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STUDENT THESIS

25 January 1960

REPATRIATION OF PRISONERS OF WAR - FORCIBLE AND NON-FORCIBLE

By

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STUDENT THESIS

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CONTENTS*

*The number following the lower case letter in footnoting refers to the entry of the pertinent bibliography item.

SUMMARY

Purpose: To explore the historical background of repatriation of prisoners of war in order to determine a legal and humane policy for the United States to adopt in the event of future conflict.

Scope: The issue of non-forcible repatriation of prisoners of war was raised during the Korean Armistice negotiations, and debated at great length in the First Committee of the United Nations General Assembly in 1952. It was the subject of many legal treatises and news commentaries, and caused serious analysis of the Geneva Conventions of 1949. Although non-forcible repatriation was finally accepted as a legal principle in the Korean armistice agreement, it has not been officially declared as a general policy of the United States.

Conclusions: It is concluded that non-forcible repatriation of prisoners of war is a principle founded in international law, customary practice, and morality. The United States, in keeping with its traditions and international reputation, should accept and uphold the principle. However, in order to avoid sociological and political dangers, barely skirted in the Korean settlement, the United States should apply the principle with skillful discretion.

Recommendations: It is proposed that the United States seek to have clarifying language on the subject of repatriation included in a revision of the Geneva Conventions of 1949; and as an interim measure, the United States should announce a policy supporting the principles of discretionary asylum and non-forcible repatriation.

CHAPTER 1

INTRODUCTION

During 1952, the cause celebre in the international arenas of law and politics was the repatriation of the prisoners of war captured in the Korean conflict. At Panmunjom, Korea, in December of 1951, subcommittees from the delegations negotiating for an armistice to the conflict began discussions on Agenda Item 4, "Arrangements Relating to Prisoners of War." On 8 June 1953, the senior delegates signed the terms of reference which established procedures for the exchange of prisoners of war. In the course of the eighteen months that this problem remained unresolved, approximately 106,000 men of the United States Command forces, and many thousands more on the communist side, were maimed or killed.

Although all parties to the Korean conflict were not signatories to the Geneva Conventions of 1949, the powers on both sides had publicly announced that they would adhere to the principles of the convention relative to the treatment of prisoners of war. Why, then, this protracted argument over one of the principles - expeditious release and repatriation of prisoners of war?

There were several contentious elements of the prisoner of war situation which added to the confusion of the debate. There was a basic difference of opinion as to how many prisoners were being held by each side; the communists refused to account for 50,000 captured Koreans which they claimed they had released at the front; communist prisoners in UNC camps were causing considerable embarrassment to the command; a large segment of the Chinese prisoners held by the UNC had denounced communism; and the communists refused to permit

representatives of the International Red Cross to inspect their camps. In such an atmosphere, spiced with ideological polemics and bitter recriminations, resolution of the two opposing views on exchange of prisoners proved impossible. Throughout the negotiations, the United Nations Command held steadfast to its position. As late as 26 May 1953 this position was given emphasis and support in a statement issued from the White House:

> "The attention of the free world is focused upon the armistice negotiations at Panmunjom. There, on May 25, the United Nations Command renewed it efforts to bring an honorable peace to Korea and a fair and humane settlement of the P.O.W. issue. ---
>
> "There are certain principles inherent in the United Nations Command position which are basic and not subject to change. No prisoners will be repatriated by force. No prisoners will be coerced or intimidated in any way. And there must be a definite limit to the period of their captivity." [a]

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[a] 10, p 1.

CHAPTER 2

THE ISSUE

Section I. Panmunjom.

From the first day of discussions of arrangements relative to prisoners of war, the communist representatives at Panmunjom insisted that all prisoners of war be returned to the other side after the armistice was signed. The initial position of the United Nations Command (UNC) was presented on 2 January 1952 in a proposed cartel providing for a one-for-one exchange of prisoners of war and foreign civilians. However, the proposal limited the individuals to be exchanged to those who elected to be repatriated. The communists turned down this proposal of voluntary repatriation as being "absurd and unreasonable"; and from that moment, the issue was drawn. On the one side, the communists held out for repatriation of all prisoners of war; on the other, the UNC insisted that only those who elected repatriation should be returned.

