing Unnecessary Suffering of Having Indiscriminate Effects").

38. Multilateral Treaties Deposited with the Secretary-General, 31 December 1992, at 813. The United States has now followed the French precedent.

39. 3 Bevans, *supra* note 8, at 1322.

40. Article 52 of that Convention, *supra* note 1, provides:

> Unless he be a volunteer, no prisoner of war may be employed on labour which is of an unhealthy or dangerous nature.
>
> . . . . . .
>
> The removal of mines or similar devices shall be considered as dangerous labour.

41. *See*, for example, Arms Project of Human Rights Watch/Physicians for Human Rights, *Landmines: A Deadly Legacy* 145 (1993). It is estimated that worldwide there are close to 10,000,000 mines buried in the earth, many of which are still subject to being detonated by the application of the appropriate amount of pressure.

42. *Id., passim.*

43. This provision is probably one of the main reasons why France and the United States ratified only Protocols I and II.

44. The term "feasible precautions" had been used in several articles of the 1977 Additional Protocol I, *supra* note 12, causing the United Kingdom to state, when signing, what it believed the words to mean. Schindler and Toman, *supra* note 1, at 717. With slight variations Article 1(5) of this Protocol adopts the British interpretation.

45. For a much more detailed analysis of this Convention and its Protocols, *see* Howard S. Levie, "Prohibitions and Restrictions on the Use of Conventional Weapons", 68 *St. John's Law Review* 643 (1995).

46. S. Treaty Doc No. 103-25, 103d Cong., 2d. Sess. (1994); 88 *Am. J. Int'l L.* 748 (1994). The United States ratified the Convention and Protocols I and II on 24 March 1995.

47. Many commentators take the position that it now represents part of the customary international law of war.

48. Executive Order 11850, 8 April 1975, 40 Fed. Reg. 16187 (1975); 14 I.L.M. 794.

49. According to a recently-published article nine countries which already possess chemical weapons are not signatories to the Chemical Weapons Convention: Egypt, Iraq, Libya, Syria, Taiwan, North Korea,

Somalia, Serbia, and Sudan. Sherman McCall, "A Higher Form of Killing", *Naval Inst. Proc.*, February 1995, at 40-44.

50. It is appropriate to record here the fact that on 25 May 1993 the Security Council of the United Nations adopted S/RES 827, establishing an International Tribunal, and approving a Statute for that Tribunal, to try persons who might be accused of a wide variety of violations of the law of war (war crimes) alleged to have been committed by the government and armed forces of the former Yugoslavia (Serbia and Montenegro) against the people of Bosnia-Herzegovina. *See* 32 I.L.M. 1203 and 1192 (1993). Then, on 8 November 1994 the Security Council adopted S/RES 955, establishing a similar Tribunal for the trial of persons accused of serious violations of international humanitarian law in Rwanda or in neighboring States by citizens of Rwanda. These actions constitute major steps forward in the enforcement of the law of war.

51. International Court of Justice, Communique 93/30, 13 September 1993.

52. *Id.*, Communique 94/24, 23 December 1994.

XXI

Prosecuting War Crimes Before An International Tribunal

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It is probably appropriate to begin this discussion by stating that while the author has acted as an official reviewer of records of war crimes trials, and has read and analyzed innumerable records of those trials, he has never personally prosecuted an individual accused of a war crime.[1] Accordingly, this discussion will necessarily be based upon what others have said and done with respect to the problem of prosecuting war crimes cases before international tribunals.[2] Some people would label such a discussion as "academic", intending the word to be interpreted pejoratively. If "academic" means knowledge gained from the study of what the majority of actors in the arena have done when confronted with the problems of prosecuting charges of the commission of war crimes, then this presentation will, indeed, be "academic." However, the author prefers to consider that a discussion based on the experiences of many such prosecutors is practical and instructive, rather than academic.

Generally speaking, except in a few specific areas, the functions of the prosecutor in war crimes trials do not differ greatly from the functions of the prosecutor in any other area of criminal law although they will, of course, differ in detail and, frequently, in magnitude.[3] Thus, just as the first function of any prosecutor, whatever name the locality gives to that position, is to get himself appointed or elected to office, the first function of the war crimes prosecutor is to get himself appointed to that position. Such an appointment is, in the opinion of this author, a dubious honor.[4] War crimes prosecutions are far more tedious, far more exhausting, than ordinary local prosecutions.[5] In almost every instance the prosecutor is dealing with accused persons and witnesses who speak a language which he does not understand and with documents written in a language which he cannot read. Not only must he rely entirely on his translator-interpreter, which in and of itself can be a very frustrating business, but every interrogation, both off and on the stand, consumes double the normal time—or more. In other words, only seek the job of prosecuting war crimes if the case is important enough to give you a place in history—as it did for Justice Jackson, Benjamin Ferencz, Telford Taylor, and a few others.[6]

Article 14 of the 1945 London Charter of the International Military Tribunal provided for four Chief Prosecutors of equal stature with their overall functions specified in detail.[7] Article 8 of the Charter of the International Military Tribunal for the Far East provided for one Chief of Counsel responsible for the investigation and prosecution with no other limitations on his activities, and with the other ten nations which had been at war with Japan each having the option of designating an Associate Counsel.[8] This latter arrangement would appear to be much more preferable inasmuch as an organizational pyramid topped by a committee is not exactly recommended as a sound management practice.[9]

Now, having disregarded the advice given above, and having sought and obtained the job of prosecuting war crimes before an international tribunal—or, being a military lawyer, having been told of your assignment to that job—your next function, and your primary and most important task, is the collection of the evidence that will identify and establish the guilt of the culprits, the evidence that you will produce at the trial and which will, you hope, result in the conviction and punishment of the accused.[10]

You will find that a great mass of material will have already been collected by various governmental and non-governmental agencies.[11] Unfortunately, it will all too frequently develop that many of the interrogations of witnesses were inadequate; that witnesses who have been interrogated and from whom helpful statements have been obtained have been released and have merged into the population or, if they were not local residents, they will have returned to their homes, probably halfway around the world; and that many of the documents with which you are presented have either not yet been formally translated or, if they have been, that the translations are not reliable. At some point along the way you will ask yourself why you ever sought and took the job of prosecuting war crimes. But, like any good lawyer, you will press ahead, seeking the documents and the witnesses that you need to fill the lacunae which will continuously make their appearance. Make no mistake—this will pose many problems unknown to the hometown prosecutor. Many potential witnesses will not have survived the hostilities; essential official documents will have been destroyed during the course of hostilities, or, more recently, by their custodians; others will be in the possession of uncooperative agents of the government of the potential accused, perhaps even in the hands of the potential accused himself; they will be in a foreign language and will be difficult to identify, even if you know exactly what you are seeking—and for the most part you will not have that knowledge. Prevarication and stalling by unfriendly witnesses is a phenomenon known to every prosecutor—but it is much easier to accomplish and much harder to identify when it is being done in a foreign language, a language with which the prosecutor is not familiar. Frequently, the interpreter

will omit the hemming and hawing that has taken place during an interrogation and, after what appears to have been a five-minute back-and-forth argument with the witness, he will turn from the witness to you and state: "He says 'No'"—and all you can do is shrug it off and continue plodding along.

But all is not as bleak as might appear. You will have some good investigators and interrogators and some good translators and interpreters and gradually you will accumulate the evidence that you believe will establish beyond a reasonable doubt the commission of war crimes by specific persons. Incidentally, the searching out, collection, analysis, and indexing of documents by the U.S. investigators in Germany during and after World War II probably contributed more than any other single factor to the success of the prosecution before the International Military Tribunal at Nuremberg and the Subsequent Proceedings conducted there.[12]

Now you are confronted with the next function of the prosecutor of war crimes before an International Tribunal—the decision as to the identity of the persons to be indicted and tried. In the international arena there is no grand jury to make the final decisions on this question. Unlike the hometown prosecutor, you may be selective and omit naming an individual as an accused even though you believe that you have evidence that proves his guilt beyond any possible doubt.[13] Leave the small fry, no matter how guilty, to some national court, military or civilian. You are going to prosecute before an International Tribunal and you want only the top people, those who established policy, those who were responsible for the decision to undertake an aggressive war, those who gave the orders for massive atrocities against the civilian population, including genocide, those who were responsible for the policies that resulted in the studied maltreatment of prisoners of war. This selection is not an easy task, particularly if it has to be done by group decision, as was the case for the International Military Tribunal in Nuremberg.[14] There the prosecutors included the name of one individual, Gustav Krupp, who was senile and *non compos mentis* and whose prosecution the Tribunal had no alternative but to defer indefinitely. As he was in the U.S. Zone of Occupation, the American prosecutors should have been aware of this and should not have named him in the indictment. Two other names, those of Raeder and Fritsche, were added to the list at Soviet insistence solely in order to include among the accused some prisoners who were in Soviet custody.[15] (Fritsche was acquitted and Raeder received a sentence to life imprisonment.)

Of course, in determining the identity of the persons to be named in the indictment charging the commission of war crimes, the most important element that the prosecutor must bear in mind is the evidence available against each individual. While acquittals are unquestionably evidence of the impartiality of the Tribunal,[16] they are anathema to the prosecutor, particularly when he can

be so much more selective than the hometown prosecutor in naming the persons whom he proposes to prosecute. The drafting of the indictment is, therefore, of major importance. He must ensure that while the charges correspond to the offenses listed in the Tribunal's constitutive document, they also correspond to the evidence against each named accused which he is going to be able to present at the trial.

The substantive law that will be the basis of your prosecution will not be difficult to identify. Basically, it will undoubtedly be stated in your constitutive document and will be supplemented by well-known and generally accepted laws and customs of war.[17] However, one problem that the prosecutor of war crimes before an international tribunal will have to face, which is unknown to his hometown counterpart, is the question of the procedure pursuant to which the trial is to be conducted. While it may happen that the prosecution and the defense in a war crimes trial have similar legal systems and trial procedures, the chances are very great that they will not—and even if they do, inasmuch as your trial is before an International Tribunal its rules of procedure will be tailored to that Tribunal and will differ markedly from most national procedural systems, probably being a composite of several systems; and if both the prosecution and the members of the Tribunal are multinational in character, as occurred in the International Military Tribunal in Nuremberg with four nations with different legal systems represented in the prosecution and on the bench and in the International Military Tribunal for the Far East in Tokyo with eleven such nations represented in the prosecution and on the bench, the problem is multiplied.[18] For example, the continental civil law does not know many of the traditional common law rules of evidence and such rules were generally not followed in war crimes trials, even by American military commissions; and one of the reasons for the dissent of the French judge in the Tokyo trial was that there had been no examining magistrate, the procedure which initiates a criminal trial under French law, and which he considered to be indispensable to a fair trial. (Strange to relate, the French judge at Nuremberg had apparently not found this to be a problem.)

The major procedural change included in the 1945 London Charter and in the laws under which trials were conducted in the American and British Zones of Occupation in Germany after World War II, the one that will undoubtedly be included in any charter or law under which you will act as Prosecutor, and the one which was found to be most repugnant by American lawyers bred on the common law system, was the provision exempting the tribunals from "technical rules of evidence."[19] Three aspects of this matter do not appear to be so widely known: first, that while the use of affidavits was and is contrary to traditional common law rules of evidence, it was not and is not contrary to the rules of evidence of many other legal systems; second, that where an affidavit

was introduced in evidence by either side, the other side had the right to demand the production of the affiant on the witness stand, a right which was rather infrequently exercised; and third, that the defense use of this affidavit privilege, as compared to its use by the prosecution, was on the order of more than ten to one.[20]

Article 19 of the 1945 Charter of the International Military Tribunal stated not only that it was not bound by technical rules of evidence, but that the Tribunal should admit "any evidence which it deems to have probative value."[21] Article 13(a) of the Charter of the International Tribunal for the Far East was to the same effect.[22] Article 14 of the Statute of the International Tribunal for the Former Yugoslavia authorizes the judges of that Tribunal to adopt rules for "the admission of evidence."[23] Rule 85(C), adopted by the judges of that Tribunal, provides that "A Chamber may admit any relevant evidence which it deems to have probative value."[24] Article 14 of the Statute of the International Tribunal for Rwanda requires the judges of that Tribunal to adopt the rules of procedure and evidence adopted by the International Tribunal for the Former Yugoslavia "with such changes as they deem necessary."[25] It would appear obvious that the international community does not intend that international tribunals should be bound by technical rules of evidence such as those which are typical of the common law system.[26]

Finally, you have collected your evidence, you have reached a decision as to whom you will charge, you have drafted your indictment, you have served it on the persons accused, you have filed it with the Tribunal, and you are ready to go to trial. There we will leave you. Apart from the different rules of evidence discussed above, and some comparatively minor variations in other aspects of the trial procedure, the trial itself should present few novelties for any attorney who has previously tried a criminal case in an American court.

Notes

1. Together with Colonel (later Major General) George Hickman, then the Command Staff Judge Advocate of the United Nations and Far East Command, in Tokyo, and Major (later Colonel) Toxey Sewell, a member of the Command Staff Judge Advocate's Office, the author, then the Chief of the War Crimes Section of that office, spent the 1950 Thanksgiving weekend as a member of a Board charged with reviewing the records of the last three Japanese war crimes trials in which some of the accused had received death sentences and in writing one opinion and reviewing the two other opinions written with respect to these cases. (Due to clemency granted by the Supreme Commander for the Allied Powers, General Douglas MacArthur, none of these accused was executed.)

2. In addition to the records of trial themselves, see, for example, Telford Taylor, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10, 15 August 1949 [hereinafter Report]; Clio Straight, Report of the Deputy Judge Advocate, War Crimes, European Command, 29 June 1948; Kerr Memorandum, Archives of the Hoover Institution, Owens Collection, File No. 79084-A.

3. While the hometown prosecutor prosecutes for a single murder, the prosecutor before an International Tribunal may prosecute for genocide—the murder of entire ethnic groups with members of those groups numbering in the thousands.

4. Raman Escovar-Salom, the first individual named as the Prosecutor of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (S/RES/827 (1993), 23 May 1993, *reprinted in* 32 I.L.M. 1203 (1993)), resigned that office in order to accept what he must have considered to be a more favorable appointment without having instituted any proceedings before the Tribunal [this Tribunal is hereinafter referred to as the International Tribunal for the Former Yugoslavia].

5. However, they are also far more gratifying when brought to a successful conclusion by the prosecutor.

6. The present Prosecutor for the International Tribunal for the Former Yugoslavia is Judge Richard J. Goldstone of South Africa. He is also the Prosecutor for the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda (S/RES/955 (1994)) 8 November 1994 [the latter Tribunal is hereinafter referred to as the International Tribunal for Rwanda]. It remains to be seen whether he will join the elite group mentioned above.

7. Charter of the International Military Tribunal, 8 August 1945, 566 Stat. 1544, 82 U.N.T.S. 279, *in* 3 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949, at 43 (Charles Bevans ed.) [hereinafter BEVANS]; HOWARD LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES, Appendix VIII, at 549 [hereinafter LEVIE].

8. Charter of the International Tribunal for the Far East, 19 January 1946, T.I.A.S. 1589; 4 Bevans, *supra* note 7, at 27; Levie, *supra* note 7, Appendix XII, at 571.

9. The single Chief Prosecutor has been adopted for all of the more recent International Tribunals. *See* the International Tribunal for the Former Yugoslavia, *supra* note 4; the International Tribunal for Rwanda, *supra* note 6; and the International Law Commission's 1994 Draft Statute of an International Criminal Court, *infra* note 26.

10. Omitted are such mundane tasks as the need to obtain funding, the securing of office space and, perhaps, a courtroom, the organization of a staff of attorneys, technicians, computer operators, investigators, interrogators, translators, secretaries, etc.

11. By the end of hostilities in the Persian Gulf Crisis the United States Army had one War Crimes team on location and one in Washington and a lengthy Report on Iraqi War Crimes (Desert Shield/Desert Storm) was prepared. Amnesty International also prepared a lengthy report on the subject. For a considerable period before the International Tribunal for the Former Yugoslavia was established a Commission of Experts created by the Security Council of the United Nations was collecting evidence which became available to the Prosecutor of that Tribunal. S/1994/674, 27 May 1994. See also the data submitted by the United States, U.S. Department of State Dispatch, Vol. 4, No. 15, at 24 (12 April 1993). Human Rights Watch Helsinki also produced a number of reports containing evidence of specific war crimes committed in the former Yugoslavia.

12. *See, e.g.*, FRANCIS BIDDLE, IN BRIEF AUTHORITY, 401 (1962); *see also* Report, *supra* note 2, at 17-18.

13. The failure of the prosecution in Tokyo to include the Emperor, Hirohito, among the accused was the only decision not to prosecute that engendered controversy—and that was a political decision made by other than the Prosecutor. LEVIE, *supra* note 7, at 144.

14. For the more or less haphazard manner in which the accused to be tried by the International Military Tribunal at Nuremberg were selected, see TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, 85-90 (1992).

15. Telford Taylor, Nuremberg Trials: War Crimes and International Law, International Conciliation No. 450, at 260 n.25 (April 1949) [hereinafter Nuremberg Trials].

16. There were three acquittals by the International Military Tribunal—Fritsche, Schacht, and von Papen. LEVIE, *supra* note 7, at 57 n. 76. There were no acquittals by the International Military Tribunal for the Far East. *Id.* at 143. Of the 177 individuals actually tried in the "Subsequent Proceedings" at Nuremberg, 35 were acquitted. Nuremberg Trials, *supra* note 15, at 371.

17. However, even in this area some problems will be encountered. Thus, the crime of conspiracy, well-known to the common law, is not known to the civil law, a matter which caused problems for the draftsmen of the London Charter of the International Military Tribunal, *supra* note 7; *see also* Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials vii (1949); *see also* NAZI CONSPIRACY AND AGGRESSION, OPINION AND JUDGMENT 54-56 (1949) (for the Tribunal reaching judgment at Nuremberg).

18. The International Tribunal for the Former Yugoslavia, *supra* note 4, likewise has a bench drawn from eleven different nations, as does the International Tribunal for Rwanda, *supra* note 6.

19. Charter of the International Military Tribunal, art. 19, *supra* note 7.

20. LEVIE, *supra* note 7, at 259-60.

21. *See supra* note 7.

22. *See supra* note 8. Paragraph c of that article was quite detailed in enumerating items which would be admissible in evidence, most of which violate the traditional common law rules of evidence.

23. *See supra* note 4.

24. International Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, adopted 11 February 1994, 33 I.L.M. 484, 533 (1994).

25. *See supra* note 6.

26. Article 19(b) of the International Law Commission's 1994 Draft Statute of an International Criminal Court (Report of the International Law Commission on the work of its forty-sixth session, G.A.O.R., 49th Sess., Supp. No. 10 (U.N. Doc. A/49/10, 1994)), provides that the judges of the Court may make rules regulating "the rules of evidence to be applied." There appears to be little doubt that any rules adopted by the judges of such a Court will closely resemble those referred to in the text.