The arguments which raged for the next few months were political in nature, based on the philosophies of the peoples and the governments of the opposing sides. Perhaps the UNC limited itself unnecessarily by avoiding legal argument. Certainly its arguments "underscored the absence of a positive comfort derived from the convention, at least as far as repatriation was concerned." [a] In March 1952, the UNC shifted its case from voluntary to non-forcible repatriation, announcing the change as a concession to agreement

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[a] 7, p 419.

and a retreat from the original position of voluntary choice. The UNC stated that it would use minimum criteria to the end that only those whose repatriation could not be effected without physical violence would be regarded as special cases. The communists refused to agree, maintaining that any interference with total repatriation was a violation of the rights of the prisoners and illegal.

In order to determine how many prisoners would accept repatriation without force, the UNC screened its camps in April, 1952, and announced to the communists that about 50,000 prisoners refused to return to communism. This threw the communists into blind rage. Now the political fat was really in the fire. The fact that over 40 percent of their heroes held by the UNC refused to return to their side was a psychological blow of stunning magnitude. Exposed for all the world to see was the vulnerability of the communist monolith in the event of another war. The communists fought the principle of non-forcible repatriation even more bitterly than they had voluntary choice, and centered their attacks on the screening process which they claimed was illegal and coercive. In fact the screening became the most popular target for communist abuse in all arenas of debate. The UNC offered to rescreen the prisoners with communist assistance, but the embarrassed Reds would have none of it. Argument went on endlessly, being for the most part recriminations from both sides and no substantive progress on the problem. However, debate did reveal that the primary concern of the communists was the fate of the 20,000 odd Chinese held by the UNC. It was hinted that if the UNC would hand over all the Chinese, the thousands of Koreans could be disposed of without argument

Of course, the UNC would not agree. Finally, unable to reach agreement, the UNC delegate called a recess on 8 October 1952, and the scene shifted from Panmunjom to the United Nations General Assembly in New York.

Section II. United Nations General Assembly.

On 14 October 1952, First Committee, United Nations General Assembly, Seventh Session, met to discuss the problem of a speedy settlement of the Korean conflict. Immediately the controversial subject of repatriation of prisoners of war became the focus of interest. It remained in the spotlight until the committee voted on 1 December 1952 to adopt the Indian Draft Resolution on a solution to the repatriation problem. During the long debate, all facets of the issue were discussed, and strong presentations were made by prominent politicians, statesmen, and jurists. The major difference between the debates in the Committee and those which had developed in Panmunjom was that the political aspects of the question were subjugated to the legal and humanitarian aspects. Further, the arguments were widely publicized and all points at issue became common public knowledge. It was evident that world opinion was strongly behind the moral position taken by the United Nations Command in Korea. The overwhelming vote in the Committee, 53 to 5, in favor of the Indian Resolution[a] was later supported in the Gen-

[a]The resolution finally adopted by the First Committee was a solution proposed by the Indian delegate, Mr. Krishna Menon. It included provisions for supervision and custody by neutral powers of prisoners who did not wish to return to the control of the powers from which they had escaped or been captured. These procedures were, for the most part, included in the final agreements at Panmunjom.

eral Assembly resolution of 3 December 1952 by a vote of 54 to 5. This resolution contained the words "force shall not be used against the prisoners of war to prevent or effect their return to their homelands and no violence to their dignity or self-respect shall be permitted in any manner or for any purpose whatsoever." Thus, the political principle fought for so long and bitterly by the military negotiators in Korea was overwhelmingly indorsed by the legal and moral support of the world's statesmen and jurists, and by public opinion.

CHAPTER 3

HISTORY

Section I. Early History.

The issue of repatriation of prisoners of war, so vital in 1952, was not new to mankind. Exchange of prisoners of war and civilian captives between belligerents probably started in the latter part of the Middle Ages. Before that time, belligerents were free morally and legally, to dispose of captives as they desired, whether by slavery, resettlement, or death. As war developed from struggles between the inhabitants of certain territories to battles between the armed forces of states parties to the conflict accepted a moral and legal duty to refrain from attacking non-combatant civilians. Subsequently, this "humanization" was extended to the protection of sick and wounded prisoners. By 1864, over 250 international agreements had been concluded for the purpose of their protection. The work done later at the Hague and Geneva conventions and by the International Red Cross extended this protection to include all victims of war.