XXII

The Statute of the International Tribunal for the Former Yugoslavia: A Comparison With The Past and a Look at the Future

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I. Introduction

Over the course of the twentieth century, many proposals have been made for the creation of an international criminal court.[1] These proposals have been met with decided apathy on the part of governments—perhaps because of a feeling on the part of the government policy-makers of many nations that they might be establishing an international criminal jurisdiction which would thereafter be exercised with respect to their own actions. During the first forty-five years of this century, the 1907 Hague Conference drafted a convention establishing an International Prize Court;[2] Article 227 of the 1919 Treaty of Versailles provided for a special international tribunal for the trial of the ex-Kaiser;[3] the League of Nations created a Permanent Court of International Justice ("PCIJ");[4] and the draftsmen of the Charter of the United Nations included, as an annex thereto, a Statute of the International Court of Justice ("ICJ").[5] Of those courts, only the one to try the ex-Kaiser had any criminal jurisdiction and it never came into being.[6] Then, on 8 August 1945, the four major victorious Allies of World War II reached agreement in London on a Charter for an International Military Tribunal ("IMT"), empowered to try the major German officials accused of having committed war crimes during the course of those hostilities.[7] Subsequently, a similar type of tribunal, the International Military Tribunal for the Far East ("IMTFE"), was established in Tokyo for the trial of the major Japanese officials accused of having committed war crimes during the course of the hostilities in that area.[8]

Although sometimes maligned as "victors' courts," these were truly the first international criminal courts to function in the modern era. Other international war crimes tribunals, military government courts, military commissions, and national courts tried war crimes cases alleged to have occurred during the course

of World War II.[9] No war crimes trials, as such, have been conducted since that time,[10] although preparations for such trials have, on occasion, taken place.[11] The recent action of the Security Council of the United Nations in establishing an "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991"[12] may be an indication that the diplomatic logjam has finally been broken and that action with respect to a general international criminal court will be taken in the not too distant future.[13] Accordingly, it appears appropriate to analyze the Statute of the new International Tribunal for the Former Yugoslavia and to compare it to the 1945 London Charter, which was the basic source for almost all of the documents creating post-World War II international and national war crimes tribunals, as well as to the latest Draft Statute for an International Criminal Court prepared by the International Law Commission ("ILC");[14] and to determine to what extent the new Statute contains novel provisions which would be suitable for an international court with more general criminal jurisdiction over individuals, provisions which should be considered by the International Law Commission in its next draft of a Statute for an International Criminal Court.[15]

II. Organization of the International Tribunal

Article 26 of the Statute of the International Court of Justice provides that the Court is to consist of fifteen judges, but that it may establish chambers of three or more judges. Such chambers have been formed for the hearing of specific cases.[16] The Statute of the International Tribunal for the Former Yugoslavia goes a step further, dividing the Tribunal, which is to consist of eleven judges, into two permanent Trial Chambers of three judges each and a permanent Appeals Chamber of five judges.[17] In addition, there is a Prosecutor and the usual Registry.[18] The provision for an Appellate Chamber is unique in international law. There was no review of, and no appeal from, the decision of the International Military Tribunal.[19] General MacArthur reserved the right to review the decision of the International Military Tribunal for the Far East but this was executive review, not judicial appellate review. The Military Governor of the U.S. Zone of Occupation of Germany reserved the right to review the decisions of the international military tribunals established under Allied Control Council Law No. 10 and he set aside some convictions and made many reductions in sentences, but once again this was executive review and clemency, not judicial appellate review. Article 60 of the Statute of the International Court of Justice provides that its judgment "is final and without appeal."[20] However, Article 48 of the ILC Draft Statute also provides for appeals and Article 9 thereof would establish an Appeals Chamber consisting of the President and six other

judges. By implication, none of them may have been members of the Trial Chamber by which the accused was convicted.[21]

III. Qualifications for Judges

The qualifications for the judges of the International Tribunal for the Former Yugoslavia are substantially the same as those for judges of the International Court of Justice.[22] The method of selection of the judges is the usual complicated system of the United Nations, with the Secretary-General, the member nations, the Security Council, and the General Assembly all playing a part.[23] One unusual aspect of the method of selection of judges for the International Tribunal for the Former Yugoslavia is that "non-member States maintaining permanent observer missions at United Nations Headquarters" are included both in the nominating and in the election process.[24] It is believed that this is a practice which should not be followed. Article 6 of the ILC Draft Statute provides for the election of judges by a majority of the States parties to the Statute of the Court. This is the general practice of multilateral international agreements and is deemed appropriate for an international criminal court. An unusual aspect of the qualifications for judges set forth in the ILC Draft Statute is that, in addition to being qualified for appointment to the highest judicial office of their country, ten of them must have "criminal trial experience" and eight of them must have "recognized competence in international law."[25]

IV. Competence of the International Tribunal for the Former Yugoslavia

Article 227 of the *1919 Treaty of Versailles* gave the special tribunal which it created the power to try the ex-Kaiser "for a supreme offense against international morality and the sanctity of treaties."[26] Article 6 of the 1945 London Charter was much more definite, listing numerous specific offenses under the rubrics of "Crimes against Peace," "War Crimes," and "Crimes against Humanity."[27] The jurisdiction of the International Tribunal for the Former Yugoslavia is set forth even more broadly. Article 1, entitled *Competence of the International Tribunal,* states:

> The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.[28]

This provision alone probably would have sufficed to grant jurisdiction to the International Tribunal for the Former Yugoslavia to try all of the offenses which might be charged in cases brought before it. However, it is followed by articles

which elaborate on (or, perhaps, restrict) the foregoing provision by enumerating four specific categories of international humanitarian law intended to be included within the jurisdiction of the Tribunal.[29] Article 2 lists as offenses within the jurisdiction of the International Tribunal "grave breaches of the 1949 Geneva Conventions;"[30] Article 3 lists conventional war crimes - violations of the laws and customs of war;[31] Article 4 lists acts of genocide;[32] and Article 5 lists "crimes against humanity."[33] Crimes against peace, perhaps the major criminal act of our times, are notable for their absence.[34] In view of the patently aggressive acts ordered by the leaders of the former Yugoslavia (Serbia and Montenegro), it is regrettable that the Secretary-General did not see fit to include crimes against peace as a fifth category of jurisdiction for the International Tribunal.[35]

Obviously, the foregoing provisions of the Statute of the International Tribunal for the Former Yugoslavia with respect to subject-matter jurisdiction would be far from adequate for an international criminal court of general jurisdiction. Any such court must have jurisdiction which includes not only the offenses constituting the violations of international humanitarian law listed in the Statute of the International Tribunal for the Former Yugoslavia, but also jurisdiction over such offenses as violations of the numerous other international conventions concerned with aviation—hijacking, drugs, hostage taking, piracy, slavery, terrorism, torture, etc.[36] And, certainly, any such international criminal court should be given jurisdiction over acts constituting violations of the General Assembly's *Definition of Aggression*.[37] Article 20 of the Draft Statute prepared by the International Law Commission is only partially successful in accomplishing this overall objective. After listing the crimes of genocide, aggression, serious violations of the laws and customs applicable in armed conflict, and crimes against humanity, it adopts the procedure of referring to an Annex in which are listed the nine conventions with respect to the violations of which the International Criminal Court would have jurisdiction on the basis that they are "crimes established" by those Conventions and that they "constitute exceptionally serious crimes of international concern." The basic defect in this manner of granting jurisdiction is obvious. The members of the International Law Commission could not possibly be aware of every treaty or convention which meets their criteria. For example, Article 1 of the 1888 Convention for the Protection of Submarine Cables specifically provides that the "breaking or injury of a submarine cable, done willfully or through culpable negligence . . . shall be a punishable offense."[38] This meets the criteria set forth above—but the Submarine Cable Convention is not among those listed. Similar provisions will be found in the 1926 Slavery Convention,[39] the 1929 Convention for the Suppression of Counterfeiting,[40] the 1950 White Slave Convention,[41] etc. It is inevitable that if the policy of enumeration is followed there will not only be unintended omissions, but that, in omitting some conventions, the ILC may

well have reached conclusions contrary to those which an international criminal court might reach.

In the Commentary to the Annex in which the specific treaties are listed, the statement is made that "[t]reaties which merely regulate conduct . . . are not included in the Annex." This is followed by an explanation as to why certain specific treaties have been omitted from the list. Thus, the regulations attached to the 1899[42] and 1907[43] Hague Conventions on the Laws and Customs of War on Land have been omitted because they "contain no provisions dealing with individual criminal responsibility"—this despite the fact that at Nuremberg the International Military Tribunal had determined that they constituted part of the customary international law of war[44] and had found violations of specific provisions thereof to be criminal offenses.[45] Similarly, the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict[46] has been omitted, although its Article 28 calls for the States Parties "to take all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons who commit or order to be committed a breach of the present Convention." This would appear to meet the criteria set forth above—but the Cultural Property Convention is not among those listed.[47] The conventions listed are five law-of-war conventions (the four 1949 Geneva Conventions and the 1977 Additional Protocol 1[48]), two aircraft hijacking conventions (the 1970 Hague[49] and 1971 Montreal[50] Conventions), the 1973 Apartheid Convention[51], the 1973 Convention on Internationally Protected Persons[52], the 1979 Convention on the Taking of Hostages[53], the 1984 Convention on Torture[54], two maritime conventions (the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation[55] and the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf[56]), and the 1988 Convention against Illicit Traffic in Narcotic Drugs.[57] Article 22 of the ILC Draft Statute sets forth the extent to which States ratifying the Convention containing the Draft Statute would be bound by the foregoing list.

While it is possible that jurisdiction over violations of the unlisted treaties mentioned above as examples, and the many other similar treaties, could be based on the grant of jurisdiction over "crimes under general international law," the fact that a treaty is not mentioned in the list would provide a strong argument against jurisdiction, particularly where it meets the first criterion but still is not listed.

Article 23 of the ILC Draft Statute would also give the international criminal court jurisdiction over cases specified in Article 20 which are referred to it by the Security Council. Paragraph 1 of the Commentary on Article 23 points out that this provision does not extend the jurisdiction of the Court and that it was included so that the Security Council would not be compelled to establish *ad*

hoc tribunals. Paragraph 2 thereof indicates that the "cases" referred to would not be complaints against individuals, but would be "a 'matter', that is to say, a situation in which Chapter VII of the Charter applies," leaving it to the Prosecutor to investigate and indict named individuals.

V. Individual Criminal Responsibility

The contention has, on occasion, been advanced that only international entities (States and international organizations) are the subjects of international law and that, therefore, individuals cannot be punished for violations of that law except as their national laws may so provide and their national courts may so decide. Concerning the claim that international law does not provide for the punishment of individuals, the International Military Tribunal said:

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[58]

Article 6 of the Statute of the International Tribunal for the Former Yugoslavia gives it jurisdiction over "natural persons."[59] It is indisputable that, like its immediate predecessors, it has been given jurisdiction to try individuals charged with violations of the provisions of international humanitarian law. The ILC Draft Statute apparently did not consider such a provision necessary but frequently refers to a "person" or "persons" and to "the accused." The final sentence of Article 6 of the 1945 London Charter provided that various categories of persons "participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan." Article 7(1) of the Statute of the International Tribunal for the Former Yugoslavia, while somewhat similar, is more specific. It provides for the individual responsibility of any person who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution" of one of the listed offenses.[60]

In general, the 1945 London Charter and the other directives creating tribunals for the trial of war crimes alleged to have been committed during the course of the hostilities in World War II contained provisions denying to the accused the right to interpose the defenses of act of state and of superior orders.[61] Article 7(2) of the Statute of the International Tribunal for the Former Yugoslavia adopts the rule of the 1945 London Charter with respect to the defense of act of state. Article 7(4) thereof adopts the rule of the 1945 London Charter with respect to the defense of superior orders.[62] The fact that the Statute of the International Tribunal for the Former Yugoslavia adopts the "superior orders" rule set forth in the 1945 London Charter is itself almost unique for an

international document drafted after the post-World War II war crimes trials. The Secretary-General of the United Nations included such a provision in the draft convention on genocide which he prepared for the use of the Economic and Social Council, but it did not survive the final drafting process;[63] such a provision was proposed by the International Committee of the Red Cross ("ICRC") in the Working Document for the Diplomatic Conference which drafted the 1949 Geneva Conventions and it was rejected by that Conference;[64] and it was proposed by the ICRC in the Working Document for the Conference which drafted the 1977 *Additional Protocol I* and it was rejected by that Conference.[65] Of course, for the delegates at those Conferences, there was fear that to deny the defense of superior orders would have an adverse effect on military discipline in the armed forces of the States participating in the Conferences which might ratify or accede to the conventions drafted by the conferences; here there was less concern with respect to the military discipline, or the lack thereof, which the denial of this defense might have on the armed forces of the several entities of the former Yugoslavia.[66]

Finally, Article 7(3) of the Statute of the International Tribunal for the Former Yugoslavia disregards the limitations placed on the responsibility of commanders for acts of their subordinates contained in Article 86(2) of the 1977 *Additional Protocol I*[67] ("if they knew, or had information which should have enabled them to conclude in the circumstances at the time") and adopts a test more closely resembling the much-maligned rule of the *Yamashita Case:*[68] "if he knew or had reason to know."

VI. Territorial and Temporal Jurisdiction

Neither the 1945 London Charter of the IMT, nor the Charter of the IMTFE, contained territorial or temporal limitations, providing as they did solely for the "trial and punishment of the major war criminals of the European Axis" or to "try and punish Far Eastern war criminals." As to territoriality, both in Europe and in the Far East, the place of the commission of the offense was generally not considered relevant.[69] However, as to temporal limitations, the International Military Tribunal found that, for certain offenses its jurisdiction was limited to those committed after 1 September 1939, the date of the commencement of World War II.[70] So, too, did several of the later Nuremberg Tribunals.[71]

The Statute of the International Tribunal for the Former Yugoslavia contains both territorial and temporal limitations: an offense must have been committed in the territory of the former Socialist Republic of Yugoslavia (this would, of course, include Bosnia, Croatia, Herzegovina, Macedonia, Montenegro, Serbia, and Slovakia); and it must have been committed after 1 January 1991. (However, there is no cut-off date).[72] Obviously, this type of provision would be out of place in the constitutive document of a permanent international criminal court

of general jurisdiction. However, applying the principle of *nullum crimen sine lege,* Article 39 of the ILC Draft Statute properly provides that the offense charged must have been a crime "at the time the act or omission occurred."[73]

VII. Concurrent Jurisdiction and Double Jeopardy

There is no question but that national courts have jurisdiction to try their own nationals for violations not only of their own law, civilian or military, but also for violations of international law. When Lieber drafted his famous code in 1863, Article 59 thereof provided for the trial of a prisoner of war for an offense committed before capture against the captor's army or people "for which he had not been punished by his own authorities."[74] After both World War I and World War II, attempts were made by defeated nations to exercise their national jurisdiction in the hope, perhaps in the expectation, that such trials would preclude trials by other tribunals, either by those of the victorious nations or by international tribunals, by application of the doctrine of *non bis in idem,* or double jeopardy. If this was their hope or expectation, it was not realized. After World War I, the Germans tried two cases in their own courts and on their own initiative before undertaking the trials of individuals named by the Allies.[75] An attempt by Admiral Doenitz, Hitler's successor as German Head of State, to adopt such a procedure after World War II was frustrated by General Eisenhower.[76] The several Japanese trials, which were conducted before this procedure was halted by General MacArthur, were disregarded and the accused were retried by Allied military commissions.[77] Despite these precedents, Article 9 of the Statute of the International Tribunal for the Former Yugoslavia gives concurrent jurisdiction to national courts and the Tribunal, with "primacy" in the latter. However, Article 10(2) of the Statute places some restrictions on the application of the doctrine of double jeopardy insofar as the jurisdiction of the International Tribunal is concerned.[78] It provides that an individual who has been tried by a national court may still be tried by the International Tribunal if:

> (a) the act for which he or she was tried was characterized as an ordinary crime; or
>
> (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

Once again, the drafting leaves much to be desired. The Secretary-General has explained that subparagraph (a) means that "the characterization of the act by the national courts did not correspond to its characterization under the statute."[79] If the offense for which the individual was tried in the national court was "theft" or "robbery," is that an "ordinary crime" to which the doctrine of

double jeopardy is not applicable so that the individual may thereafter be tried by the International Tribunal for the Former Yugoslavia for "plunder of private property", an offense specifically set forth in Article 3(e) of the Tribunal's Statute? And sub-paragraph (b), quoted above, means that the International Tribunal will have no alternative but to conduct a hearing on its jurisdiction before it can apply the provisions of that subparagraph. It would have been better to have provided specifically that the doctrine of double jeopardy was inapplicable to the International Tribunal for the Former Yugoslavia where the prior trial was in a national court.[80] This would have constituted notice to the national authorities that they would be unable to immunize an individual by any of the types of trials referred to in sub-paragraph (b), while relieving the International Tribunal for the Former Yugoslavia of the task of a preliminary hearing to determine whether the national trial falls within the ambit of that sub-paragraph. The Tribunal could then have taken into consideration the action of the national court and authorities to the extent that it deemed such consideration appropriate as partially provided in the third paragraph of Article 10 of its Statute.[81]

The Rules adopted by the International Tribunal for the Former Yugoslavia, in this respect, do not appear to be helpful in solving this problem. Rule 9 provides that where it appears to the Prosecutor that any national investigation or criminal proceedings falls within the paraphrased provisions of Article 10(2) of the Statute, or that "what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal," he may propose to a Trial Chamber of the Tribunal that a formal request be made that the national court defer to the Tribunal. Rule 10 provides for the formal request to the State concerned by the Trial Chamber[82]; and Rule 11 provides that in the event of a State's failure to respond to the Trial Chamber's request within sixty days, the latter may request the President of the Tribunal to report the matter to the Security Council.[83]

VIII. Rules of Procedure and Evidence

Article 13 of the 1945 London Charter provided that the International Military Tribunal could draft rules of procedure, the only limitation being that they could not be inconsistent with the provisions of the Charter itself. Article 15 of the Statute of the International Tribunal for the Former Yugoslavia authorizes it to adopt rules of procedure and evidence.[84] While it does not include the limitation contained in the London Charter, it is unlikely that any judicial body would adopt a rule which was in direct conflict with its basic constitutive document. The members of the International Tribunal met at The Hague and, on 11 February 1994, they adopted their Rules of Procedure and Evidence.[85]

Article 19 of the 1945 London Charter was perhaps the most controversial provision included in that instrument, particularly insofar as American attorneys were concerned. It provided that the International Military Tribunal "shall not be bound by technical rules of evidence" and that it "shall admit any evidence which it deems to have probative value." Thus, the strict rules of evidence of the common law system (the rule against hearsay, the best evidence rule, etc.) were not followed.[86] Article 15 of the Statute of the International Tribunal for the Former Yugoslavia goes even further in that it authorizes the Tribunal to adopt its own rules for "the admission of evidence," with no limitations whatsoever on what those rules may include. Inasmuch as many of the strict rules of evidence of the common law system do not exist in the continental law system, and a majority of the judges are from non-common-law countries, it was to be assumed that the rules with respect to evidence adopted by the eleven Judges of the International Tribunal would most probably follow the example of the 1945 London Charter. Accordingly, it is not surprising to find that, after providing that national rules of evidence are not binding on the Trial Chambers, Rule 89 of the Tribunal's Rules of Procedure and Evidence continues with the following:

> (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
> (C) A Chamber may admit any relevant evidence which it deems to have probative value.
> (D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.
> (E) A Chamber may request verification of the authenticity of evidence obtained out of court.[87]

It is interesting to note that while Article 44 of the ILC Draft Statute is entitled "Evidence," that article does not contain any similar provisions relating to the admissibility of evidence. However, the Commentary to that article indicates that the matter should be dealt with by the Court in its Rules, calling attention to Rules 89-106 of the International Tribunal for the Former Yugoslavia.[88] Strange to relate, while Rule 91 of that Tribunal contains lengthy provisions on the action to be taken in the event of the commission of perjury before it, Paragraph 2 of the Commentary to Article 44 of the ILC Draft Statute points out that prosecutions for perjury committed by witnesses before the International Criminal Court would have to be brought before the appropriate national court. This would put a premium on perjury before the International Criminal Court.

Of particular interest are the provisions for the protection of the accused contained in both the Statute of the International Tribunal for the Former Yugoslavia and in the Rules adopted by that Tribunal. Article 21 of the Statute lists the "Rights of the Accused." While these rights are such as to provide an accused with all of the various protections generally considered essential for a fair trial, it would, perhaps, have been better to have borrowed the "fundamental guarantees" of Article 75 of the 1977 Additional Protocol 1.[89]

One criticism that has been made of the Statute of the International Tribunal for the Former Yugoslavia and of the Rules of Procedure and Evidence adopted by the Tribunal is that "they do not grant victims the right to plead and be represented by counsel."[90] However, as the critic of this alleged omission points out, the Tribunal's Rule 74 authorizes a Chamber to "invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber." This would certainly include granting leave to the victim to appear before the Chamber, either in person or by counsel, and to make submissions on the issues of the horrendous nature of the offense charged and of the guilt of the accused.

IX. The Prosecutor

One of the major mistakes made in the drafting of the 1945 London Charter was contained in its Article 14, which provided that each of the four signatories (France, Great Britain, the Soviet Union, and the United States) should appoint a "Chief Prosecutor."[91] With no single "boss" to make final decisions, it was only the adoption of a proposal made by the Soviet Chief Prosecutor for the distribution of the prosecutorial functions that made possible the functioning of the prosecution at Nuremberg.[92] The problem of State equality does not arise with respect to the International Tribunal for the Former Yugoslavia, Article 16 of which provides for a single Prosecutor to be nominated by the Secretary-General of the United Nations and to be appointed by the Security Council, and a staff to be appointed by the Secretary-General on the recommendation of the Prosecutor.[93] Similarly, Article 12 of the ILC Draft Statute provides for a "Procuracy," consisting of a Prosecutor and one or more Deputy Prosecutors who, like the judges, are to be elected by the States Parties to the Convention establishing the Court.[94]

X. The Registry

A judicial body cannot operate without an administrative branch, whatever it may be called. While a number of articles of the Statute of the International Court of Justice refer to functions to be performed by a "Registrar," there is no provision in that Statute actually establishing such an office. The 1945 London

Charter, likewise, had no provision in this respect, but nevertheless a Secretariat was established to perform the necessary administrative functions for the International Military Tribunal. Article 3(b) of the Charter of the International Military Tribunal for the Far East established a Secretariat to perform administrative functions for that Tribunal. Article 17 of the Statute of the International Tribunal for the Former Yugoslavia provides for a Registry consisting of a Registrar and staff "for the administration and servicing of the International Tribunal" to be appointed by the Secretary-General of the United Nations.[95] Article 13 of the ILC Draft Statute is quite similar except that the Registrar and the Deputy Registrar, if any, are to be elected by the judges.

XI. Investigation and Preparation of Indictment

There are, of course, no true police, no grand juries, and no examining magistrates or judges of instruction in the international arena. Accordingly, official prosecutors have been called upon to initiate investigations; to collect evidence; where deemed appropriate, to draft and file indictments; and to conduct the prosecution at the trial. Articles 14 and 15 of the 1945 London Charter so provided. Article 18 of the Statute of the International Tribunal for the Former Yugoslavia is quite complete in its coverage of these matters.[96] Not only may the Prosecutor institute investigations, he may draft and file indictments on his own initiative.[97] The ILC Draft Statute adopts a quite different approach to this problem. Under its Article 25, complaints may only be filed by certain categories of States and by the Security Council.[98] It is believed that the listing of the States which may file complaints is too restrictive; and no valid reason is perceived for denying this right to the Prosecutor who may well have come into the possession of evidence of a serious violation of international law with respect to which no State has filed, or is willing to file, a complaint.

Article 19 of the Statute of the International Tribunal for the Former Yugoslavia, entitled "Review of the Indictment," is rather unusual. When the indictment is received by one of the Trial Chambers of the International Tribunal "the judge of the Trial Chamber to whom the indictment has been transmitted shall review it" and, as a result of this review, the indictment is either confirmed or dismissed.[99] Normally, in the common law system, a preliminary determination with respect to the validity of an indictment is only undertaken when a challenge is initiated by the accused named therein. It would appear that the procedure adopted more closely follows the continental law system, where all of the prosecution's evidence is attached to the indictment and is reviewed by a magistrate before being referred for trial.[100]

Like Article 19 of the Statute of the International Tribunal for the Former Yugoslavia, the previous draft of the ILC Draft Statute provided that the Bureau of the Court (consisting of its President and its two Vice Presidents) "acting as

an Indictment Chamber, shall examine the indictment and determine whether or not a *prima facie* case exists."[101] The present draft prepared by that body has a convoluted procedure set forth in its Articles 26 and 27.[102] When a complaint is filed by a State, or results from action of the Security Council, the preliminary investigation and review is by the Prosecutor. If he concludes that there is no sufficient basis for the filing of an indictment and for a prosecution, he must so inform the Presidency. At the request of the State which filed the complaint, or of the Security Council if the complaint is based upon action of that body, the Presidency may review the action of the Prosecutor and "may request" him to reconsider his decision. Apparently, his subsequent decision not to file an indictment is final. If his investigation of the complaint indicates that there is a *prima facie* case, the Prosecutor drafts an indictment which he files with the Registrar. The Presidency reviews the indictment and its supporting material. If it determines that the case should be heard by the Court it confirms the indictment and establishes a Trial Chamber to hear the case; if it determines that the case should not be heard by the Court, it so notifies the complainant State or the Security Council, as the case may be.

XII. Cooperation and Judicial Assistance

Having determined that there is a valid indictment against an accused, he must be brought before a Trial Chamber of the International Tribunal for the Former Yugoslavia. Because of the situation existing at the end of World War II, with most of the individuals accused of war crimes being found in defeated States, little difficulty was encountered in this regard at that time.[103] Unlike the provisions with respect to cooperation and judicial assistance appearing in most law-of-war treaties, which are frequently optional and dependent largely upon the extradition treaties of the State in whose territory the accused is to be found,[104] Article 29 of the Statute of the International Tribunal for the Former Yugoslavia is set forth in mandatory terms. "States *shall* cooperate with the International Tribunal"; "States *shall* comply without delay."[105] A State will be unable to avail itself of the exclusionary provisions of its extradition treaties, including particularly the "political offense" exception, when the International Tribunal for the Former Yugoslavia issues an order for the arrest and surrender of an individual within the State's territory who is charged with having committed a violation of any of the provisions of Articles 1 through 5 of the Statute of the Tribunal.[106]

Of course, it undoubtedly will be found that many, if not most, of the individuals whose surrender will be demanded by the International Tribunal will be located in the former Yugoslavia (Serbia and Montenegro) and in Bosnia-Herzegovina. Both of these entities can be expected to be reluctant to surrender any of their personnel to the International Tribunal for trial for

violations of international humanitarian law. The individuals who negotiate the final cease-fire on behalf of those entities will, understandably, vigorously oppose including any provision in that document calling for compliance with the provisions of the Statute, particularly for the surrender of personnel for trial.[107] While the Statute is contained in a Security Council resolution and is, therefore, binding upon authorities in all of the entities which came into being upon the dissolution of what was once the Socialist Federal Republic of Yugoslavia, it can be anticipated that considerable difficulty will be encountered by the International Tribunal for the Former Yugoslavia in securing the custody of many of the individuals against whom valid indictments may be filed, particularly if a provision in any cease-fire agreement setting forth the right to demand such custody is seen as causing a prolongation of hostilities.

Part 7 (Articles 51-57) of the ILC Draft Statute deals with this subject. Article 51 is concerned with general matters and the Commission's Commentary to that article states that it is "adapted from article 29 of the Statute of the International Tribunal for the former Yugoslavia."[108] It, too, provides that States "*shall respond* without undue delay" to the requests of the International Criminal Court; and Article 54 mandates that a "custodial State" shall either extradite the suspect or try him.[109] Article 55 sets forth the well-established rule of specialty—that an individual delivered to a court for trial may only be prosecuted for the offense or offenses included in the request for his custody. For some reason the Secretary-General did not consider it appropriate to include such a provision in the Statute of the International Tribunal for the Former Yugoslavia, nor did the Judges of that Tribunal consider it appropriate to include such a provision in their Rules.

XIII. The Trial

Articles 20, 21, and 22 of the Statute of the International Tribunal for the Former Yugoslavia make it clear that the Trial Chamber is in control of the trial proceedings and is responsible for ensuring not only that the accused receives a fair trial, but also that victims and witnesses receive proper protection.[110] The usual rights of the accused (the presumption of innocence, to be informed of the charges against him in a language which he understands, to have counsel of his own choice, to have a prompt trial but with adequate time to prepare the defense, to be present at the trial,[111] to examine the witnesses against him and to obtain the presence of witnesses on his behalf, to have an interpreter if that is necessary, and not to be compelled to testify against himself or to confess guilt) are set forth *seriatim*.[112] Understandably, the Rules of Procedure and Evidence adopted by the Judges of the International Tribunal for the Former Yugoslavia include a great many provisions necessary to ensure that the Judges of the Trial

Chambers of that Tribunal will be able to control the proceedings and to enforce the necessary decorum.[113]

XIV. Penalties

A major difference between the relevant provisions of the 1945 London Charter and the Statute of the International Tribunal for the Former Yugoslavia is that, unlike the former, where a death sentence was far from unusual, under Article 24 of the Statute the penalties which may be imposed by the latter are limited to imprisonment.[114] This is understandable as many nations have now abolished the death sentence in their domestic judicial systems.[115]

The 1945 London Charter, as well as many of the other post-World War II laws and regulations establishing various types of tribunals for the conduct of war crimes trials, authorized the judicial body to impose financial forfeitures.[116] Except for the French, this power was rarely, if ever, used. No such provision is included in the Statute of the International Tribunal for the Former Yugoslavia which does, however, include in its Article 24(3) a provision authorizing the Trial Chamber to "order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners."[117]

There are, of course, no international prisons. After World War II, the Germans convicted of war crimes were normally incarcerated in German prisons while the Japanese convicted of war crimes (except those convicted by Soviet courts) were incarcerated in a Japanese prison. In those cases, however, the prisons were located in occupied territory or the country involved had entered into a contractual arrangement with respect to such prisoners. No such situations exist with respect to any accused who may be convicted and sentenced to imprisonment by the International Tribunal for the Former Yugoslavia. Accordingly, another solution of the problem was required. Article 27 of the Statute provides, in essence, that States may indicate to the Security Council their willingness to accept for imprisonment in their penal institutions persons convicted and sentenced to imprisonment by the Tribunal. The Tribunal then designates a State from those which have so notified the Security Council.[118] Once in a prison of one of the volunteer States, the imprisonment is to be in accordance with the laws of that State, "subject to the supervision of the International Tribunal." Thus, Article 28 specifically provides that if, under the laws of the State in which the individual is confined, "he or she is eligible for pardon or commutation of sentence," the State concerned is to notify the International Tribunal which then decides the matter.[119]

Article 59(1) of the ILC Draft Statute likewise provides for incarceration in prisons maintained by States "which have indicated to the Court their willingness to accept convicted persons." However, paragraph 2 of that article provides that if no State is designated, the convicted person is to serve the sentence "in a prison

facility made available by the host State." Inasmuch as Article 3(1) of that Statute designates the State of the seat of the Court as the "host State," this imposes on that State an obligation which it may be unable or unwilling to accept.

XV. Appellate Proceedings

We have already seen that Article 12 of the Statute of the International Tribunal for the Former Yugoslavia provides for a permanent Appeals Chamber of five judges.[120] Article 25 of the Statute sets forth the grounds for appeals to that body, grounds which include both errors of law and errors of fact. An unusual aspect of this provision is that either the convicted person or the Prosecutor may appeal. Does this mean that the Prosecutor may appeal from an acquittal? It would appear that it does.[121] Strangely, the Statute does not include any time limit for the filing of such appeals. That omission has been rectified by the Tribunal's Rule 108 which allows thirty days from the date on which the judgment is pronounced.

In addition to the provisions for appeals, the Statute of the International Tribunal for the Former Yugoslavia provides, in its Article 26, for review proceedings when a fact is discovered which had not been previously known and had not been made available to the Tribunal at the trial or on appeal.[122] As in the case of an appeal, the application for review may be made by either the convicted person or by the Prosecutor. It would normally be assumed that the Prosecutor might only make such an application in the interest of justice, if the accused has been convicted and the new evidence might warrant upsetting that conviction or reducing the severity of the punishment, and not if the accused has been acquitted. However, in view of the provisions relating to appeals which have just been discussed, it is doubtful that such an assumption is warranted.[123]

Article 48 of the ILC Draft Statute also provides for appeals by either the Prosecutor or the convicted person and Article 49(2)(b) refers to an "appeal brought by the Prosecutor against an acquittal." However, Article 50 of the ILC Draft Statute makes it clear that applications for revision of the decision of a Trial Chamber, or of the Appeals Chamber, on the basis of newly discovered evidence may only be made where there has been a conviction. This means that, unlike the Prosecutor of the International Tribunal for the Former Yugoslavia, the Prosecutor of the International Criminal Court may not seek to reopen a judgment of acquittal pronounced by a Chamber of that Court which has become final.

XVI. Conclusion

While the Statute of the International Tribunal for the Former Yugoslavia is not a perfectly drafted instrument, it appears that it will accomplish the purpose

for which it was intended—provided, of course, that the possibility that it may function is not largely nullified by the provisions of any final cease-fire agreement. On the other hand, the Draft Statute for an International Criminal Court prepared by the International Law Commission, while an improvement over the previous drafts, leaves something to be desired, particularly with respect to the grant of jurisdiction. It is to be hoped that before a final draft is approved by the General Assembly for reference to the States in the form of a Convention, its provisions in this and other respects will be both clarified and enlarged.

Notes

1. *See, e.g.,* TOWARD A FEASIBLE INTERNATIONAL CRIMINAL COURT (J. Stone & R. Woetzel eds., 1970); 1-2 BENJAMIN FERENCZ, AN INTERNATIONAL CRIMINAL COURT (1980); M. CHERIF BASSIOUNI, DRAFT STATUTE INTERNATIONAL CRIMINAL TRIBUNAL (1993).

2. *1907 Hague Convention No. XII Relative to the Creation of an International Prize Court,* 205 Consol. T.S. 381, 2 AM. J. INT'L L. 174 (1908); THE LAWS OF ARMED CONFLICTS 825 (D. Schindler & J. Toman eds., 3d ed. 1988)[hereinafter THE LAWS OF ARMED CONFLICTS]. This Convention never entered into force.

3. 2 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949, at 43 (C. Bevans ed., 1969) [hereinafter TREATIES AND OTHER INTERNATIONAL AGREEMENTS]; 225 Consol. T.S. 189; 13 AM. J. INT'L L. (Supp.) 151 (1919).

4. 1 INTERNATIONAL LEGISLATION 530 (M. Hudson ed., 1931). The Permanent Court had jurisdiction only over disputes between States. A proposal for an international criminal court to try individuals for violations of international law made by Elihu Root, the American representative on the Committee of Jurists, was not adopted. 1 FERENCZ, *supra* note 1, at 36-39.

5. Among many other places, the Charter of the United Nations, with the Statute of the Court attached, will be found at 59 Stat. 1031, Consol. T.S. 993, 3 TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 3, at 1153, 1179. Like its League of Nations predecessor, Article 34(1) of its Statute provides that only States may be parties in cases before the International Court of Justice.

6. This special tribunal did not come into being because the Netherlands, where the ex-Kaiser had sought and obtained asylum, refused to extradite him. (It may well be asserted that the tribunal that tried Peter von Hagenbach in 1474, consisting as it did of the representatives of twenty-eight Allied City-States, was an international criminal tribunal. *See* 2 GEORG SCHWARZENBERGER, INTERNATIONAL LAW 462-466 (1968). Obviously, it was not a much-followed precedent).

7. Charter of the International Military Tribunal, 56 Stat. 1544, 82 U.N.T.S. 279 [hereinafter 1945 London Charter]; 3 TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 3, at 1240; 39 AM. J. INT'L L. (Supp.) 258 (1945); HOWARD, LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES 549 (1993).

8. Charter of the International Military Tribunal for the Far East, T.I.A.S. No. 1589; 4 TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 3, at 27; LEVIE, *supra* note 7, at 571.

9. International military tribunals established by the United States Military Governor pursuant to the directive contained in Allied Control Council Law No. 10 (1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS xvi (1949-1953) [hereinafter TRIALS OF WAR CRIMINALS]; LEVIE, *supra* note 7, at 558) tried twelve cases in the zone of Germany occupied by the United States. (These trials are known as the "Subsequent Proceedings.") Other war crimes cases tried after World War II were tried by national courts, either military or civilian.

10. Later national trials by France (Klaus Barbie), Germany (Horst Schumann), and Israel (Adolf Eichmann), all involved offenses alleged to have been committed during World War II. Trials by national courts-martial of their own personnel for violations of the international law of war are not generally considered to be "war crimes trials" although that is what they actually are. Thus, the much-publicized trial by a United States Army court-martial of Lieutenant William Calley (46 C.M.R. 1131 (1973)) for having murdered, and having ordered his men to murder, Vietnamese civilians was a true war crimes trial, even though it was not so considered by the general public.

11. During the hostilities in Korea the United Nations Command was prepared to conduct war crimes trials, had identified and isolated potential accused in the prisoner-of-war camps, and had issued implementing laws; however, because the provisions of the Armistice Agreement required the repatriation of all prisoners of war who desired repatriation, no such trials were conducted. After the 1972 war between India and Pakistan,

the former held back 195 prisoners of war for trial by Bangladesh for the crime of genocide; however, these prisoners of war were eventually repatriated without trial. During the 1990-1992 Persian Gulf Crisis the United States Army prepared a Report on Iraqi War Crimes, the unclassified version of which covered over one hundred pages, and Amnesty International published a lengthy report on the same subject. However, no war crimes trial were conducted.

12. UNITED NATIONS, SECURITY COUNCIL, RESOLUTION 827, INT'L TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INT'L HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991, U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1203 (1993) [hereinafter INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA]. The Statute of that Tribunal and the Secretary-General's Commentaries are also contained in the *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution* 808 (1993), UN. SCOR, U.N. Doc. S/25704, 3 May 1993, *reprinted in* 32 I.L.M. 1163, 1192 (1993)[hereinafter the S/G Report]. Discussions of the Statute will be found in *The United Nations Ad Hoc Tribunal for the Former Yugoslavia,* 1993 AM. SOC. INT'L L. PROC. 20; Diane Orentlicher, *Yugoslavia War Crimes Tribunal,* ASS'N STUDENT LAW SOC'Y NEWS., June-August 1993, at 13; and James O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia,* 87 AM. J. INT'L L. 639 (1993).

13. In a document drafted by a Commission of Jurists established by the French Minister of Foreign Affairs and transmitted to the Secretary-General of the United Nations, the statement is made that the establishment of the International Tribunal then being considered for Yugoslavia could "be the prelude" for a permanent international criminal court. Letter from the Permanent Representive of France, Feb. 10, 1993, U.N. Doc. S/25266, para. 25.

14. The Draft Statute for an International Criminal Court prepared by the International Law Commission, together with the Commission's Commentaries, is set forth in the Report of the International Law Commission on the work of its forty-sixth session, U.N. GAOR, 49th Sess., Supp. No. 10, paras. 40-91, UN. Doc. A/49/10 (1994) [hereinafter ILC Draft Statute]. The report of the discussion of this Draft Statute in the Sixth Committee of the General Assembly of the United Nations in 1994 is not yet available.

15. We are assisted in this respect by the Commentaries of the Secretary-General which are contained in the S/G Report, *supra* note 12, and by those contained in the International Law Commission's Report, *supra* note 14, in connection with its Draft Statute. A perhaps overly critical analysis of the Statute of the International Tribunal for the Former Yugoslavia will be found in HUMAN RIGHTS WATCH HELSINKI, PROCEDURAL AND EVIDENTIARY ISSUES FOR THE YUGOSLAV WAR CRIMES TRIBUNAL (1993). It is to be noted that on 8 November 1994 the Security Council, by S.C. Res. 955, adopted a Statute which is, *mutatis mutandis,* identical to that for the former Yugoslavia, establishing a tribunal for the trial of serious violations of international humanitarian law alleged to have been committed in Rwanda, or in neighboring States by Rwandan citizens, UNITED NATIONS, SECURITY COUNCIL, RESOLUTION 955, STATUTES OF THE INT'L TRIBUNAL FOR RAWANDA, U.N. Doc. S/RES/955 [hereinafter INTERNATIONAL TRIBUNAL FOR RWANDA].

16. For example, the International Court of Justice has established a Chamber for Environmental Matters to which will be assigned cases involving problems affecting the environment where the Parties agree to the use of a Chamber. I.C.J. Communique No. 94/10, 14 March 1994.

17. As an amusing aside, it is understood that when queried at the organization meeting held in The Hague in February 1994, every one of the eleven judges recently elected to the International Tribunal for the Former Yugoslavia expressed a desire to sit on the Appellate Tribunal!

18. *See* INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, *supra* note 12, at arts. 11 & 12. Rule 23 of the Rules of Procedure and Evidence adopted by the International Tribunal (33 I.L.M. 503 (1994)) established one other body, the Bureau of the International Tribunal. It consists of the President, the Vice-President, and the Presiding Judges of the two Trial Chambers. It acts administratively, not judicially.

19. Article 26 of the 1945 London Charter specified that the judgment of the International Military Tribunal "shall be final and not subject to review." 1945 London Charter, *supra* note 7, at art. 26.

20. So, too, did its predecessor, Article 60 of the Statute of the Permanent Court of International Justice, *supra* note 4.

21. Article 12(2) of the Statute of the International Tribunal for Rwanda, *supra* note 15, provides that the Appeals Chamber of the International Tribunal for the Former Yugoslavia is also to serve as the Appeals Chamber for the International Tribunal for Rwanda.

22. *See* Statute of the International Court of Justice, *supra* note 5, at art. 2 and INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, *supra* note 12, at art. 13(1).

23. Statute of the International Tribunal for the Former Yugoslavia, *supra* note 12, at art. 13(2). The judges have been elected and have met in The Hague. A list of the members of the International Tribunal will be found in Bruce Zagaris, *Clinton Administration Supports War Crimes Tribunal,* AM. SOC. INT'L L. NEWSL., Mar.-May 1994, at 17.

24. INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, *supra* note 12, at arts. 13(2)(a) and (d). Paragraph 75 of the Commentary of the Secretary-General (*see S/G* Report, *supra* note 12) mentions this provision, but it does not explain the reason why it was included.

25. Article 9(1) of the ILC Draft Statute, *supra* note 14, further provides that at least three of the judges appointed as members of the Appeals Chamber shall be those with "recognized competence in international law."

26. The United States representatives on the Commission that recommended this provision to the Plenary Meeting of the Peace Conference, Robert Lansing and James Brown Scott, took the position that moral offenses were not justiciable. *Memorandum of Reservations Presented by the Representative of the Untied States to the Report of the Commission on Responsibilities*, 14 AM. J. INT'L L. 128 (1920).

27. Allied Control Council Law No. 10, *supra* note 9, at art. 2, xvii. The basic law under which the Military Tribunals in the American Zone of Occupation of Germany tried the twelve "Subsequent Proceedings" at Nuremberg, was substantially to the same effect.

28. *See supra* note 12. The drafting of this provision leaves much to be desired. It would have been more appropriate to state that the International Tribunal had the power "to *try* persons *allegedly* responsible," or "*accused of*," rather than "to prosecute *persons responsible*." Prosecution is the function of the Prosecutor, not of the Tribunal; and persons are not "responsible" until that has been determined by trial and conviction. Moreover, it was obviously not intended that the "serious violations of international humanitarian law" were to have been committed "in accordance with the provisions of the present Statute."

29. In paragraphs 33-35 of his Commentary, (S/G Report, *supra* note 12), the Secretary-General points out that the listed items are all rules of international humanitarian law (the law of war) which are customary international law and that, therefore, there can be no claim of *nullum crimen sine lege* - that the action is *ex post facto*.

30. Geneva Conventions for the Protection of War Victims, 1949, 6 U.S.T. 3114-3695, T.I.A.S. No. 3362-3365, 75 U.N.T.S. 31-468; THE LAWS OF ARMED CONFLICT, *supra* note 2, at 373-594. There is no mention of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1 Swiss Federal Political Department, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977, Pt. 1, at 115; U.N. Doc. A/321144, Annex 1; 72 AM. J. INT'L L. 457 (1977); 16 I.L.M. 1391 (1977); THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 621.

31. Geneva Conventions for the Protection of War Victims, 1949, 6 U.S.T. 3114-3695, T.I.A.S. No. 3362-3365, 75 U.N.T.S. 31-468; THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 373-594. There is no mention of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1 Swiss Federal Political Department, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977, Pt. 1, at 115; U.N. Doc. A/32/144, Annex 1; 72 AM. J. INT'L L. 457 (1977); 16 I.L.M. 1391 (1977); THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 621.