Exchange of prisoners was normally carried out in conformance with cartels, being usually head-for-head trades involving paroles and ransom monies. Holding back large groups or important persons by one or both parties was an accepted form of political blackmail. The International Red Cross and government representatives at the conferences worked hard to overcome this practice and to raise the prisoners of war from the status of chattels to that of individuals with guaranteed rights. Their work had great influence on the treaties and armistice agreements executed after the turn of the twentieth century.

Section II. Twentieth Century.

Many of the bilateral treaties and agreements signed by belligerents after World War I included provisions for voluntary repatriation of prisoners of war. At least fifteen treaties between Russia and other nations, drawn up between 1918 (Brest Litovsk) and 1921 (Riga) contained language similar to: "Prisoners of war and interned civilians of both sides are to be repatriated in all cases where they themselves desire it. The repatriation shall begin without delay, and shall be carried out with the utmost dispatch." [a] During World War II, in return for their surrender, the Soviets offered the Germans at Stalingrad (8 January 1943) and later at Budapest (27 December 1944) a guarantee that they would be returned at the end of the war to Germany or any other land they desired. Thus, not only was repatriation an old issue by 1952, but also the Soviets were old hands at arranging repatriation by choice of the prisoners of war.

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[a] 17, p VI 2.

CHAPTER 4

CONSIDERATIONS OF THE ISSUE

Section I. Legal.

The legal considerations of repatriation of prisoners of war were not developed in the political and ideological dialectics at Panmunjom. During the debates of the UN Committee, the communists introduced legal arguments which were met head on. Discussion revolved around the 1949 Geneva Convention Relative to the Treatment of Prisoners of War and particularly Articles 118 and 7 thereof. The pertinent paragraphs of Article 118 read as follows:

> "Prisoners of War shall be released and repatriated without delay after the cessation of active hostilities.
>
> "In the absence of stipulation to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph."

Article 7 reads:

> "Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present convention and by the special agreements referred to in the foregoing Article, if such there be."

Mr. Vishinsky, representing USSR, adopted a literalist approach, assuming the words of the articles to be without ambiguity. He contended that no where in the wording of Article 118 was there any condition attached to the release and repatriation of the prisoners of war. Further, the Convention was an agreement between states and the obligations therein are due to the

states. The rights were accorded indirectly to the prisoners of war through the primary obligations which were owed to the state whose citizens they were. Article 7 clearly prohibited the individual prisoner from renouncing any of these rights. Therefore, since it was the presumption that every prisoner of war wished to return to his country of origin, and since it was the desire of his country to receive him, he should not be made the victim of unlawful or unreasonable measures which would deprive him of his right to repatriation. Finally, prima facie evidence to support this argument could be found in the rejection by the Diplomatic Conference at Geneva (1949) of the Austrian proposal relative to Article 118 that would have entitled prisoners of war to apply for transfer to any other country (than their homeland) which would accept them.

Arguments against this communist position, both in Committee and in contemporary legal writings, were based largely on interpretation and intent. No word or words, out of context can have a single, clear, unambiguous meaning. Treaty words, especially, acquire meaning only from context and in terms of the major purpose of the treaty. An examination of the wording of Article 118 reveals two key words neglected by Mr. Vishinsky - "release" in the first paragraph and "principle" in the second.[a] Clearly, if a prisoner must be forced at the point of a bayonet to accept repatriation, he cannot in any sense be released. Rather, more restraint must be placed on him to send him home. And the word "principle" mitigates any unconditional or absolute literal interpretation of the first paragraph.

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[a]Annex 1.

It is true that the obligations of the conventions are national in character, and may not be altered by the action of individual prisoners of war. However, these obligations do not over ride the rights of the individuals guaranteed to them in Article 6:

> "No special agreement shall adversely affect the situation of prisoners of war, as defined by the present Convention, nor restrict the rights which it confers upon them."

It was the sense of the delegates as expressed in debate in 1947 and 1949 that Article 7 should operate to prevent a detaining power from alleging "partial or total renunciation on the part of protected persons in order to deprive them of the rights to which they were entitled under the Convention." [a] Further, it can be interpreted that the home state has no power to force a prisoner of war to use his rights, and therefore can raise no legal issue when the prisoner renounces them.