32. It must be borne in mind that while Article 4 of the Statute of the International Tribunal for the Former Yugoslavia is basically a reproduction of Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (*opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277, 45 (Supp.) 7 (1951); THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 231), the International Tribunal for the Former Yugoslavia would normally exercise jurisdiction under its own Statute, rather than under that Convention.

33. Articles 3 and 5 borrow generously from the 1945 London Charter, *supra* note 7. The Statute of the International Tribunal for Rwanda, *supra* note 15, lists as the offenses of which that Tribunal has jurisdiction: genocide (Art. 2); crimes against humanity (Art. 3); and violations of common Art. 3 of the 1949 Geneva Conventions (Art. 4). This latter refers to the "mini-convention" contained in each of those conventions setting forth the humanitarian rules applicable in non-international wars.

34. Pursuant to the will of the General Assembly of the United Nations, the International Law Commission continues to prepare drafts of a Draft Code of Offenses (now Crimes) Against the Peace and Security of Mankind. UNITED NATIONS, GENERAL ASSEMBLY, DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND, 42d Sess., 6th Committee, U.N. Doc. A/C.6/42/L.13 [hereinafter ILC Draft Code]. For the latest version of this Draft Code, *see* 30 I.L.M. 1584 (1991). *See also* COMMENTARIES ON THE INTERNATIONAL LAW COMMISSION'S 1991 DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (M.C. Bassiouni ed., 1993).

35. It is probable that he feared that including crimes against peace as a category of triable war crimes would have resulted in opposition to the Statute by a number of nations. In Article 20 of the ILC Draft Statute,

supra note 14, which defines the general jurisdiction of the proposed international criminal court, paragraph (b) does include this category of international crimes. However, Article 23(2) provides:

> A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint.

ILC Draft Statute, *supra* note 14, at art. 23(2).

36. *See also* 1-2 INTERNATIONAL CRIMES: DIGEST/INDEX (M.C. Bassiouni ed. 1986)(which will indicate that the foregoing is but a small number of the subjects of international conventions, the violations of which should be within the jurisdiction of an international criminal court.). Bassiouni's, DRAFT STATUTE INTERNATIONAL CRIMINAL TRIBUNAL, *supra* note 1, is quite conservative in its proposed grant of jurisdiction.

37. G.A. Res. 3314, U.N. GAOR, 26th Sess. (1974), *reprinted in* 13 I.L.M. 710 (1974). *See supra* note 14, arts. 20(b) and 23(2) of the ILC Draft Statute (which would give the International Criminal Court jurisdiction over acts of aggression but only when the Security Council has determined them so to be. This is a good solution because, in effect, the action of the Security Council would constitute the legislative establishment of the substantive offense and the Court would then be required to perform only its natural function—the determination of the guilt or innocence of the accused before it of a legislatively-established offense).

38. 24 Stat. 989; T.S. 380; 1 TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 3, at 92; 75 B.F.S.P. 356; 163 Consol. T.S. 391.

39. 60 U.N.T.S. 253.

40. 112 L.N.T.S. 371.

41. 96 U.N.T.S. 271.

42. 32 Stat. 1803; 1 TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 3, at 247; 1 AM. J. INT'L L (Supp.) 129 (1907); THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 63.

43. 36 Stat. 2227; T.S. 539; 1 TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 3, at 631; 2 AM. J. INT'L L. (Supp.) 90 (1908); THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 63.

44. OPINION AND JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL, NAZI CONSPIRACY AND AGGRESSION 83 (1947)[hereinafter NAZI CONSPIRACY].

45. *Id* at 62, 68, 72. So, too, did dozens of other military tribunals and military commissions. Another reason given by the Commission for not including the Hague Regulations in the Annex listing is that "aspects of the Regulations fall within the notion of serious violations of the laws and customs applicable in armed conflict and are thus covered by article 20(c) of the statute." But this is also true of the four 1949 Geneva Conventions and the 1977 Protocol I, *supra* note 30, all of which are, however, included in the Annex listing.

46. GOVERNMENT OF THE NETHERLANDS, RECORDS OF THE CONFERENCE CONVENED BY THE UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION HELD AT THE HAGUE FROM 21 APRIL TO 14 MAY 1954 5; THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 745.

47. The Commentary to the Annex states that this Convention is not included because "[i]t does not create crimes as such (*cf.* art 8)." This completely disregards the quoted provision of the Convention.

48. *See supra* note 30.

49. 22 U.S.T. 1641; T.I.A.S. No. 7192.

50. 24 U.S.T. 564; T.I.A.S. No. 70.

51. 1015 U.N.T.S. 243.

52. 28 U.S.T. 1975; T.I.A.S. No. 8532; 1035 U.N.T.S. 167.

53. T.I.A.S. No. 11081; 1315 U.N.T.S. 205.

54. U.N. Doc. A/RES/39/46, (1984); 23 UNITED NATIONS RESOLUTIONS (GENERAL ASSEMBLY) 395 (D. Djonovich ed.).

55. 27 I.L.M. 668 (1988).

56. *Id.* at 685.

57. *Id.*

58. NAZI CONSPIRACY, *supra* note 44, at 53.

59. S/G Report, *supra* note 12, at para. 53, which points out that in a number of resolutions the Security Council has referred to "individual criminal responsibility."

60. "Conspiracy" was the nub of the offense set forth in the provision of the 1945 London Charter quoted in the text. It caused considerable difficulty for the representatives of the civil law countries at Nuremberg. While that word does not appear in the Statute of the International Tribunal for the Former Yugoslavia, anyone who "aided and abetted in the planning, preparation or execution" of a crime would, from the common law point of view, be guilty of having participated in a criminal conspiracy.

61. *See generally* 1945 London Charter, *supra* note 7, at arts. 7 &: 8; Charter of the International Military Tribunal for the Far East, *supra* note 8, at art. 6; Allied Control Council Law No. 10, *supra* note 9, at art. 4.

Nevertheless, the defense of superior orders was the defense most frequently interposed in post-World War II war crimes trials and the defense of act of state was also asserted in a great many cases. LEVIE, *supra* note 7, at 465-469 and 512-521.

62. The 1945 London Charter, *supra* note 7, and INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, *supra* note 12, both provide that the order of a government or of a superior shall not relieve an accused of criminal responsibility, "but may be considered in mitigation of punishment." Article 11 of the ILC Draft Code, *supra* note 34, rejects that defense only "if, in the circumstances at the time, it was possible for him not to comply with that order."

63. Howard S. Levie, *The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders,* 30 MIL. L. & L. WAR. REV. 199 (1991).

64. *Remarks and Proposals* at 64, ICRC (1949); 2B Final Record of the Diplomatic Conference of Geneva of 1949, at 115, Swiss Fed. Pol. Dep't. (1949); Levie, *supra* note 63, at 199-200.

65. *Draft Additional Protocol to the Geneva Conventions of August 12, 1949,* at 25, ICRC (1973); 9 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts at 386-392, Swiss Fed. Pol. Dep't. (1978); Levie, *supra* note 63, at 200-203. As indicated in note 62, *supra,* the International Law Commission has included in its Draft Code a provision limiting, but not completely denying, the assertion of the defense of superior orders.

66. Paragraph 58 of the S/G Report, *supra* note 12, points out that the International Tribunal for the Former Yugoslavia will be called upon to consider the merits of other defenses, "such as minimum age or mental capacity, drawing upon general principles of law recognized by all nations."

67. *See supra* note 30.

68. 327 U.S. 1 (1947); LEVIE, *supra* note 7, at 156.

69. Concerning its basic law, Allied Control Council Law No. 10, *supra* note 9, the Military Tribunal in the *Einsatzgruppen Case* said: "As this law is not limited to offenses committed during war, it is also not restricted as to the nationality of the victim, *or to the place where committed"* (emphasis added) (4 TRIALS OF WAR CRIMINALS, *supra* note 9, at 499). A French law limited the jurisdiction of its Permanent Military Courts sitting in France to offenses committed in France or against French nationals. There were no such limitations on French military courts sitting in Germany.

70. The International Military Tribunal has so held with respect to crimes against humanity. *See* NAZI CONSPIRACY, *supra* note 44, at 84. Allied Control Council Law No. 10, *supra* note 9, and the United States Zone Military Government Ordinance No. 7, 18 October 1946 (1 TRIALS OF WAR CRIMINALS, *supra* note 9, at xxi; LEVIE, *supra* note 7, at 563), are similarly lacking in temporal limitations and were similarly construed. It should be noted, however, that the tribunals which sat in Europe all considered 1 September 1939 to be the date of the beginning of the war, although the Soviet Union did not become a belligerent until June 1941 and the United States did not become a belligerent until December 1941.

71. The Military Tribunals in *The Medical Case,* 2 TRIALS OF WAR CRIMINALS, *supra* note 9, at 12 and 174; the *Flick Case,* 6 TRIALS OF WAR CRIMINALS, *supra* note 9, at 1213; and the *Ministries Case,* 13 TRIALS OF WAR CRIMINALS, *supra* note 9, at 112, all so held. However, the Military Tribunals which heard the *Justice Case,* 3 TRIALS OF WAR CRIMINALS, *supra* note 9, at 956, and the *Einsatzgruppen Case,* 4 TRIALS OF WAR CRIMINALS, *supra* note 9, at 499, held otherwise.

72. For the territorial limitations placed on the International Tribunal for Rwanda, *see supra* note 15. Article 7 of that Tribunal's Statute sets the temporal limits of jurisdiction as the period beginning on 1 January 1994 and ending on 31 December 1994.

73. It should be noted that the Secretary-General did not consider it necessary to include in the Statute of the International Tribunal for the Former Yugoslavia a provision concerning the applicability or non-applicability of any statute of limitations. However, a provision with respect to limitations of time would be appropriate for an international criminal court of general jurisdiction. There is no such provision in the ILC Draft Statute.

74. United States Army, General Orders No. 100, 24 April 1963; LEVIE, *supra* note 7, at 529, S32.

75. JAMES F. WILLIS, PROLOGUE TO NUREMBERG 130 (1982). After the Allies refused further participation in the Leipsig Trials, the Germans continued to conduct hundreds of such trials, all of which concluded with the acquittal of the accused. This did not stop the French from subsequently trying many of these same individuals, usually *in absentia.*

76. PETER PADFIELD, DONITZ: THE LAST FUEHRER 428 (1984).

77. LEVIE, *supra* note 7, at 141. In any event, there is considerable doubt that the doctrine of *non bis in idem* precludes trials for the same offense by different sovereigns.

78. INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, *supra* note 12, at art. 10, para. 1, specifically prohibits a trial by a national court for an offense for which the accused has previously been tried by the International Tribunal for the Former Yugoslavia.

79. *See* S/G Report, *supra* note 12, at para. 66(a).

80. Rule 12 of the Rules of Procedure and Evidence adopted by the International Tribunal for the Former Yugoslavia, *supra* note 18, provides that, "Subject to Article 10(2) of the Statute, determinations of national courts are not binding on the Tribunal." This, however, adds nothing to the Statute.

81. Article 42 of the ILC Draft Statute, *supra* note 14, adopts the provisions of Article 10 of the Statute of the International Tribunal for the Former Yugoslavia with some minor variation. It is, therefore, subject to the same infirmities.

82. An oddity of this Rule is that where a Trial Chamber makes such a request, it is disqualified from taking further proceedings in the matter.

83. Rule 13 is the reverse of the coin. Where an individual has been tried by the International Tribunal for the Former Yugoslavia and proceedings are thereafter instituted against him in a national court, a Trial Chamber, following the procedure set forth in Rule 10, *mutatis mutandis,* will request the national court to discontinue its proceedings; and, if it fails to do so (presumably within sixty days), the President of the Tribunal may so report to the Security Council.

84. Article 14 of the Statute of the International Tribunal for Rwanda, *supra* note 15, provides that the Tribunal shall adopt the rules of procedure and evidence already adopted by the International Tribunal for the Former Yugoslavia "with such changes as they deem necessary."

85. *See supra* note 18. Article 19 of the ILC Draft Statute would also authorize the International Criminal Court to draft rules for the functioning of that Court. However, the rules so drafted would be subject to the approval of a conference of the States Parties to that Statute.

86. *See* LEVIE, *supra* note 7, at 52-53, 259-262. In this respect, it is worthy of note that the rules of procedure proposed by the United States for the International Tribunal included the following provisions:

> 19.5(A) The Trial Chamber shall in general admit any relevant oral, written or physical evidence having a bearing on the issues before it, and shall exclude any evidence which in its opinion is of no value as proof. . . .
>
> (B) The Trial Chamber shall in general require the best evidence available.

United States, Draft Rules of Procedure for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia.

87. *See supra* note 18. Other, generally non-controversial, rules with respect to evidence will be found in Rules 90-98. They include such subjects as "False Testimony," "Confessions," "Judicial Notice," etc. Rule 96 (Evidence in Cases of Sexual Assault) provides that no corroboration of the victim's testimony is required, that consent shall not be allowed as a defense, and that prior conduct of the victim shall not be admitted as evidence.

88. The ILC Commentary, *supra* note 14, erroneously refers to Rules 89-106 of the Rules of the International Tribunal for the Former Yugoslavia. The reference should have been to Rules 89-98. Rules 99-106 are concerned with sentencing procedures.

89. *See supra* note 30. Additional items for the protection of an accused will be found in Rule 42 (Rights of Suspects during Investigation), Rule 43 (Recording Questioning of Suspects), Rule 45 (Assignment of Counsel), Rule 63 (Questioning of Accused), Rule 66 (Disclosure [of Evidence] by the Prosecutor), Rule 67 (Reciprocal Disclosure), Rule 68 (Disclosure of Exculpatory Evidence).

90. Bruce Zigaris, *Introductory Note,* 33 I.L.M. 484, 488 (1994).

91. *See supra* note 7. Article 8 of the Charter of the International Military Tribunal for the Far East, *supra* note 8, avoided this problem by providing for one Chief of Counsel and an Associate Counsel to be appointed by each nation which had been at war with Japan and which desired to appoint one.

92. LEVIE, *supra* note 7, at 54.

93. Article 16(2) of INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, *supra* note 12, properly provides that the Prosecutor "shall not seek or receive instructions from any Government or from any other source." An identical provision is in Article 13(4) of the ILC Draft Statute, *supra* note 14, and in Article 15(2) of the Statute of the International Tribunal for Rwanda, *supra* note 15. The latter Statute also provides that the Prosecutor of the International Tribunal for the Former Yugoslavia shall serve as the Prosecutor for the International Tribunal for Rwanda, with an additional Deputy Prosecutor and additional staff.

94. *See supra* note 14.

95. The provisions with respect to the Registry of the International Tribunal for Rwanda are the same as provisions contained in the Statute of the International Tribunal for the Former Yugoslavia, but, there are to be two separate Registries.

96. Article 18(1) of the Statute of the International Tribunal for the Former Yugoslavia provides that the Prosecutor may "initiate investigations *ex officio* or on the basis of information obtained from any source." Article 18(1) then goes on to list possible sources. The Commission of Experts created by S.C. Res. 780 (1992), 6 October 1992, 31 I.L.M. 1476 (1992), for the purpose of receiving and analyzing the evidence of

war crimes alleged to have been committed in Bosnia-Herzegovina, is not specifically mentioned. It may be considered that its Final Report (S/1994/674, 27 May 1994) and its voluminous records are included under the heading of "United Nations organs." They have already been made available to the Prosecutor.

97. On 8 November 1994, the prosecutor, Judge Richard J. Goldstone of South Africa, filed an indictment against Bosnian Serb Dusan Tadic, alleging murder, torture, forced evacuations, and gang rape. Judge Goldstone also requested a Chamber of the International Tribunal for the Former Yugoslavia to seek the custody of Tadic from the German authorities who were keeping him in confinement in Munich and had indicted him for genocide and murder. The Chamber did so, and the German authorities indicated an intention to comply with the International Tribunal's request. Associated-Press Dispatch, *Shrapnel, Snipers Killed in Central Sarajevo; War Crimes Tribunal Seeks Serb Accused of Murder, Torture,* CHI. TRIB., November 9, 1994, at 16. On 7 November 1994, the Prosecutor filed with the Tribunal an indictment against Dragan Nikolic who is alleged to have been a concentration camp commander and who is believed to be in Bosnia. It will be interesting to see the answer to a request for his custody made to the Serbian authorities in Bosnia. Roger Cohen, *Serb is First to Face Post-World War II War-Crimes Indictment,* N.Y. TIMES, Nov. 8, 1994, at A5, col. 1.

98. A proposal to permit the Prosecutor to file a complaint was rejected. *See* paragraph 4 of the International Law Commission's Commentary to Article 25, *supra* note 15.

99. Unfortunately, paragraph 95 of the Commentary, S/G Report *supra* note 12, does not give us a reason for this provision as it merely paraphrases the Statute's provision.

100. Rule 47 of the Rules of Procedure and Evidence adopted by the International Tribunal for the Former Yugoslavia, *supra* note 18, provides the method for the review of an indictment; Rule 28 provides that in July of each year the President of the Tribunal shall assign for each month of the next calendar year a Judge of a Trial Chamber to review the indictments.

101. *See* Report of the Working Group, arts. 10(3), 32, 33 I.L.M. 258, 260, 274 (1994).

102. ILC Draft Statute, *supra* note 14.

103. *See* LEVIE, *supra* note 7, at 238-250. While a number of individuals wanted for trial did manage to reach sanctuary in several South American countries and even in the United States and Canada, in most such cases their whereabouts were not known for many years so no requests for custody were made.

104. *See, e.g.,* Article 88 of the 1977 Additional Protocol I, *supra* note 30, which contains such phrases as "subject to the rights and obligations established in the Conventions," "when circumstances permit," "they shall give due consideration," etc.

105. *See* the S/G Report, *supra* note 12, at paras. 23 & 125.

106. In paragraph 126 of the S/G Report, *supra* note 12, the Secretary-General takes the position that such an order "shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations."

107. When World War II in Europe was approaching its conclusion, the United States drafted a proposed surrender agreement to be submitted to the Germans. Concerning this draft the Soviet representative said:

> [T]he U.S. draft [is] acceptable except for paragraph VII which required the German authorities and people to cooperate in apprehending war criminals and making them available for trial. The Soviet government, he said, did not want a reference to war criminals in the document because the men who came to sign might themselves fall into this category and might, therefore, refuse to do business at all.

EARL ZIEMKE, THE UNITED STATES ARMY IN THE OCCUPATION OF GERMANY 112 (1975). It is inevitable that the officials negotiating the final cease fire in the former Yugoslavia will seek to include some type of amnesty provision in that document. There are those who believe, with considerable justification, that including any such provision will constitute a major setback for the future of the United Nations.

108. *See supra* note 14.

109. This article provides that extradition would be "to a requesting State" rather than to the International Criminal Court. Paragraph 5 of the ILC's Commentary to its Article 21 and paragraphs 1 and 2 of the Commentary to its Article 54, *supra* note 14, explain that this provision was intended to cover instances where the custodial State has not accepted the jurisdiction of the International Criminal Court over the crime alleged.

110. While paragraph 108 of the Commentary contained in the S/G Report, *supra* note 12, attributes this latter requirement "to the particular nature of the crimes committed," the protection of victims and witnesses (and of the accused) has also been recognized as a requirement in Article 43 of the ILC Draft Statute, *supra* note 14. Rules 69 and 75 of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia, *supra* note 18, contain additional provisions aimed at protecting victims and witnesses. All of these Rules will also apply to the International Tribunal for Rwanda. *See supra* note 84.

111. The 1945 London Charter, *supra* note 7, at art. 12, authorized trials in the absence of the accused and one accused, Martin Bormann, was so tried. There is no such provision in the Statute of the International Tribunal for the Former Yugoslavia and the right of the accused "to be tried in his presence" would appear

to negate the possibility of trials *in absentia*. *See* Commentaries of the S/G, *supra* note 12, at para. 101. Article 41(1)(d) of the ILC Draft Statute, *supra* note 14, gives the accused the right "to be present at the trial." Article 37(1) thereof states that "[a]s a general rule, the accused should be present during the trial." (*See* the lengthy Commentary on this matter, *supra* note 14). However, Article 37(2) authorizes the Trial Chamber to proceed with a trial in the absence of the accused where such absence is due to certain specified actions on his part.

112. These rights are not quite as well set forth as in Article 75(4) of the 1977 Additional Protocol I, *supra* note 30. They are extracted from Article 14 of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967).

113. The International Law Commission apparently expects that the International Criminal Court will likewise adopt rules on this subject as no provisions with regard thereto are included in its Draft Statute.

114. The Italian proposal for an International Tribunal would have required the International Tribunal for the Former Yugoslavia to "apply the penalties provided for by the criminal law in force at the time of the commission in the State in whose territory the crime was committed." S/25300, 17 February 1993, Annex I, art. 7(1). While there is considerable merit to this proposal, in view of the fluid situation in the territory of the former Yugoslavia its adoption might have caused some difficulties.

115. Rule 101 of the Rules of Procedure and Evidence promulgated by the International Tribunal for the Former Yugoslavia, *supra* note 18, lists the factors to be taken into consideration by the Tribunal in determining the sentence to be imposed. Article 47 of the ILC Draft Statute, *supra* note 14, also authorizes the imposition of imprisonment, up to life. Paragraph 1 of the Commentary to that article states flatly that "[t]he Court is not authorized to impose the death penalty." *Id* at Commentary, art. 47, para. 1. As a member of the Security Council for this year Rwanda voted against the creation of the International Tribunal for Rwanda because that Tribunal would not be able to impose the death penalty while Rwandan courts, trying lesser criminals, would be doing so. Julia Preston, *Tribunal Set on Rwanda War Crimes; Kigali Votes No on U.N. Resolution*, WASH. POST, Nov. 9, 1994, at A44, col. 1.

116. Article 47 of the ILC Draft Statute, *supra* note 14, also authorizes the imposition of fines and provides for the disposition of fines so imposed and collected.

117. Rule 105 of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia, *supra* note 18, elaborates on this provision of its Statute. The previous draft of the ILC Draft Statute also provided for restitution orders but such a provision was omitted from the 1994 draft. Paragraph 3 of the Commentary to Article 47 of the ILC Draft Statute, *supra* note 14, indicates that it was considered that such a matter would be more appropriate for a separate civil proceeding.

118. If several States have notified the Security Council of their willingness to accept for imprisonment persons convicted and sentenced by the International Tribunal for the Former Yugoslavia, the Tribunal is to designate the State in the prison of which the convicted person will be confined. There is no indication in the Statute as to how, and to what extent, reimbursement will be made to the imprisoning State for the expenses incurred in the confinement of persons convicted and sentenced by the Tribunal. Presumably, this will be negotiated by the Secretary-General and the State concerned.

119. Rule 125 of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia, *supra* note 18, sets forth the criteria to be employed by the Tribunal for granting pardon or commutation of sentence. (Inasmuch as "pardon" normally refers to executive clemency and is always available, with no qualifying requirements, the term *"parole"* would have been more appropriate than the term "pardon"—unless it is considered that the Tribunal will be acting in an executive, rather than a judicial, capacity. Article 60 of the ILC Draft Statute, *supra* note 14, refers to "pardon, parole or commutation of sentence").

120. *See supra* text accompanying note 17.

121. Paragraph 117 of the Commentary, S/G Report, *supra* note 12, states that "the Prosecutor should also be entitled to initiate appeal proceedings on the same grounds." Again, there is no indication as to whether this means that he may appeal an acquittal. Rule 99 of the Tribunal's Rules of Procedure and Evidence, *supra* note 18, appears to assume that he may do so. After providing for the immediate release of an accused who has been acquited, that Rule states:

> (B) If, at the time the judgment is pronounced, the Prosecutor advises the Trial Chamber in open court of his intention to file notice of appeal pursuant to Rule 108, the Trial Chamber may, at the request of the Prosecutor, issue a warrant for the arrest of the accused to take effect immediately.

Id. In addition, Rule 118 refers to the possible absence of the accused when the appellate judgment is delivered, he "having been acquitted on all charges."

122. Article 50 of the ILC Draft Statute, *supra* note 14, is to the same effect. Rule 115 of the International Tribunal for the Former Yugoslavia, *supra* note 18, covers the use of new evidence during the course of an appeal.

123. Rules 107 to 118 of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia, *supra* note 18, amplify the provisions of the Statute with respect to appellate proceedings.

XXIII

Was the Assassination of Abraham Lincoln a War Crime?

Dr. Mudd and the Lincoln Assassination: The Case Reopened 213 (John P. Jones ed., 1995)

There does not appear to be any dispute about the following facts concerning the assassination of President Abraham Lincoln: that on 14 April 1865, while sitting in a box at Ford's Theater in Washington, D.C., watching a performance of "Our American Cousin," Lincoln was shot and killed by John Wilkes Booth; that in jumping from the box to the stage (where he delivered the *sic semper tyrannis* pronouncement) one of Booth's spurs caught on a flag decorating Lincoln's box with the result that he fell and broke his leg; that despite this he was able to escape from the theater and from Washington; that he was later joined in his flight by David E. Herold; that Dr. Samuel Mudd, a Booth acquaintance living in Maryland, treated Booth's leg and provided him with a makeshift crutch; and that all this occurred five days after Lee's surrender to Grant at Appomattox.

From that point on there is little agreement on the facts[1]—and even less on the applicable law. However, as to some of the facts which are disputed, there is really no basis for argument. For example, it is sometime argued that with Lee's surrender the Civil War (or the War Between the States) came to an end. That is not so. Lee had merely surrendered the Army of Northern Virginia. The Confederate States of America had other armies in the field, armies which continued to fight, armies which did not surrender until well after the date of the assassination.[2] Moreover, because of the presence of thousands of Confederate sympathizers in Washington, martial law had been declared for that city, which was fortified and heavily guarded by Union troops, and that status still existed on 14 April 1865, when the assassination took place.

The current manual on the law of war of the United States Army defines a war crime as "a violation of the law of war by any person or persons, military or civilian."[3] Adopting this definition, the sole question that this article will attempt to answer is: Was the assassination of Abraham Lincoln by John Wilkes Booth (and any co-conspirators) a violation of the law of war and, hence, a war crime? To refine our discussion even further: Is the murder of an individual

committed in wartime by one or more individuals of the same nationality as the victim a war crime?

If the answer to these questions is in the affirmative, under the law of war a military commission would unquestionably have jurisdiction to try the accused persons, including Dr. Samuel Mudd, brought before it charged with such an offense. If the answer to these questions is in the negative, the question of the jurisdiction of a military commission becomes one of constitutional and national law which is beyond the purview of this discussion.[4]

For our purposes we will assume the worst case for the accused: 1) that the evidence established that there was a conspiracy to assassinate President Lincoln; 2) that the eight individuals convicted by the military commission on 30 June 1865, including Dr. Samuel Mudd, as well as others who were not charged, were parties to that conspiracy;[5] 3) that all of the conspirators charged, being residents of the District of Columbia or of the State of Maryland, were nationals of the Union; 4) that, nevertheless, all of the conspirators were strong supporters of the Confederate cause; and 5) that the conspiracy to assassinate Lincoln was motivated by a desire on their part to help that cause.[6]

The charge with respect to which the military commission opened its hearings on 9 May 1865, and to which the eight accused pleaded "Not Guilty" on the following day, alleged that they "maliciously, unlawfully and traitorously" combined, confederated, and conspired to kill and murder Abraham Lincoln and others.[7] There is no allegation that their acts were in violation of the law of war. The wording of the charge itself demonstrates that the prosecution considered the offense charged to be a conspiracy to commit treason by murdering the President and his successors-to-be and that it did not consider this to be a war crime.[8] As the present author has said elsewhere:[9]

> There are a number of actions which, while they are wartime criminal offenses and are punishable by the injured belligerent, do not come within any definition of war crimes. Thus, while there is a wide-spread belief that espionage and treason are violations of the laws and customs of war and are, therefore, war crimes,[10] this is not so.[11] International law does not forbid espionage and treason; national laws do.[12]

Presumably, the accused, Union citizens, assumed their acts of assassination would in some manner benefit the Confederate cause, even at that late date in the war. Their acts were, therefore, traitorous—but, as it has just been shown, treason is not a violation of the law of war, and it is not a war crime.

The post-World War II trials in which Germans tried Germans, Austrians tried Austrians, Hungarians tried Hungarians, etc., were not true war crimes trials. For the most part they were collaborationist (treason) cases and, in many cases, prosecuted misuse or abuse of power. Nor were the euthanasia cases or

the concentration camp cases (involving actions which took place prior to, and after, 1 September 1939, the official date of the beginning of World War II in Europe), which were tried by the Germans, true war crimes cases. They were violations of German criminal law, which had existed at the time of the offenses, but which, for obvious reasons, had not been enforced by Nazi officials.[13]

In the Nordhausen Concentration Camp case, the review of the case contains the following statement:

> For an illegal act to be a war crime certain elements must be present, viz., (1) the act must be a crime in violation of international law; (2) there must be a disparity of nationality between the perpetrator and the victim; and (3) the criminal act must have been committed as an incident of war.[14]

These elements were not present in the trial of those alleged to have been parties to the conspiracy to assassinate Abraham Lincoln. The act charged was not a violation of international law; there was no disparity of nationality between the persons charged as perpetrators and the victim; and it is extremely doubtful that the assassination of Lincoln may be considered to have been an incident of the war. Therefore, it was not a war crime.

Proponents of the argument that the law of war governed the assassination of Abraham Lincoln, a Union citizen, by those who were likewise Union citizens, will find support in the trial of Mariano Uyeki,[15] a case for which the present author can find no justification:

> Mariano Uyeki was born in 1924 in Iloilo, Panay, the Philippines, of Japanese parents. When the war broke out in 1941 he apparently suffered at the hands of his Filipino schoolmates because he was pro-Japanese and it was alleged that on 10 May 1942, after the Japanese occupation of Panay, and without any justification, he shot and killed a fellow Filipino teenager. There was some evidence at that period he was acting as an interpreter for the Japanese and that he was wearing at least parts of a Japanese Army uniform. However, he was not conscripted into the Japanese Army until October 1944. He became a prisoner of war on 1 September 1945. Early in 1946 he was tried for the murder by a United States Military Commission. He was convicted and sentenced to death. That conviction was vacated because "the validity of the proceedings is faulty." Unfortunately, there is no explanation of the basis for that statement. He then made an application to the Supreme Court of the Philippines for a writ of habeas corpus, claiming that he was a Filipino citizen and that the United States Military Commission had no jurisdiction to try him. His application was denied on the ground that even if he had originally been a national of the Philippines, he had forfeited that nationality by rendering military service to the Japanese Government. This was not a decision that the military commission had jurisdiction to try him, it was a decision that the Supreme Court of the Philippines had no jurisdiction to rule on the jurisdiction

> of the United States court because he was not a citizen of the Philippines. He was retried by another United States Military Commission in April 1946 and was again convicted and sentenced to death.[16]

Concerning this case the present author went on to say:

> When the offense was committed in 1942, it was a matter of the murder of one (pro-American) Filipino civilian by another (pro-Japanese) Filipino civilian. It was a violation of the criminal law of the Commonwealth of the Philippines. Surely, this was a case for the courts of the Philippines and not a war crime for trial by a United States Military Commission. Even though the accused may have lost his Filipino nationality in 1944, upon entering the Japanese Army, and even though the Philippines were not yet fully independent, it did have its own fully-developed criminal justice system. It is difficult to find a basis for the jurisdiction of the United States military commission for this offense committed in 1942. Regrettably, no application for a writ of habeas corpus was made to the United States Courts.[17]

In other words, it is not believed that motive alone can convert an offense which is a violation of national law into one which is a violation of international law. Had Booth and his fellow conspirators been disappointed office seekers, the assassination of President Lincoln would certainly not have been a war crime, and the fact that they acted as they did because of their political motivation, because of their desire to support the Confederacy, does not convert a common law national crime into an international crime.

The conclusion is reached that the assassination of President Abraham Lincoln by John Wilkes Booth and his fellow conspirators was not a violation of the law of war and, therefore, was not a war crime, but was a politically motivated, treasonous act committed by Union citizens in the hope that it would help the Confederate cause. Accordingly, even if we assume that the evidence supported Dr. Mudd's conviction of conspiracy to commit treason and murder under national law, he was properly convicted only if a trial by military commission at that time and place complied with the constitutional and statutory law of the United States.

Notes

1. *See* OTTO EISENSCHIML, WHY WAS LINCOLN MURDERED? (1937) (discussing one extreme, and perhaps discredited, version of the facts); WILLIAM HANCHETT, THE LINCOLN MURDER CONSPIRACIES (1983) (containing a 15-page bibliography and more scholarly discussion on the subject); *see also* LOUIS J. WEICHMAN, A TRUE HISTORY OF THE ASSASSINATION OF ABRAHAM LINCOLN AND THE CONSPIRACY OF 1865 (Floyd H. Risvold ed., 1975) (setting forth the contents of a number of interesting documents).

2. For example, Confederate General Joseph E. Johnston did not surrender to Union General William T. Sherman until 18 April 1865. THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, ser. I, vol. XLVII, pt. III, 243-45 (Washington, GPO 1895).

General Sherman was reprimanded for giving General Johnston what were considered to be excessively favorable conditions for his surrender and the Federal Government repudiated the surrender agreement! *Id.* at 301-02, 334-36, 345.

3. DEPARTMENT OF THE ARMY, FIELD MANUAL FM27-10, The Law of Land Warfare ¶ 499 (1956). Much of this manual was the work of the late Richard R. Baxter, subsequently the United States Judge on the International Court of Justice.

In amplification of the foregoing the present author has stated:

> Anyone—military or civilian, man or woman, enemy nationals, allied nationals, and neutral nationals—may commit a war crime and may be tried and punished for the criminal act.

HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES 431 (1993). No national of the United States was tried by a United States military commission for a war crime during or after World War II although a considerable number were tried by courts-martial for violations of the Articles of War, then the Army's penal code; and many of those trials would have been considered to be war crimes trials if they had been tried by the enemy. For such activities during Vietnam, see W. Hayes Parks, *Crimes in Hostilities* (pt. 1 & conclusion), 60 MARINE CORPS GAZETTE 16 (Aug. 1976), 60 MARINE CORPS GAZETTE 33 (Sept. 1976).

4. There were a number of trials by military commissions after the Civil War which, unquestionably, involved war crimes, primarily the maltreatment of Union prisoners of war held in the South. The most famous of these was the trial of Captain Henry Wirz, who had commanded the notorious prisoner-of-war camp at Andersonville, Georgia. *See* H.R. EXEC. DOC. No. 23, 40th Cong., 2d Sess. (1867); 8 AMERICAN STATE TRIALS 657 (John Davison Lawson ed., 1918). For a different type of war crime, see T.E. Hogg *et al.*, Gen. Orders No. 52, Dep't of the Pac. (June 27, 1865) *in* THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, ser. II, vol. VIII, 674-81 (Washington, GPO 1899).

5. Of course, Booth must be added to this group. He was not a defendant at the trial because, while being pursued by the Union authorities, he had been shot and killed in Garrett's barn, near Bowling Green, Virginia. John Surrat, another alleged conspirator, had left the country and, not having been apprehended and returned to the United States until a considerable period thereafter, could not be tried with those whom we are assuming to be his fellow conspirators. He was tried in a civil court in 1867, the trial resulting in a hung jury. He was not retried.

6. It has often been charged that the conspiracy to assassinate President Lincoln was approved by Jefferson Davis and members of the Confederate Cabinet. In fact, the charge (or indictment) includes their names and the specification includes a statement to the effect that the conspirators were "incited and encouraged" by Davis and other well known Confederates. However, no substantial evidence of their involvement was adduced at the conspiracy trial. Davis was taken into Union custody on 10 May 1865, after the trial was under way, and he was not brought before the Commission. He was released from custody in May 1867 without having been tried for any offense.

7. BENN PITMAN, THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS 18-21 (New York, Moore, Wilstach & Baldwin 1865) *(facsimile ed.* 1954). This is the courtroom testimony as recorded by Pitman, the official court reporter.

8. In *Ex parte* Quirin, 317 U.S. 1 (1942), where unlawful belligerents, including one individual who claimed to be a citizen of the United States, had entered this country for purposes of espionage and sabotage, the Court stated that "even when committed by a citizen, the offense [entering the country for the purpose of committing sabotage while wearing civilian clothes] is distinct from the crime of treason . . . since the absence of uniform essential to one is irrelevant to the other." *Id.* at 38.

In other words, unlawful combatants wearing civilian clothes and bent on sabotage are in violation of the law of war; inasmuch as only citizens can commit treason, their attire at the time of the commission of the act is immaterial, and there is no unlawful combatancy involved.

9. LEVIE, *supra* note 3, at 3.

10. *See, e.g.*, Iu. A. Reshetov, *International Criminal Responsibility of Individuals for International Crimes, in* THE NUREMBERG TRIALS AND INTERNATIONAL LAW 167 (George Ginsburgs & V.N. Kudriavtsev eds., 1990); Jacob Berger, *The Legal Nature of War Crimes and the Problem of Superior Command*, 38 AM. POL. SCI. REV. 1203, 1204 (1944); W.L. Ford, *Resistance Movements in Occupied Territory*, 3 NETH. INT'L L. REV. 355, 372 (1956). Ford appears to take the position that neither spying nor sabotage is a violation of the law of war. Sabotage by legal combatants is not a violation of the law of war. Sabotage by illegal combatants is such a violation. Roling says: "Both in the case of espionage and in that of 'risky war acts' the term 'war crimes' is used metaphorically. This concept should be kept for breaches of the laws and customs of war, for violations of the international law concept of *jus in bello*." B.V.A. Roling, *Supranational Criminal Law in Netherlands Theory and Practice*, 2 INT'L L. IN THE NETH. 161, 194 (1979).

11. With respect to espionage and war treason. War Office, THE LAW OF WAR ON LAND ¶ 624 (Sir Hersch Lauterpacht, rev., 1958), states rather conservatively that "the accuracy of the description of such acts as war crimes is doubtful." *See also* UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 487 (1948).

12. Nathan Hale, Major John André, Mata Hari, Richard Sorge were not war criminals. They did not violate the laws and customs of war; each of them violated the laws relating to espionage of the enemy of the belligerent for which he or she acted—and they were punished under those laws. The United States Supreme Court erred in *Ex parte* Quirin when it stated that spies are "offenders against the law of war." 317 U.S. at 31. Similarly, Quisling, Pétain, Laval, Lord Haw Haw, Kawakita, Tokyo Rose, etc., were not war criminals. They did not violate the laws and customs of war, they were collaborationists who violated the treason laws of their own countries—and they were punished under those laws.

13. The trials of Germans by German courts for membership in Nazi organizations determined to have been criminal in nature were mandated by the Charter of the International Military Tribunal which sat in Nuremberg and by the judgment of that Tribunal.

14. *See* LEVIE, *supra* note 3, at 283. This case was officially known as *The Trial of Kurt Andree.* National Archives, Records Group 338, File M 1079, Rolls 1-16. It was tried by a United States military commission at Dachau, Germany, in December 1947.

15. Archives of the Hoover Institution for War, Peace, and Revolution, U.S. Armed Forces W. Pac, File CSUZXX 191-A, Box 2, LEVIE, *supra* note 3, at 236.

16. LEVIE, *supra* note 3, at 236.

17. *Id.*

XXIV

War Crimes in the Persian Gulf

1996 Saint Louis-Warsaw Transatlantic Law Journal 153[*]

I. Introduction

Events since the cessation of the hostilities during the Gulf Crisis have demonstrated conclusively the mistake that was made in not allowing the forces of the Coalition of Nations, operating in the Persian Gulf in 1990-1991, to occupy Iraq in its entirety. The Iraqi Army was in full retreat with thousands of its members surrendering. Saddam Hussein and his aides could have been made prisoners of war[1] and they could have been put on trial for violations of international law, and particularly of the law of war.[2] Had this been done, there would have been no need for embargoes and no difficulty in searching for, and destroying, nuclear, chemical, and biological plants, weapons, and materials in Iraq.

This essay examines, in retrospect, whether a legal basis existed for the establishment of an International Military Tribunal to try Saddam Hussein and his aides for war crimes in the Persian Gulf. It argues that a legal basis for such a Tribunal existed and still exists. It will do so by first establishing the legal foundation for and jurisdiction of a war crimes tribunal in the Persian Gulf. It will then describe the substantive law that the Tribunal would apply. Finally, it will outline the substantive evidence of war crimes already available that could be presented before the Tribunal, including, but not limited to, violations of the rights of foreign and protected persons, other human rights violations, and environmental destruction and use of chemical and biological weapons.[3]

II. Legal Foundation For And Jurisdiction of a War Crimes Tribunal in the Persian Gulf

The provisions of the 1945 London Charter which created the International Military Tribunal (IMT)[4] were the foundation for most of the war crimes

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* An earlier, and necessarily much less detailed, version of this article was presented at a Conference entitled Crisis in the Gulf: Enforcing the Rule of Law, sponsored by the Standing Committee on Law and National Security of the American Bar Association, at the International Club, Washington, D.C., on Jan. 30-31, 1991. The author also made a presentation on the subject at a hearing on *War Crimes: Hearing before the Subcommittee on International Law, Immigration and Refugees of the Committee on the Judiciary of the House of Representatives*, 102d Cong., 1st Sess., (1991).

directives promulgated in Europe after World War II,[5] and they were repeated almost verbatim in the corresponding activity in the Far East.[6] There was, therefore, adequate precedent for the members of the Coalition of Nations involved in the Gulf War to draft and become Parties to an agreement such as the London Charter. This agreement would contain provisions for the establishment and procedure of an International Tribunal similar to, but not necessarily identical with, those contained in the London Charter. Moreover, we now have the additional precedents of the establishment, by the Security Council of the United Nations, of an International Tribunal for the Former Yugoslavia,[7] and an International Tribunal for the trial of persons accused of having committed war crimes in Rwanda, or in neighboring States by Rwandans, during the year 1994.[8] Therefore, in its 1991 cease-fire Resolution, the Security Council might well have declared its intention to establish an International Tribunal for the trial of persons accused of having ordered or committed war crimes in Kuwait and in Iraq on and after August 2, 1990.[9]

There is one jurisdictional issue that would undoubtedly be raised by the defense if Saddam Hussein and other members of the Iraqi military were to be tried by an International Tribunal. Article 63 of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War[10] provided that any sentence adjudged against a prisoner of war must be "by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the Detaining Power."[11] In the famous *Yamashita Case,*[12] the United States Supreme Court held that this provision did not apply to trials for pre-capture offenses (war crimes), but only to offenses committed while under the status of a prisoner of war. This decision was almost uniformly adopted by the courts of other countries trying war crimes cases after World War II.[13] When the 1949 Geneva Diplomatic Conference drafted the new version of the 1929 Convention,[14] its Article 102 included a provision similar to that contained in Article 63 of the 1929 version but ending with the phrase "and if, furthermore, the provisions of the present Chapter have been observed."[15] In addition, the Conference then drafted Article 85 of that Chapter which states, "[p]risoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."[16]

Undoubtedly, one purpose of this provision was to establish a rule contrary to that of the *Yamashita Case.*[17] That is, to make the provisions of Article 102 applicable to all trials of prisoners of war by a Detaining Power, whether the offense charged was alleged to have been committed prior to, or after, the accused became a prisoner of war.[18] The question which then arises is: Does this preclude the trial of a prisoner of war for war crimes by an internationally constituted tribunal? The answer would appear to be in the negative as such a

trial would not be "prosecuted under the laws of the Detaining Power," but under international law. Furthermore, the accused would not be tried by a Detaining Power but by an international entity. While the Commentary on the 1949 Geneva Prisoner of War Convention, prepared by the International Committee of the Red Cross, advances a contrary interpretation of that phrase, its reasoning is not particularly convincing.[19] Further, the Commentary states that Article 129 of the Convention, an article concerned specifically with the punishment of "grave breaches" of the Convention, "does not exclude handing over the accused to an international criminal court whose competence has been recognized by the Contracting Parties."[20]

It appears that if a Detaining Power elects to try a prisoner of war pursuant to its national law, for a war crime committed prior to capture, it must do so "by the same courts according to the same procedure as in the case of a member of the armed forces of the Detaining Power."[21] However, if the trial is by an International Tribunal whose members have been elected by the Security Council and General Assembly of the United Nations, or have been selected by the members of a Coalition or by the Parties to a convention on the subject, such a Tribunal would have jurisdiction despite the above-mentioned provisions of the 1949 Geneva Prisoner of War Convention. The applicable rules of procedure and evidence could be included in the Charter of the Tribunal, as in the case of the International Military Tribunal which sat in Nuremberg, or they could be drafted and adopted by the members of the Tribunal, as in the case of the International Tribunal for the Former Yugoslavia.[22]

III. The Substantive Law of the Tribunal

Having established that our International Tribunal would have jurisdiction to try individuals for war crimes alleged to have been committed during the Persian Gulf Crisis of 1990-1991, and assuming that its substantive provisions, like the Statute of the International Tribunal for the Former Yugoslavia, are based on Article 6 of the London Charter,[23] the provisions of that article would be applicable to the actions of Saddam Hussein and his military commanders.