The Austrian proposal mentioned by Mr. Vishinsky was an attempt to include in the wording of Article 118 specific rights on the part of prisoners of war to apply for asylum. Implied was a corollary obligation on the part of the detaining power to grant it. It was argued that the act of giving asylum is a right of a state, and not an obligation, and no language should be included in the Convention to restrict the right of a nation to grant or deny asylum. Further, no specific language should weaken the general principle that the prisoners should return to their own countries at the end of hostilities.

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[a] , p 214.

"A reasonable, rather than a forced, construction of this record, is that the Geneva Conference of 1949, like the Conference of 1947, neither intended to foreclose the sanctuary of asylum to the prisoners faced with danger of persecution nor desired to open the door on the one hand to unpredictable and unwanted liabilities for the detaining power and on the other to abuses by the detaining power. The Austrain amendment as presented threatened both of the latter results and was not necessary to achieve the first." [a]

It may be concluded that the communist interpretation of Article 118, based on literal arguments, are not valid when confronted with interpretive arguments based on the intent of the conferees as found in the records. No doubt the delegates could have devised specific language for Article 118, but they did not. Clearly, they intended that no limitations be placed on the right of nations to grant asylum nor on the right of individuals to seek it. For these reasons, Article 118 does not speak directly to the question of forcible repatriation, but on the other hand, neither does it obligate the detaining power to use force to turn over prisoners of war who do not wish to be returned.

Section II. Humanitarian.

International law, and the treaties and conventions which support it or are supported by it, cannot be interpreted solely by the written word.

"A treaty is to be interpreted in the light of the general purpose which it is intended to serve. This historical background of the treaty, travaux preparations, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the

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[a] 17, p IV 17-18.

> provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve." [a]

There can be no question that the delegates to the 1949 Geneva Conventions intended that their purpose was to protect the prisoners of war against violence and insure them humane treatment at all times. This theme of humanitarianism is found in general and specific language throughout the conventions, and included in their titles are the words "---- for the Protection of War Victims." Resolution 8 of the Conference states, in part "the Conference wishes to affirm before all nations -- that its work has been inspired solely by humanitarian aims." [b] In fact the whole purpose of the Conventions was to "humanize" the 1929 Conventions in the light of lessons learned in World War II. Nor were the delegates unaware that as they met, almost two million prisoners of war of World War II were still in captivity, or their whereabouts unknown.

Of specific interest to this discussion is the evolution of the language currently found in Article 11o of the 1949 Convention Relative to the Treatment of Prisoners of War.

Article 20 of the Hague Conventions of 1899 and 1907 Respecting the Laws and Customs of War on Land treated repatriation as follows: "After the conclusion of peace, the repatriation of prisoners of war shall take place as speedily as possible."

Article 75, Geneva Convention of 1929 Relative to the Treatment of

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[a] 1, p 395.
[b] 17, p IV 2.

Prisoners of War provided that armistice conventions would include provisions concerning repatriation of prisoners of war or the parties to the conflict would communicate on the question as soon as possible. "In any case, the repatriation of prisoners shall be effected as soon as possible after the conclusion of peace."

Article 118 of the 1949 Convention provided (a) for the release and repatriation of prisoners of war without delay after the cessation of active hostilities; (b) that it was the duty of the detaining power to effect a plan of repatriation in conformity with the principle of release and repatriation without delay; and (c) the measures adopted should be brought to the knowledge of the prisoners of war.

Two major points are notable in this development. First, repatriation shall be effected without delay after the cessation of active hostilities rather than after the conclusion of peace. Second, the prisoners of war concerned shall be informed of the plan for repatriation. The speed-up of return of prisoners was desired in the interest of the prisoners themselves. History had proved that often many years lapse between an armistice or cease fire and a political treaty of peace. The requirement that the prisoners be kept informed of the development of repatriation plans implies that the drafters were concerned that the prisoners should be in a position to make known their own needs, desires or grievances.

In 1947 a Conference of Government Experts met in Geneva to prepare for the 1949 Conventions. This Conference considered proposals of the International Red Cross relative to repatriation, which noted that:

a. Discrimination had been shown by some detaining powers as to the category or nationality of the prisoners returned home quickly or belatedly.

b. Many prisoners had been sent home against their wills, leading to suicides by those who feared reprisal.

c. Some states decided not to repatriate prisoners of war who had good reasons for not going home.

d. Some prisoners asked to be repatriated to countries other than those in whose armed forces they served when captured.

e. Some prisoners, on being returned home, were being taken prisoners again.