A. Article 6(a): Crimes Against Peace

Article 6(a) of the London Charter states:

> *Crimes against peace*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.[24]

A number of writers have urged that in the post World War II trials this provision constituted the creation of an offense *ex post facto*.[25] This was also the contention of those accused at Nuremberg and Tokyo, as well as in other cases where the accused were charged with waging aggressive war. Nevertheless, both the International Military Tribunal (IMT)[26] and its counterpart in the Far East, the International Military Tribunal for the Far East (IMTFE)[27] ruled that such a crime already existed in international law. Professor B. V. A. Röling, the Dutch judge on the IMTFE, dissented from this ruling.[28] However, in an article written some years later he stated that the IMTFE had:

> recognized the legal existence of the crime against peace as defined in the Charter. In so doing it contributed to the recognition of this crime. Its decision, combined with later actions taken within the United Nations, confirmed the crime against peace as a crime under international law.[29]

Thus, it appears that since at least 1945, if not before, the waging of aggressive war, as well as the waging of war in violation of international treaties, has been a violation of international law and a war crime. Recognizing the severity of this offense the IMT said, "[t]o institute a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[30]

B. Application of Article 6(a) and the Law of Aggression Against Saddam Hussein.

In examining whether Saddam Hussein's actions fall within the purview of Article 6(a),[31] it is necessary to refer to Article 5 of the 1945 Pact of the League of Arab States.[32] Both Iraq and Kuwait were original Parties to this treaty, Article 5 of which specifically prohibits the use of force for the resolution of disputes between member states. Better known, of course, are the provisions of Article 2(4) of the United Nations Charter which require members (and both Iraq and Kuwait are members) to refrain "from the threat or use of force against the territorial integrity or political independence of any state."[33] After many decades of debate, that provision has been amplified by the General Assembly resolution entitled Definition of Aggression.[34] This Resolution provides in its Article 1 that "[a]ggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State . . ."[35] but also specifies, in Article 3(a), that the following qualify as acts of aggression:

> The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof.[36]

Moreover, Article 5(2) of the resolution states that "[a] war of aggression is a crime against international peace. Aggression gives rise to international responsibility."[37] It seems indisputable that Saddam Hussein has been guilty of this international crime and that he could have been indicted and tried therefor. In addition, it is equally clear that he has been guilty not only of planning, preparing, initiating, and waging a war of aggression against Kuwait, but also that his actions have been in violation of international treaties and agreements to which both Iraq and Kuwait were Parties.

Article 6(b) of the London Charter states:

> *War crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.[38]

Both Article 147 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War[39] and Article 130 of the 1949 Geneva Prisoner of War Convention,[40] to which Iraq and Kuwait (as well as most countries of the world) are Parties, list as "grave breaches" almost all of the acts listed in Article 6(b) of the London Charter, as well as a number of additional acts. Thus, a court trying war crimes cases today is even better supplied with specifications of substantive international criminal law than were the courts which tried those cases after World War II.

Iraqi troops invaded Kuwait on August 2, 1990.[41] United States military forces were ordered to the Persian Gulf five days later, on August 7, 1990.[42] Saddam Hussein announced the annexation of Kuwait on August 8, 1990.[43] After World War II the contention was frequently advanced that because an invaded country had been incorporated into Germany, the law of war, and specifically the law of military occupation, no longer offered protection to the inhabitants of the occupied territory. Concerning this contention the IMT said:

> In the view of the Tribunal it is unnecessary in this case to decide whether this doctrine of subjugation, dependent as it is upon military conquest, has any application where the subjugation is the result of the crime of aggressive war. The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners. . .[44]

The subjugation of Kuwait by Iraq was, without question, "the result of the crime of aggressive war"—but was there an army in the field, opposing Iraq, on August 8, 1990? The answer to that question must be in the negative. Kuwait

had been overrun and its army had disintegrated. Undoubtedly, Saudi Arabia had mobilized its armed forces prior to this date, and had an army in the field; but that army was mobilized solely for self-defense against an Iraqi attack. It was not to "restore [Kuwait] to its true owners." While it might be urged that the United States forces (and those of the other nations which soon assembled in Saudi Arabia, on the Iraqi border) were "an army in the field," at that time those forces lacked both national and international authority to restore Kuwait to the Kuwaitis. This raises the issue which the IMT felt it unnecessary to decide: Does the doctrine of subjugation apply where the subjugation is the result of a criminal war of aggression? Or, as in the context of this particular problem, does the law of war protect civilian inhabitants (and prisoners of war) of a country victimized by a war of aggression and formally annexed by the aggressor?

The doctrine applied by the IMT, that there could be no annexation of occupied territory while there was an opposing army in the field, was based upon the principle that any annexation announced before the conflict had fully terminated and peace had been restored was unlawful. Today, Article 5(3) of the Definition of Aggression states that "[n]o territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful."[45] While it is true that resolutions of the General Assembly of the United Nations are not binding, it would certainly appear that the provision with respect to aggression quoted above is an expression of present-day customary international law. In other words, it is a principle of customary international law that there can be no lawful annexation resulting from an aggressive war; *ergo* Iraq's annexation of Kuwait was unlawful. Moreover, Security Council Resolution 662, adopted on August 9, 1990, stated that the Security Council, "[*d*]*ecides* that the annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void."[46] In this Resolution, the Security Council also decided "to continue its efforts to put an early end to the *occupation*."[47]

If the annexation was unlawful, then the status of Kuwait continued to be one of military occupation, a status which began on August 2, 1990, and which continued thereafter despite Iraq's unlawful attempt to change it to one of ownership by annexation on August 8, 1990. Moreover, Article 47 of the 1949 Geneva Civilians Convention provides,"[p]rotected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention . . . by any annexation by the latter [Occupying Power] of the whole or part of the occupied territory."[48]

Accordingly, it must be concluded that the annexation of Kuwait by Iraq was a nullity, and that subsequent to August 2, 1990, Iraq was bound by the law of war and, specifically, by the law of military occupation.

IV. Substantive Evidence of Iraqi Offenses

A. Violations of the Rights of Foreign Nationals and Protected Persons

The 1907 Hague Regulations[49] and the two 1949 Geneva Conventions referred to above, contain provisions which, as will be discussed later, were violated by the Iraqi army in Kuwait and in Iraq. The violations occurred both before and after the unlawful annexation. Convincing evidence of these offenses was collected and evaluated by the appropriate authorities during the course of, and after the hostilities.[50] Moreover, information with respect to numerous offenses against the law of war was available through the media, including the official Iraqi television, and from a report prepared by Amnesty International.[51]

When Iraq invaded Kuwait on August 2, 1990, there were many Americans and other foreign nationals in both Kuwait and Iraq. As these individuals were not allowed to leave Iraq, they had the status of "protected persons" and were entitled to all of the protections afforded by the 1949 Geneva Civilians Convention. Articles 48 and 35 thereof provide that protected persons "who are not nationals of the Power whose territory is occupied" have the right to leave the occupied territory, "unless their departure is contrary to the national interests of the State."[52] The exception was included primarily to enable a State to prevent neutral persons, who were important to its economy, from leaving the occupied territory. Its purpose was not to enable a belligerent to detain such individuals as hostages.[53] The United States nationals, among others, were not only compelled to remain in Kuwait and in Iraq in violation of Article 48, but they were held there as hostages. This was well publicized and verified by the returnees, and constituted a violation of Article 134 of the Geneva Civilians Convention. This Convention specifically prohibits the taking of hostages and Article 147 makes such action a "grave breach" of that Convention.[54] Moreover, these hostages were frequently forced to remain in military installations and armament factories (including those producing chemical weapons), in an effort to deter the Coalition armed forces from attacking these sites by air bombardment. This violated Article 28 of that Convention which specifically prohibits using protected persons "to render certain points or areas immune from military operations."[55]

There have been reports that thousands of persons, foreign, Kuwaiti, and Iraqi, who were in Kuwait as refugees from Iraq, were deported from Kuwait to Iraq. This was a violation of Article 49 of the 1949 Geneva Civilians Convention which prohibits "[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power . . ."[56] Furthermore, Article 147 provides that a violation of this provision is a "grave breach" of the Convention—a war crime.[57]

B. Other Human Rights Violations

In referring to the massive violations of human rights which occurred in Kuwait immediately after the Iraqi invasion and occupation of that country, the Amnesty International Report contains the following statement, "[t]hese include the arbitrary arrest and detention without trial of thousands of civilians and [Kuwaiti] military personnel; the widespread torture of such persons in custody; the imposition of the death penalty and the extrajudicial execution of hundreds of unarmed civilians, including children."[58]

Murder and torture are specifically prohibited by Article 32 of the 1949 Geneva Civilians Convention and both are listed among the "grave breaches" of Article 147. According to the Amnesty International Report, hundreds of extrajudicial executions were carried out.[59] Some of these were apparently occasioned by the refusal of the Kuwaiti citizens involved to pledge allegiance to Saddam Hussein. Civilians detained by the Iraqis were required to pledge such allegiance in order to obtain their freedom.[60] Article 45 of the 1907 Hague Regulations forbids compelling the inhabitants of occupied territory to swear allegiance to the hostile Power.[61]

The Amnesty International Report also indicates that:

> [W]idespread destruction and looting of public and private property was carried out. Most critical of these has been the looting of medicines, medical equipment and food supplies. The massive scale of destruction and looting which has been reported suggests that such incidents were neither arbitrary nor isolated, but rather reflected a policy adopted by the government of Iraq.[62]

These actions violated Article 23(g) of the 1907 Hague Regulations, which prohibits wanton destruction of property; Articles 46 and 56 thereof which protect private property and that of municipalities and institutions; and Article 47 of those Regulations, which prohibits pillage.[63] Article 53 of the 1949 Geneva Civilians Convention likewise prohibits the destruction and appropriation of real or personal property not justified by military necessity and Article 147 makes such destruction or appropriation a "grave breach" of that Convention.[64]

Iraqi television is reported to have shown two captured American airmen being paraded through the streets of Baghdad. It also conducted on-screen interviews of prisoners of war from the United States and other Coalition nations. Both of these actions were violations of Article 13 of the 1949 Geneva Prisoner of War Convention which specifically provides that prisoners of war must be protected against "intimidation and against insults and public curiosity."[65] Similar actions during World War II resulted in a number of convictions for violations of this aspect of the laws and customs of war.[66]

Moreover, in the first few interviews each of the prisoners of war looked battered and bewildered and made a statement favorable to Iraq—which would seem to indicate that at least some of the prisoners, if not all, had either been coerced by force or drugged.[67]

Iraq announced that it had placed prisoners of war in economic and scientific centers. As in the 1949 Geneva Civilians Convention, the 1949 Geneva Prisoner of War Convention, in its Article 23(1), specifically prohibits using the presence of prisoners of war "to render certain points or areas immune from military operations."[68]

War crimes trials conducted after World War II demonstrated that where there was a general pattern of violations of the law of war, it was the result of orders emanating from the top echelons of leadership—in this case, Saddam Hussein and his agents. It was on this basis that many of the higher-ranking Nazi officials were convicted of conventional war crimes. This rule of customary international law has now been incorporated into conventional international law. Article 29 of the 1949 Geneva Civilians Convention states, "[t]he Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred."[69] Articles 12(1) and 131 of the 1949 Geneva Prisoner of War Convention are to the same effect.[70]

No attempt has been made to list and discuss every war crime that may have been committed by Iraq. However, those that have been enumerated indicate an almost total disregard for the provisions of the customary and conventional law of war. When the Coalition captured its first Iraqi armed soldiers, the men who composed the anti-aircraft crews on the oil platforms off the coast of Kuwait, the United States informed the Iraqi Government that the Coalition would comply with the 1949 Geneva Prisoner of War Convention and that it expected the same of Iraq.[71] However, based upon the non-compliance by both sides during the Iran-Iraq War (1980-1988), it was undoubtedly realized that this Convention, as well as other law of war conventions, would be the subject of similar widespread violations by the Iraqis in this conflict.[72] Referring back to Article 6(b) of the London Charter, it will be found that with one or two exceptions (for example, the murder of persons on the high seas[73]), Saddam Hussein and his followers have substantially violated that provision.

C. Wanton Environmental Destruction

The Governments have been exceedingly slow in drafting law-of-war agreements, or even provisions, for protecting the environment.[74] Concerning Iraqi actions against the environment the following was found:[75]

> The Gulf was fouled when between seven and nine million barrels of oil were discharged into it by Iraq. In the desert, five hundred and ninety oil wellheads were damaged or destroyed: five hundred and eight of them were set on fire, and the remaining eighty-two were damaged in such a manner that twenty-five to fifty million barrels of oil flowed freely from them onto the desert floor. The result was total devastation of the fragile desert ecological system and the pollution of water sources critical to survival. . . .
>
> From 9 to 12 July 1991, the Government of Canada, in concert with the Secretary General of the United Nations, hosted a conference of international experts in Ottawa, Ontario, to consider the law of war implications of the environmental devastation caused by the Iraqis. There was general agreement that the actions cited constitute violations of the law of war, specifically:
>
> a. Article 23(g) of the Annex to the 1907 Hague Convention IV Respecting the Customs of War on Land of 18 October 1907, forbids the destruction of "enemy property unless imperatively demanded by the necessities of war;" and,
>
> b. Article 147 of the GC [1949 Geneva Civilians Convention], makes the "extensive destruction . . . of property, not justified by military necessity and carried out unlawfully and wantonly" a grave breach.[76]

Clearly, the oil well destruction by Iraq served no military purpose, but was designed to wreck Kuwait's future, carrying a scorched earth policy to the extreme.[77]

D. Use of Chemical and Biological Weapons

The use of chemical and biological weapons is worthy of attention. In 1925 a Protocol was drafted in Geneva prohibiting the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials, or devices. It also prohibits "the use of bacteriological methods of warfare."[78] Iraq is a Party to this Protocol as are most of the nations represented in the multilateral force which opposed Iraq.[79] Nevertheless, Iraq has used poison gas against Iran and against Kurdish and Shiite rebels in its own territory. It was apparently well supplied with this type of weapon and had threatened that in the event of hostilities by the Coalition forces it would use poison gas not only against the armed forces facing it, but also against Israel, which had played no part in the confrontation. While Iraq did fire a number of missiles against Israel, they had conventional warheads.

There are some claims that it did use gas or biological weapons during the hostilities. If proven that Iraq did so, this will be one more treaty Iraq will have

violated, and one more war crime or a crime against humanity to be charged against Saddam Hussein and his agents.

Article 6(c) of the London Charter contains the following definition of crimes against humanity:

> *Crimes against humanity*: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[80]

With respect to this category of offenses, the IMT said, "from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity."[81] If one substitutes 1990 for 1939 in that statement, it aptly describes the situation in Kuwait and, perhaps, in Iraq.

V. Conclusion

This essay has demonstrated that if custody of Saddam Hussein and the members of his Military Council could be obtained, they could be charged and tried for having committed crimes against peace, war crimes, and crimes against humanity during the Iraqi invasion of Kuwait. To do so would require some or all of the States which actively supported the actions against Iraq (or the Security Council of the United Nations) to reach an agreement under which a Tribunal would be established, evidence collected, charges made, and a trial, or trials, conducted.[82]

In any event, it is to be hoped that in the light of the experience in the Persian Gulf, and the problems that Saddam Hussein has caused in the implementation of the cease-fire resolution, should he or another military despot disturb the peace of the world at some future date, the international community will not commit the same mistake of not making him pay for his crimes.

Notes

1. Unfortunately, as so often happens, to have included a provision concerning trials for war crimes in the terms of the cease fire enunciated in U.N. Doc. S/RES/687 (1991), would undoubtedly have lengthened the period of hostilities. Eventually, this would have resulted in Saddam Hussein and other high ranking Iraqis seeking refuge in a country that would have granted them asylum and would have refused to try or extradite them as required by international agreements to which all of the States involved are Parties.

2. One eminent student of this area of international law has made a case for Saddam Hussein's assassination. Robert F. Turner, *Killing Saddam: Would It Be a Crime?*, WASH. POST, Oct. 7, 1990, at D1. Although the word "assassination" is inherently repulsive, this is not an idea that should be dismissed out of hand. Saddam Hussein was a uniformed member of the Iraqi Army and was, therefore, a legitimate target. Killing him during the course of hostilities would have been a legitimate act of war and not an assassination. During World War II the British in Africa mounted an unsuccessful operation in North Africa the sole purpose

of which was to kill German Field Marshal Rommel and his staff. In the Pacific, the United States mounted a successful operation aimed specifically at killing Japanese Admiral Yamamoto. (If the attempt to assassinate Hitler by members of the German resistance had been successful, World War II would have probably ended a year or so earlier and thousands of lives might have been saved at the cost of one life, which was already forfeited.)

3. One of the most extensive, if somewhat biased, reviews of the Persian Gulf Crisis of 1990-1991 can be found in GREENPEACE, ON IMPACT: MODERN WARFARE AND THE ENVIRONMENT, A CASE STUDY OF THE GULF WAR (1991) [hereinafter ON IMPACT]. For a broad, general view of the matter, *see* John N. Moore, *War Crimes and the Rule of Law in the Gulf Crisis*, 31 VA. J. INT'L L. 403 (1991). Moore properly concludes that, "[p]erhaps the most important reason for holding war crimes trials in the Gulf crisis is that we must bring deterrence home to totalitarian elites if we are to be most effective in avoiding aggressive war and human rights violations." *See id.* at 405. Perhaps, if there had been war crimes trials after the Gulf Crisis, the leaders of the various parts of the former Yugoslavia would have given more thought to compliance with the law of war in the conflict in Bosnia; *see also* Jordan J. Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking*, 31 VA. J. INT'L L. 351 (1991).

4. Charter of the International Military Tribunal attached to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 27 [hereinafter Charter of the International Military Tribunal]; HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES 549 (1993) [hereinafter WAR CRIMES]. The Charter was drafted by representatives of France, the Soviet Union, the United Kingdom, and the United States. The Agreement to which it was attached was subsequently adhered to by nineteen other nations. *See id.* at 51.

5. *See e.g.*, Allied Control Council Law No. 10, Dec. 20, 1945, 15 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 23 (1947) (hereinafter TRIALS OF WAR CRIMINALS); *see also* WAR CRIMES, *supra* note 4, at 558.

6. Charter of the International Military Tribunal for the Far East (IMTFE), Jan. 19, 1946, *as amended* Apr. 26, 1946, T.I.A.S. No. 1589, 4 Bevans 20, 27; WAR CRIMES, *supra* note 4, at 571. This Charter was issued by the Supreme Commander for the Allied Powers (SCAP), the post-World War II Military Governor of Japan, and was approved by the Far East Commission, the Allied body which was created to exercise overall political control of Japan during the Occupation.

7. Statute for an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1203 (1993).

8. International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and the Violations Committed in the Territory of Neighboring States, Between January 1, 1994, and December 31, 1994, U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598 (1994).

9. Certainly, this would have been well within its power under Chapter VII of the Charter of the United Nations. However, such a provision would have been anathema to the Iraqi regime, and might even have caused it to refuse to agree to the cease-fire. However, this would have lengthened the hostilities by only a matter of days.

10. 1929 Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343.

11. Of course, not every potential accused will be able to claim the status of prisoner of war. However, as noted in note 2, *supra*, Saddam Hussein and most of his aides did maintain a military status.

12. Application of Yamashita, 327 U.S. 1 (1946).

13. *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 413-14 (Jean S. Pictet ed., 1960) (hereinafter Pictet). The French *Cour de Cassation* held to the contrary, but not until 1950, when most war crimes trial programs, including that of the French, were all but completed. In recent years the French tried Klaus Barbie (a German, tried in 1987) and Paul Touvier (a Frenchman, tried in 1994) before civilian courts for crimes against humanity committed during World War II.

14. 1949 Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316; 75 U.N.T.S. 135 [hereinafter 1949 Geneva Prisoner of War Convention].

15. *Id.* art. 102, 6 U.S.T. at 3394, 75 U.N.T.S. at 212.

16. *Id.* art. 85, 6 U.S.T. at 3384, 75 U.N.T.S. at 202.

17. *See supra* note 12.

18. It is noteworthy that in Article 99 the draftsmen prohibited trials and punishment "for an act which is not forbidden by the law of the Detaining Power *or by International Law*." *See* 1949 Geneva Prisoner of War Convention, *supra*, art. 99, 6 U.S.T. at 3392, 75 U.N.T.S. at 210 (emphasis added.). As Article 85 contains

no reference to international law, it would appear that there was no intention on the part of the draftsmen to make its requirements applicable to trials under that law. *See* 1949 Geneva Prisoner of War Convention, *supra* note 14, art. 85, 6 U.S.T. at 3384, 75 U.N.T.S. at 202. Whether a national court trying a case involving a pre-capture offense is applying national or international law will frequently be a debatable matter.

19. Pictet, *supra* note 13, at 416-17. Pictet points out that the Italian Supreme Military Tribunal has held, in the *Case of Kappler*, 49 A.J.I.L. 96 (1955), that violations of the laws and customs of war are offenses against international law and not against the legislation of the Detaining Power. *Id.* at 426. Nevertheless, Pictet believes that the decision is erroneous. However, if, for example, a representative of a Detaining Power compelled prisoners of war held by it to remove land mines, this would be a violation of Article 52 of the 1949 Geneva Prisoners of War Convention and a war crime—but it is extremely doubtful that any State would have a national law making such action a crime. *See* 1949 Geneva Prisoner of War Convention, *supra* note 14, art. 52. Similarly, few, if any, States are known to have a penal statute making the waging of a war of aggression a criminal offense.

20. Pictet, *supra* note 13, at 624. As there was no permanent International Criminal Court in 1960, when the Commentary was published (and there still is none although the international community is moving closer to the establishment of such an institution), the reference could only be to an *ad hoc* International Criminal Court created for the specific purpose of trying "grave breaches." Therefore, it is difficult to understand how the competence of such a court could have been "recognized by the Contracting Parties," except in the unlikely event of such "recognition" being included in a cease-fire or armistice agreement.

21. For the United States this would mean trials by courts-martial, rather than by military commissions. Trials by courts-martial require more rigid rules of procedure and evidence than trials by military commissions. This will often create insurmountable problems for the prosecution as the trial may be held thousands of miles from the place of the offense and years after its commission, with witnesses scattered all over the world.

22. For the text of the Rules of Procedure and Evidence adopted by the members of the International Tribunal for the Former Yugoslavia, *see* 33 I.L.M. 493 (1994). (The Rules have since been the subject of a number of amendments. Rules on subjects other than procedure and evidence have been drafted and adopted by the Tribunal.). There can be no doubt that these Rules will ensure a fair trial for any accused whose trial takes place before one of the Trial Chambers of the Tribunal.

23. *See* Charter of the International Military Tribunal, *supra* note 4, art. 6(a), 59 Stat. at 1547, 82 U.N.T.S. at 286, 288. As the hostilities in Rwanda were of an internal nature, the substantive provisions of the Statute of the International Tribunal for Rwanda are somewhat different in form, if not in substance. *See supra* note 8. There is, of course, no "crime against peace." *See supra* note 8.

24. *See* Charter of the International Military Tribunal, *supra* note 4, art. 6(a), 59 Stat. at 1547, 82 U.N.T.S. at 286.

25. *See e.g.*, VISCOUNT MAUGHAM, U.N.O. AND WAR CRIMES, *passim* (Greenwood Press 1975) (1951); Hans-Heinrich Jescheck, *Nuremberg Trials, in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 50, 52 (Rudolf Bernhardt ed., 1982) [hereinafter ENCYCLOPEDIA].

26. NAZI CONSPIRACY AND AGGRESSION: OPINION AND JUDGMENT 48-54 (1947) (hereinafter NAZI CONSPIRACY AND AGGRESSION).

27. 1 THE TOKYO JUDGMENT 27-29 (B. V. A. Röling & C. F. Rüter eds., 1977).

28. 2 *id.* at 1045-64.

29. B. V. A. Röling, *Tokyo Trial, in* 4 ENCYCLOPEDIA, *supra* note 25, at 242, 244. The "later actions taken within the United Nations" undoubtedly refers to such matters as *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, G.A. Res. 95I, 1st Sess., 55th plen. mtg. (1946), 1946-1947 U.N.Y.B. 254; *Definition of Aggression*, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142 (1974); as well as numerous other resolutions.

30. NAZI CONSPIRACY AND AGGRESSION, *supra* note 26, at 16.

31. In *United States v. Wilhelm von Leeb (The High Command Case)*, 11 TRIAL OF WAR CRIMINALS, *supra* note 5, at 490, the Military Tribunal said:

> The crime denounced by the law is the use of war as an instrument of national policy. Those who commit the crime are those who participate at the policy making level in planning, preparing or in initiating war.
>
> . . . .
>
> The making of a national policy is essentially political, though it may require, and of necessity does require, if war is to be one element of that policy, a consideration of matters military as well as matters political.

(No accused in that case was found guilty of crimes against peace.) While there would be no question but that Saddam Hussein would meet the Tribunal's requirements for the crime of waging an aggressive war, a crime

against peace, some of the members of his Military Council might be able to prove that they had had no influence in the reaching of the decision by Iraq to occupy Kuwait.

32. 1945 Pact of the League of Arab States, 22 March 1945, 70 U.N.T.S. 237.

33. U.N. CHARTER art. 2, § 4.

34. *See* G.A. Res. 3314, *supra* note 29.

35. G.A. Res. 3314, *supra* note 29, at 143.

36. G.A. Res. 3314, *supra* note 29, at 143. Although the resolutions adopted by the General Assembly are not lawmaking, it is believed that at this point in time the quoted provisions of the Resolution of the General Assembly represent customary international law.

37. G.A. Res. 3314, *supra* note 29, at 144.

38. *See* Charter of the International Military Tribunal, *supra* note 4, art. 6(b), 59 Stat. at 1547, 82 U.N.T.S. at 286, 288.

39. 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516; 75 U.N.T.S. 287 [hereinafter 1949 Geneva Civilians Convention]. *See also* U.N. Doc. S/RES/670 (1990), *reprinted in* 29 I.L.M. 1334 (1990) which:

> Reaffirms that the Fourth Geneva Convention applies to Kuwait and that as a High Contracting Party to the Convention Iraq is bound to comply fully with all its terms and in particular is liable under the Convention in respect of the grave breaches of the Convention committed by it, as are individuals who commit or order the commission of grave breaches.

Id. art. 147.

40. *See* 1949 Geneva Prisoner of War Convention, *supra* note 14, art. 130, 6 U.S.T. at 3420, 75 U.N.T.S. at 238.

41. Apple Jr., *The Iraqi Invasion*, N.Y. TIMES, Aug. 3, 1990, at A1.

42. Bill Keller, *The Iraqi Invasion*, N.Y. TIMES, Aug. 8, 1990, at A1; Andrew Rosenthal, *Bush Sends U.S. Force to Saudi Arabia as Kingdom Agrees to Confront Iraq*, *id.* at A1, col. 6.

43. John Kifner, *Confrontation in the Gulf*, N.Y. TIMES, Aug. 9, 1990, at A1, col. 1.

44. NAZI CONSPIRACY AND AGGRESSION, *supra* note 26, at 83.

45. *See* G.A. Res. 3314, *supra* note 29, at 144.

46. U.N. Doc. S/RES/662 (1990), *reprinted in* 29 I.L.M. 1327 (1990).

47. *Id.* (emphasis added).

48. *See* 1949 Geneva Civilians Convention, *supra* note 39, art. 47, 6 U.S.T. at 3548, 75 U.N.T.S. at 318.

49. Convention Respecting the Laws and Customs of War on Land, No. IV., Oct. 18, 1907, Annex, Regulations, 36 Stat. 2277, 1 Bevans 631[hereinafter 1907 Hague Regulations]. While Iraq was not a Party to this Convention and its Regulations, the latter are now considered to be a part of customary international law. Thus, the International Military Tribunal said, "by 1939 these rules laid down in the [1907 Hague IV] convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6(b) of the Charter." NAZI CONSPIRACY AND AGGRESSION, *supra* note 26, at 83.

50. *See e.g.*, WAR CRIMES DOCUMENTATION CENTER, INTERNATIONAL AFFAIRS DIVISION, THE UNITED STATES ARMY REPORT ON IRAQI WAR CRIMES (DESERT SHIELD/DESERT STORM) (Sec. of the Army ed., 1992) [hereinafter ARMY REPORT]. (This report later became U. N. Doc. S/25441 (1993)). This 116 page report identifies 16 specific types of violations of the law of war. *Id.* at 11-13.

51. AMNESTY INTERNATIONAL, IRAQ/OCCUPIED KUWAIT: HUMAN RIGHTS VIOLATIONS SINCE AUGUST 2, 1990 [hereinafter AMNESTY INTERNATIONAL REPORT]. *See also* ON IMPACT, *supra* note 3. In September 1990 the President of the International Committee of the Red Cross visited Baghdad. After several days of conferences with Iraqi officials he returned to Geneva and reported that he "did not succeed in obtaining the Iraqi Government's authorization to launch an operation in Iraq and Kuwait for the victims of the crisis." 30 INT'L REV. RED CROSS 437 (1990).

52. *See* 1949 Geneva Civilians Convention, *supra* note 39, arts. 35, 48, 6 U.S.T. at 3540, 3548, 75 U.N.T.S. at 310, 318.

53. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 235-36 (Jean S. Pictet ed., 1958).

54. Although there was no such conventional prohibition in existence during World War II, many courts found that this practice violated customary international law. *But* see, *United States v. Wilhelm List (The Hostage Case)*, 11 TRIALS OF WAR CRIMINALS, *supra* note 5, at 1230.

55. 1949 Geneva Civilians Convention, *supra* note 39, art. 28, 6 U.S.T. at 3538, 75 U.N.T.S. at 308. Additionally, according to the ARMY REPORT, evidence was available that "over 4,900 U.S. hostages [were] taken by Iraq, 106 of whom were used by Iraq as human shields." ARMY REPORT, *supra* note 50, at 6.

56. *See* 1949 Geneva Civilians Convention, *supra* note 39, art. 49, 6 U.S.T. at 3548, 75 U.N.T.S. at 318. This article also prohibits deportation to any other country. It is this provision which has served as the basis of the complaints against Israel when it deported Palestinian terrorists.

57. *See* 1949 Geneva Civilians Convention, *supra* note 39, art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388.

58. AMNESTY INTERNATIONAL REPORT, *supra* note 51, at 4.

59. *Id.* at 45. The figures contained in the AMNESTY INTERNATIONAL REPORT are far below those emanating from refugee Kuwaiti officials and individuals. The Report includes a list of thirty-eight methods of torture employed by the Iraqis. *Id.* at 38-41.

60. *Id.* at 20.

61. *See* 1907 Hague Regulations, *supra* note 49, art. 45, 36 Stat. at 2306, 1 Bevans at 651.

62. *See* AMNESTY INTERNATIONAL REPORT, *supra* note 51, at 5. Similarly, the ARMY REPORT states:

> The evidence collected during this investigation establishes a *prima facie* case that the violations of the law of war committed against Kuwaiti civilians and property, and against third party nationals, were so widespread and methodical that they could not have occurred without the authority or knowledge of Saddam Husayn [*sic*]. They are war crimes for which Saddam Husayn, officials of the Ba'ath Party, and his subordinates bear responsibility.

See ARMY REPORT, *supra* note 50, at 13.

63. *See* 1907 Hague Regulations, *supra* note 49, arts. 23(g), 46, 47, 56, 36 Stat. at 2302, 2306, 2309, 1 Bevans at 648, 651, 652, 653; *see also The Hostage Case, supra* note 54, at 1295. In the *Hostage Case,* General Rendulic of Germany was charged with ordering a scorched earth policy which was not militarily necessary during his retreat across Norway from Finland. The Tribunal held that although his information that the Soviet Army was in close pursuit of his troops was incorrect, he had a right to act on his belief that this information was correct. *Id.* at 1296. Much to the dismay of the Norwegians, he was acquitted of this charge. *Id.* at 1297.

64. *See* 1949 Geneva Civilians Convention, *supra* note 39, arts. 53, 147, 6 U.S.T. at 3552, 3618, 75 U.N.T.S. at 322, 388.

65. *See* 1949 Geneva Prisoner of War Convention, *supra* note 14, art. 13, 6 U.S.T. at 3328, 75 U.N.T.S. at 146.

66. *Trial of Kurt Maelzer,* 11 LAW REPORTS OF TRIALS OF WAR CRIMINALS 53 (1949), WAR CRIMES, *supra* note 4, at 342; *see also id.* at 343 (*Trial of Masataka Kaburagi).*

67. In subsequent television interviews the prisoners of war did not look so battered and, while they gave more than "name, rank, serial number, and date of birth," they did not make statements favorable to Iraq.

68. *See* 1949 Geneva Prisoner of War Convention, *supra* note 14, art. 23, 6 U.S.T. at 3336, 75 U.N.T.S. at 154, 156.

69. *See* 1949 Geneva Civilians Convention, *supra* note 39, art. 29, 6 U.S.T. at 3538, 75 U.N.T.S. at 308.

70. *See* 1949 Geneva Prisoner of War Convention, *supra* note 14, arts. 12, § 1, 131, 6 U.S.T. at 3328, 3420, 75 U.N.T.S. at 146, 238.

71. The statement did not indicate who the Detaining Power was but, presumably, in this instance it was the United States. Only States, and then too only those states Parties to the Convention may be Detaining Powers. Fortunately, the mistake made in Korea, where the United Nations Command was deemed to be the Detaining Power, was not made again. Prisoners of war captured by the armed forces of Arab States were transferred to the custody of Saudi Arabia. All others were transferred to the custody of the United States. Such transfers are authorized by Article 12(2) of the 1949 Geneva Prisoner of War Convention, *supra* note 14, 6 U.S.T. at 3328, 75 U.N.T.S. at 146.

72. In 1985, during the Iran-Iraq War (1980-1985), the Secretary-General of the United Nations sent a mission to both Iran and Iraq to determine how these two countries were treating the prisoners of war held by them. The Mission found that both countries were in substantial violation of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. Moreover, it stated that: "Physical violence appeared to be particularly common in POW camps in Iraq." Report of the Mission, U.N. Doc. S/16962, Feb. 22, 1985, ¶ 273.

73. The ARMY REPORT, *supra* note 50, at 13, does charge that one naval war crime committed by Iraq was, "[e]mployment of unanchored naval mines and mines lacking devices for their self-neutralization in the event of their breaking loose from their moorings in violation of Article 1, Hague VIII." This refers to the 1907 Hague Convention No. VIII Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, 36 Stat. 2332, 1 Bevans 669.

74. The 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1976 (better known as the ENMOD Convention), 31 U.S.T. 333, 16 I.L.M. 88 (1977); and Articles 35(3) and 55 of the 1977 Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), June 8, 1977,

72 A.J.I.L. 457 (1978), 16 I.L.M. 1391 (1977) constitute the entire international legislation on the subject of the protection of the environment during the course of hostilities. There are, however, a number of international rules that can be said to protect the environment indirectly. *See* 1907 Hague Regulations, *supra* note 49, and Article 2(4) of the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 19 I.L.M. 1524, 1535 (1980). Iraq is not a Party to the ENMOD Convention, nor to the 1977 Additional Protocol, nor to the Conventional Weapons Convention.

While not drafted as an environmental protection provision, it is appropriate to call attention to Article 53 of the 1949 Geneva Civilians Convention, which provides, "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations." 1949 Geneva Civilians Convention, *supra* note 39, 6 U.S.T. at 3550, 75 U.N.T.S. at 320.

75. The ARMY REPORT, *supra* note 50, at 10-11.

76. *Id.*

77. An elaboration of these events can be found in ON IMPACT, *supra* note 3, at 21-25, 62-72. The legal aspects of the problem have been widely commented upon. *See e.g.*, Anthony Leibler, *Deliberate Wartime Environmental Damage: New Challenges for International Law*, 23 CAL. W. INT'L L.J. 67 (1992); Liesbeth Lijnzaad & Gerard Tanja, *Protection of the Environment in Times of Armed Conflict: The Iraq-Kuwait War*, 40 NETH. INT'L L. REV. 169 (1993); Mark J. T. Caggiano, *The Legitimacy of Environmental Destruction in Modern Warfare: Customary Substance over Conventional Form*, 20 B.C. ENVTL. AFF. L. REV. 479 (1993). *But see* W. MICHAEL REISMAN ET AL., THE LAWS OF WAR 28, 69 (1994).

78. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

79. Iraq became a Party to the 1925 Protocol in 1931. It made a "first use" reservation similar to that made by many other Parties. The Protocol does not have a general participation (*si omnes*) clause. Iraq is not a Party to the 1972 Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 11 I.L.M. 309 (1972).

80. *See* Charter of the International Military Tribunal, *supra* note 4, art 6(c), 59 Stat. at 1547, 82 U.N.T.S. at 286, 288.

81. NAZI CONSPIRACY AND AGGRESSION, *supra* note 26, at 84.

82. Many of the problems which can be envisioned for such a Tribunal could be solved easily by reference to the Statutes adopted by the Security Council of the United Nations for the International Tribunal for the Former Yugoslavia, *supra* note 7, and for the International Tribunal for Rwanda, *supra* note 8, and by the Rules of Procedure and Evidence adopted by the members of those Tribunals. (Concerning the rules of procedure and evidence adopted by the members of the International Tribunal for the Former Yugoslavia, *see supra* note 22. There have since been some amendments to these rules. *See* 33 I.L.M. 838, 1620 (1994). *See also Directive on Assignment of Defense Counsel*, 33 I.L.M. 1581; *Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal. Id.* at 1591 (1994).

XXV

Enforcing The Third Geneva Convention On The Humanitarian Treatment Of Prisoners Of War

7 United States Air Force Academy Journal of Legal Studies 37 (1997)

During the period of early history, through the Biblical days, the Egyptian, Greek, and Roman empires, and the Crusades, and well into the Middle Ages, there was no protection for individuals taken prisoner in conflict and they were either killed or enslaved. It was not until well into the seventeenth and eighteenth centuries that it began to be accepted that prisoners of war were merely unfortunate human beings who were being held in custody solely to prevent them from once again engaging in the hostilities.[1] While this resulted in some bilateral agreements touching on the subject, the first multilateral attempt to legislate in this area was Chapter II of the Regulations Attached to the 1899 Hague Convention No. II on the Laws and Customs of War on Land,[2] a document containing 17 articles with respect to prisoners of war. The 17 articles of Chapter II of the Regulations Attached to the 1907 Hague Convention No. IV on the Laws and Customs of War on Land[3] were, for all practical purposes, identical to those of 1899. The provision of these two instruments most relevant to our discussion is Article 4(2) which provides that: "They [i.e., prisoners of war] must be humanely treated." Although these Conventions had no penal provisions as such, after both World War I and World War II individuals were tried and convicted for what amounted to violations of their provisions.[4]

During the course of World War I the provisions of the 1907 Hague IV Convention relating to the protection of prisoners of war were found to be so inadequate that a great number of bilateral and multilateral agreements on the subject were drafted and entered into by the opposing belligerents.[5] Then in 1929, as an aftermath of World War I, the International Committee of the Red Cross (the ICRC), which had previously been concerned solely with the sick and wounded of armed forces in the field and at sea, entered the prisoner-of-war arena by sponsoring the 1929 Geneva Convention Relative to the Treatment of Prisoners of War[6]; and World War II was followed by four new ICRC-sponsored conventions, the third of which was the 1949 Geneva

Convention Relative to the Treatment of Prisoners of War.[7] It is with this 1949 Third Geneva Convention that we will be primarily concerned.[8] In view of the breadth of the subject-matters covered by the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, this discussion will be limited to the provisions relevant to "deterring humanitarian law violations" and to those "strengthening enforcement" of those provisions.[9]

First, some statistics: as of 31 December 1995 there were 185 members of the United Nations. At that same time, there were 186 States Parties to the 1949 Geneva Conventions. The only members of the United Nations, or Parties to the Statute of the International Court of Justice, who were not Parties to these Conventions were Eritrea, Lithuania, Marshall Islands, and Nauru.[10] The near universality of these conventions is obvious and it is probably not an exaggeration to say that they are now part of the customary law of war, binding on all nations, whether or not they are Parties thereto.

There are a number of articles of the 1949 Third Geneva Convention which are worthy of mention in the context of our study as they establish either the coverage of the Convention or the substantive humanitarian rule which is to be followed. Thus, Article 1 is short and to the point: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." Note that not only does a Party itself undertake to respect the provisions of the Convention, it is responsible for ensuring respect thereof by its people, civilian and military, and by other Parties, including the belligerents when it is a neutral and its allies when it is a co-belligerent. This latter is not always an easy task, as the United States learned in Vietnam.

Article 2 specifies when the Convention is applicable. First, it is applicable

> in all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties even if the state of war is not recognized by one of them.[11]

The latter part of this provision has increased in importance because of the fact that although there have been more than a hundred international armed conflicts since the end of World War II, there have been no declarations of war since that of the Soviet Union against Japan in August 1945 and there have, therefore, been no formal acts recognizing the existence of a state of war.

Second, the Convention is applicable in the case of a military occupation, even if that occupation is not resisted; and, third, the general participation (*si omnes*) clause of the 1899 and 1907 Hague Conventions is specifically rejected and the Convention is applicable as between States Parties thereto even if one of the belligerents is not a Party to the Convention. In view of the wide acceptance of this Convention, this provision, which was of major importance

when adopted, has lost that status. Its importance when drafted is evidenced by the fact that in his 1948 dissent in the trial of the major Japanese war criminals by the International Military Tribunal for the Far East, Justice Pal of India found that during World War II in the Pacific Japan was not bound by the rules set forth in the 1907 Hague Convention No. IV and its annexed Regulations because Bulgaria and Italy were not Parties to that Convention.[12]

Article 4 of the 1949 Third Geneva Convention is an extremely lengthy article which specifies the numerous classes of individuals who are entitled to prisoner-of-war status when they fall into the power of the enemy. For the purposes of the present study it may be assumed that at the time of the alleged violation of the humanitarian provisions of the Convention the victims were prisoners of war and that at the time of the prosecution for that alleged violation of the humanitarian provisions of the Convention, the accused were entitled to the status of prisoners of war.[13]

Article 5 has two very important provisions. Its first paragraph provides that the Convention is applicable "from the time they [i.e., persons entitled to prisoner-of-war status] fall into the power of the enemy until their final release and repatriation." The North Koreans and the Chinese Communists in Korea contended that a prisoner of war was not entitled to the benefits of the Convention until he had "repented"—which meant that he had accepted Communist indoctrination[14]; and the North Vietnamese contended that, although no American prisoners of war had been tried, they were all war criminals captured in *flagrante delicto* and, therefore, were not entitled to the protection of the Convention.[15] Neither of these contentions was legally valid. Moreover, the second paragraph of that article specifically provides that if there is a dispute as to the entitlement to prisoner-of-war status, the individual is entitled to the protection of the provisions of the Convention until his status has been determined by a competent tribunal. No such determinations were made in either North Korea or North Vietnam, but prisoners of war held by those entities were denied the protection of the provisions of the Convention.[16]

Article 8 is concerned with the operations of the Protecting Power, the neutral Power which represents a belligerent in the territory of its enemy and which has the very important responsibility of ensuring that prisoners of war receive the humane treatment and other protections to which they are entitled under the provisions of the 1949 Third Geneva Convention. A Protecting Power is selected by the belligerent which it is to represent and it must be acceptable to the belligerent in whose territory it is to operate. While most belligerents had Protecting Powers during World War II, the 1982 Falklands War is the only real instance of the designation, acceptance, and functioning of Protecting Powers during hostilities since 1949 despite the great number of international wars which have occurred since that time.[17] This is, indeed, a

tragedy, as the mere existence of a Protecting Power is frequently sufficient to ensure more humane treatment for prisoners of war.

Article 9 provides that nothing in the Convention is to be considered as adversely affecting the humanitarian activities of the ICRC, or of any other impartial humanitarian organization, which activities are, however, subject to the consent of the belligerent concerned. In Korea the ICRC was allowed to perform its normal functions of inspecting prisoner-of-war camps, consulting individual prisoners of war, providing relief supplies, etc., by the United Nations Command in South Korea, but it was not permitted to function in North Korea. In Vietnam the ICRC was allowed to perform its normal functions in South Vietnam, but it was not permitted to function in North Vietnam. During the hostilities in Vietnam one well-known academic took the position that an anti-war group of which he was a member was such an "impartial humanitarian organization."[18] The present author strongly challenged that conclusion.[19] During the Iran-Iraq War there were not only no Protecting Powers, but both countries frequently denied the International Committee of the Red Cross access to its prisoner-of-war camps. Eventually, the Secretary-General of the United Nations sent a special mission to inspect the prisoner-of-war camps in both countries and numerous violations of the provisions of the 1949 Third Geneva Convention were found to have been committed by both sides.[20]

The 1949 Third Geneva Convention contains a number of substantive provisions which define certain inhumane conduct towards prisoners of war as punishable. Thus, Article 13 provides:

> Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited and will be regarded as a serious breach of the present Convention.[21] In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.[22]

> Likewise, prisoners of war must at all times be protected, particularly against acts of violence and against insults and public curiosity.[23]

> Measures of reprisal against prisoners of war are prohibited.[24]

And Article 130 states:

> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully

> depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.[25]

These two articles refer specifically to serious or grave breaches of the provisions of the 1949 Third Geneva Convention.[26] Article 129(1) of that Convention requires States Party "to enact legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches" defined in Article 130. Based upon the precedents of post-World War II, this provision was unnecessary. A violation of a prohibitive provision of a law-of-war convention is a war crime; a war crime is punishable as a violation of international law; the punishment to be assessed for the commission of a war crime is within the discretion of the trial court.[27] Article 129(3) requires each State Party to take measures for the punishment of all violations of the 1949 Third Geneva Convention other than the grave breaches. Thus, violations of other provisions of the Convention such as, for example, those contained in Articles 14, 16, 17, 23, 26, 34, 52, etc., are likewise punishable offenses, although the international community considers them to be on a lesser level of importance than violations of the provisions of Articles 13 and 130.[28]

There will be little difficulty in identifying the acts which constitute violations of the substantive provisions of the 1949 Third Geneva Convention. Unfortunately, the procedural provisions of that Convention, while easily identified, may present some problems of application.

Articles 82-88 and 99-107 set forth rules which are intended to ensure that any prisoner of war who is subjected to a judicial proceeding by the Detaining Power, whether for a pre-capture or a post-capture offense, will receive a fair trial. Most of those provisions should cause no difficulty of implementation.[29] However, there are two which will.

Article 63 of the 1929 Geneva Prisoner-of-War Convention provided:

> A sentence shall only be pronounced on a prisoner of war by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power.

In the Yamashita Case[30] the United States Supreme Court held that this provision was directed at post-capture offenses only and did not apply to trials for pre-capture offenses (war crimes). This ruling was followed by all of the courts before which the issue was raised in the war crimes cases tried after World War II with the result that those cases were not tried by courts-martial, but by military tribunals, military commissions, and other specially established courts, each with its own rules concerning procedure and, particularly, the admission of evidence.[31]

Apparently the participants in the Diplomatic Conference which drafted the 1949 Third Geneva Convention desired to make its provisions applicable to pre-capture, as well as post-capture, offenses. To accomplish this end they included in that Convention Article 102 which, for all practical purposes, is identical with Article 63 of the 1929 Geneva Prisoner-of-War Convention; then they drafted a new provision to be found in Article 85 of the 1949 Third Geneva Convention, which states:

> Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.[32]

It would appear that the draftsmen were attempting to provide that when prisoners of war are tried for pre-capture offenses, that is, for war crimes, they would, in accordance with the provisions of Article 102, be entitled to be tried "by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power"—which means that the draftsmen of the Convention were adopting a rule contrary to that laid down in the Yamashita Case.[33] Of course, such trials could still be conducted by military commissions or other specially created tribunals—but only if members of the armed forces of the Detaining Power could be tried by such commissions or tribunals.[34]

There is one possible view of Article 85 of the 1949 Third Geneva Convention which might result in its being interpreted differently. As we have seen, that article refers to prisoners of war "prosecuted under the laws of the Detaining Power." When a prosecution is for a violation of a provision of the 1949 Third Geneva Convention, is it based on "the laws of the Detaining Power" or is it based on international law? The International Committee of the Red Cross urges very strongly that such a prosecution is based on national law, particularly for a country like the United States where treaties are part of the supreme law of the land.[35] On the other hand, it is often argued: (1) that the post-World War II war crimes trials established the precedent that war crimes were and are violations of international law; (2) that it would be difficult to find a national statute which, for example, prohibited compelling a prisoner of war to serve in the forces of the Capturing Power, or the denial of quarter, or the use of prisoner-of-war labor in a munitions factory; and (3) that the fact that Article 99 of the 1949 Third Geneva Convention prohibits the trial of a prisoner of war for an act not "forbidden by the law of the Detaining Power or by International Law,"[36] while Article 85 of that Convention refers only to "the laws of the Detaining Power," indicates that the draftsmen did not intend prosecutions under international law to be covered by the provisions of Article

85 and that, therefore, the decision in the Yamashita Case, and like cases, continues to apply. This appears to be a problem of interpretation which will only be resolved when courts are actually presented with the problem.[37]

It is apparent that in any future war crimes trials there will be little opportunity to advance the contention that the offense charged is subject to the claim of being ex post facto; and that, under the post-war situation which normally prevails, prosecutions in common law countries will be much more difficult to conduct if there must be compliance with the strict common law rules of evidence. However, all in all, it may certainly be said that while some of the provisions of the 1949 Third Geneva Convention are intended to protect the helpless prisoner of war from unfair prosecutions, the specific aim of many of those provisions is to "deter humanitarian law violations" and to "strengthen enforcement" of the substantive provisions thereof.

Notes

1. For a more elaborate discussion of the historical aspects of this subject, see HOWARD LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 2-11 (1979) (hereinafter cited as LEVIE, PRISONERS).

2. 32 Stat. 1803; T.S. 403; 1 BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949, at 247 (1968) (hereinafter cited as BEVANS).

3. 36 Stat. 2277; T.S. 539; 1 BEVANS, *supra* note 2, at 631.

4. They were tried for and convicted of violations of the law of war. Thereafter the International Committee of the Red Cross (ICRC) decided that "war" was a nasty term and started the practice of using the term "armed conflict" in its place. Apparently "armed conflict" is now likewise a nasty term so they have substituted the term "humanitarian law." (This is to distinguish it from "human rights law," applicable for the protection of the individual in time of peace.) The present author does not believe that the ugly face of war can be changed by semantics and continues to use the term "law of war." [Fortunately, there was no attempt made to change the term "prisoners of war" (POWs) into "prisoners of armed conflict" (PACs)!]

5. The agreement on the treatment of prisoners of war entered into between Germany and the United States was not signed until 11 November 1918, the day of the German surrender! It was quite comprehensive and unquestionably served as a model for the 1929 Geneva Prisoner-of-War Convention hereinafter referred to.

6. 47 Stat. 2021; T.S. 846, 2 BEVANS, *supra* note 2, at 932.

7. 6 U.S.T. 3316; T.I.A.S. No. 3364; 75 U.N.T.S. 135. This Convention is known, and will hereinafter be referred to, as the "1949 Third Geneva Convention."

8. If no references to the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I, 72 A.J.I.L. 457 (1978), 16 I.L.M. 1391 (1977), are to be found in the text, that is because the United States is not a Party to that instrument, a situation which, hopefully, will change in the not too distant future.

9. For a somewhat different approach to this problem, see U. Palwankar, *Measures Available to States for Fulfilling their Obligation to Ensure Respect for International Humanitarian Law,* INTERNATIONAL REVIEW OF THE RED CROSS, January-February 1994, No. 298, at 9.

10. *Ibid,* March-April 1996, No. 311, at 251. It would appear that Lithuania should be bound by succession from the State of which it was previously a part—the U.S.S.R. (Lithuania is a Party to the 1929 Geneva Prisoner-of-War Convention.)

11. The latter part of this provision was bad drafting. Does the Convention apply if a state of war is not recognized by two or more of the belligerents? That this error was recognized is demonstrated by the fact that when the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict [249 U.N.T.S. 240; THE LAWS OF ARMED CONFLICTS 745 (D. Schindler & J. Toman, eds., 3rd ed., 1988] was drafted five years later, in 1954, the comparable provision in Article 18(1) of that Convention reads "is not recognized by one or more of them."

12. 2 The Tokyo Judgment 1001 (B. Roling & C. Ruter, eds., 1977). He overlooked (or disregarded) the fact that Bulgaria, Italy, and Japan were all Parties to the 1899 Hague Convention No. II and that Japan

therefore continued to be bound by the almost identical rules annexed to that Convention. [Article 4(2) of the 1907 Hague Convention IV points out that "The Convention of 1899 remains in force as between the Powers which signed it, and which do not also ratify the present Convention."]

13. The scope of Article 4 of the 1949 Third Geneva Convention has been considerably extended by Articles 1, 43, 44, and 45 of the 1977 Protocol I, *supra* note 8.

14. LEVIE, PRISONERS, *supra* note 1, at 351 n.36 (1979). While the 1949 Conventions had not yet been ratified by either the United States or North Korea (and, in any event, was not yet in force), the former had stated that it "would be guided by humanitarian principles of [the 1949] Conventions" [1 LE COMITE INTERNATIONAL DE LA CROIX-ROUGE ET LE CONFLIT DE COREE: RECUEIL DE DOCUMENTS 13 (1952)] and the latter had stated that it was "strictly abiding by principles of Geneva Conventions in respect to Prisoners of War." *Ibid.* at 15. *See also* TREATMENT OF BRITISH PRISONERS OF WAR IN KOREA 31-32 (Ministry of Defence, 1955).

15. Howard Levie, "Maltreatment of Prisoners of War in Vietnam", 48 B.U.L. REV. 323, 346-347 (1968); *reprinted in* 2 THE VIETNAM WAR AND INTERNATIONAL LAW 361 (R. Falk, ed., 1969). The penal offense in the course of which they were captured in *flagrante delicto* was apparently that of engaging in war with the North Vietnamese!

16. The interpretation of the clause "released and repatriated" lengthened the Korean war by over a year as the United Nations Command insisted that repatriation was a voluntary act and that a prisoner of war had the right to elect not to return to his homeland while the Comunists insisted on "forcible repatriation," repatriation even against the wishes of the prisoner of war. "Voluntary repatriation" is now an accepted rule of the international law of war.

17. The ICRC takes the view that there were several other instances of the designation of Protecting Powers but these are questionable. Article 5 of the 1977 Protocol I, *supra* note 8, was a much watered-down attempt by its draftsmen to increase the likelihood of the designation of Protecting Powers. It has not accomplished that purpose in the past and it is doubtful that it will do so in the future.

18. Richard Falk, *International Law Aspects of Repatriation of Prisoners of War During Hostilities,* 67 A.J.I.L. 465, 473-475 (1973); *reprinted in* 4 THE VIETNAM WAR AND INTERNATIONAL LAW 326 (R. Falk, ed., 1976).

19. Howard Levie, *International Law Aspects of Repatriation of Prisoners of War During Hostilities: A Reply,* 67 A.J.I.L. 693, 696-701 (1973); *reprinted in* 4 THE VIETNAM WAR AND INTERNATIONAL LAW 340 (R. Falk, ed., 1976).

20. *Prisoners of War in Iran and Iraq: The Report of a Mission Dispatched by the Secretary-General,* January 1985, S/16962, 22 February 1985. In the covering Note, the Secretary-General expressed "his deep dismay and concern that the unanimous findings of the mission indicate that the fundamental purposes that the international community set itself in adopting in 1949 the Third Geneva Convention relative to the Treatment of Prisoners of War are not being fulfilled."

21. As we shall see, while the English version of Article 13 of the 1949 Third Geneva Convention uses the term "serious breach," Articles 129 and 130 thereof use the term "grave breaches." In the French version of the Convention, which is equally authentic, the term *"infractions graves"* is used in all three articles. It would appear that the variation in the English version is the result of bad translation and that it was the intention of the Diplomatic Conference which drafted this Convention to put violations of the provisions of Article 13 on a par with violations of the provisions of Article 130. See, for example, J. DE PREUX, COMMENTARY III: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 140 (1960) (hereinafter cited as DE PREUX).

22. For trials for this offense after World War II, see HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES 54 (1993) (hereinafter cited as LEVIE, WAR CRIMES); The Medical Case, *ibid,* 76 and 322; The Kyushu University Case, *ibid,* 325; etc. Article 11 of the 1977 Protocol I, *supra* note 8, considerably amplifies this provision.

23. For trials for this offense after World War II, see the Opinion of the Tribunal (IMTFE), Levie, War Crimes, *supra* note 22, at 151-152; Trial of Karl Maelzer, *ibid.,* 342; Trial of Masataka Kaburagi, *ibid.,* 343; The Borkum Island Case, *ibid.,* 315; etc.

24. The classic case of a reprisal against prisoners of war was the handcuffing of British and Commonwealth officer prisoners of war by the Germans during World War II when they learned that a British order called for the handcuffing of German soldiers captured during the Dieppe Raid in order to prevent them from destroying documents of intelligence value. 1 REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS ON ITS ACTIVITIES DURING THE SECOND WORLD WAR 368-370 (1948).

25. The majority of the war crimes trials conducted after World War II involving prisoners of war as victims will be found to include a charge of a violation of at least one of the offenses now listed in Articles 13 and 130 of the 1949 Third Geneva Convention.

26. Article 75(2) of the 1977 Protocol I, *supra* note 8, reiterates and enlarges on the cited provisions of the 1949 Third Geneva Convention. Article 85 of the 1977 Protocol I not only reiterates and enlarges on the grave breaches listed in the Third Convention, but paragraph 5 thereof specifically denominates their violations as war crimes.

27. The United States Army Field Manual 27-10, THE LAW OF LAND WARFARE (1956), states:

> 499. War Crimes. The term "war crimes" is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.
>
> 505. Trials.
>
> (e) Law Applied. As the international law of war is part of the law of the land in the United States, enemy personnel charged with war crimes are tried directly under international law without recourse to the statutes of the United States. . . .
>
> 506. Suppression of War Crimes.
>
> (c) Grave Breaches. "Grave breaches" of the Geneva Conventions of 1949 and other war crimes which are committed by enemy personnel or persons associated with the enemy are tried and punished by United States tribunals as violations of international law. If committed by persons subject to United States military law, these "grave breaches" constitute acts punishable under the Uniform Code of Military Justice. Moreover, most of the acts designated as "grave breaches" are, if committed within the United States, violations of domestic law over which the civilian courts can exercise jurisdiction.
>
> 508. Penal Sanctions. The punishment imposed for a violation of the law of war must be proportionate to the gravity of the offense. The death penalty may be imposed for grave breaches of the law. . . .

28. Article 20(c) of the Draft Statute for an International Criminal Court prepared by the International Law Commission (ILC) at its 1994 meeting would give that Court jurisdiction over "serious violations of the laws and customs applicable in armed conflict." Report of the International Law Commission on the Work of its Forty-sixth Session, U.N. GAOR, 49th Sess., Supp. No. 10, at 70, UN Doc. A/49/10 (1994). The ILC's Commentary on that provision contains quite a detailed discussion of the problem, citing the relevant provisions of the Statute of the International Tribunal for the Former Yugoslavia and of its own Draft Code of Crimes against the Peace and Security of Mankind. *Ibid.*, at 73-75.

29. Article 75 of the 1977 Protocol I, *supra* note 8, enlarges somewhat upon the provisions of the cited articles of the 1949 Third Geneva Convention.

30. 327 U.S. 1 (1946). *See* LEVIE, WAR CRIMES, *supra* note 22, at 156-163; 261.

31. *See* DE PREUX, *supra* note 21, at 413-414. In 1950, when the World War II war crimes trials program was winding down, the French Supreme Court of Appeal reversed the rule previously established by French courts, which had until then followed the rule of the Yamashita Case, *supra* note 30.

32. For the historical background of this article, see DE PREUX, *supra* note 21, at 413-416. The Soviet Union, followed by all of the other Communist countries of that period, made a reservation to this article, but this reservation related to post-conviction treatment only. Ibid., 423-425.

33. In Everett & Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509, 516-517 (1994) (hereinafter cited as Everett & Silliman), the authors state that "this provision [Article 102] applies only to crimes committed while a prisoner of war, and not for a violation of the law of war committed while a combatant," relying on the decisions in the Yamashita Case, *supra* note 30, and in Johnson v. Eisentrager, 339 U.S. 763 (1950). This completely ignores the problem created by the presence of Article 85 of the 1949 Third Geneva Convention.

34. The article by Everett & Silliman, *supra* note 33, at 519, takes the position that "the rationale of Madsen v. Kinsella [343 U.S. 341 (1952)] might suggest that a military commission could try a [United States] servicemember for any violation of the law of war." While this is marginally possible, it is highly improbable.

35. DE PREUX, *supra* note 21, at 416-417. *But see* paragraph 505(e), FM 27-10, *supra* note 27.

36. Emphasis added.

37. Surprisingly, this is one of the very few issues which has not been raised as a defense in the trials before the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (better known as the International Criminal Court for the Former Yugoslavia), a Tribunal established by S/Res/827 (1993), 25 May 1993, of the Security Council of the United Nations. [The Charter of the Tribunal is reproduced at 32 I.L.M. 1203 (1993).] A number of the decisions of the Trial and Appeals Chambers of that Tribunal, including several on the question of jurisdiction, will be found in 10 TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 59-276 (H. Levie, ed., 1996).

Appendix

Principal Publications of Professor Howard Levie

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