After much debate, it was decided to note the proposals but refrain from drafting language for exceptions which might militate against assuring repatriation of all prisoners. In the words of the chairman:

> "I believe that we should note very carefully the difficulties brought to our attention by the ICRC, but I do not believe we can go any further.
>
> "I think we ought to limit ourselves to a very general formula which could not cover every situation.
>
> "I propose that we confine ourselves to the general principle that there ought to be repatriation to the country of origin, the details to be settled by the interested governments." [a]

During the plenary sessions of the Diplomatic Conference of Geneva, 1949, considerable discussion arose over the wording of Article 109 relative to the repatriation of sick and wounded prisoners of war. Here the language is explicit:

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[a] 17, p IV 11.

"No sick or injured prisoner of war who is eligible for repatriation under the first paragraph of this Article may be repatriated against his will during hostilities."

Again the arguments revolved around the right of a power to grant or withhold asylum. One side contended that a country should be allowed to decide for itself whether it will give refuge and asylum to a foreigner who has good grounds for staying, but should not be obligated to do so. The other side did not contest this basic right, but offered examples of injustices which occurred after World War II, particularly where Detaining Powers had forced prisoners to repatriate in order to compel them to collaborate in the economy of the occupying power. The contention was that a sick prisoner should not be forced to work for a government which he no longer supported as the real government of his country, at the decision of the detaining power which controlled that government. Thus, it is clear that both positions were predicated on the legal applicability of asylum and on the desire to give maximum protection to the rights of the prisoners.

Article 118 was not discussed in plenary session, but was accepted as proposed by Committee II which had drafted it. In committee, however, discussion arose over the question of general versus specific language. The Austrian proposal has been mentioned here before (entitlement to ask for transfer to any other country than their homeland). Opponents argued that the obligation of the Detaining power should be limited to sending the prisoners of war back to the country in whose service they were at the time of capture; and, prisoners of war might not be able to express themselves with complete freedom while in captivity.

The discussions of the two articles, then, affords an explanation of the intent of the majority of the delegates: the specific option and obligation in the case of the sick and wounded would not be extended to all categories of prisoners of war. This protected the needs and interests of the detaining powers and the privilege of granting asylum. It did not deny the privilege of asylum nor obligate the detaining power to repatriate prisoners of war against their will.

> "Article 118, it thus appears, does in fact impose a duty on a detaining power to proceed without delay to carry out release and repatriation under an agreement or plan consistent with the established variants of international law and practice, and responsive to humanitarian needs often met by the grant of asylum. The practice of according asylum involves both the option of the detaining power and the existence of conditions making return of the prisoners a personal risk. Although plans and agreements evidencing it are therefore materially less numerous than routine arrangements for return, they are a well-known fact of international conduct." [a]

The overriding philosophy of humanitarian treatment of prisoners of war as human beings rather than chattels was recognized and emphasized by the United Nations General Assembly at its Fifth Session in December 1950.

Under consideration was the problem of the large numbers of prisoners of war under allied control that still had not been repatriated nor accounted for. The sense of the Assembly was announced in Resolution 427(V) of 14 December 1950, which called on the governments concerned to act in conformity with recognized standards of international conduct and treaties and conventions to give all prisoners, without delay after the cessation of

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[a] 17, p IV 18.

hostilities, the unrestricted opportunity of repatriation.

Section III. Political.

Although the public may subscribe to the humanitarianism of repatriation without force, and jurists may accept its legality, nation-states must shudder at its political implications. In fact, it was politics which gave the communists so much concern and caused them to fight the principle so bitterly in Korea and in New York. A precedent has been set as a result of the Korean Armistice, but the details of the agreement pertained only to the solution of the specific, and unique, problem in Korea. Much of the bitterness in debate was founded in the conflict of ideologies. Communist resistance to the humane solution was based on a fear that the loss of the psychological battle might have great influence on the conduct of the armed forces of USSR and Red China satellites in future conflicts. Some students question whether the psychological and moral victory in Korea was worth over 100,000 United Nations Command casualties. In another conflict, might not the issue again be debated within the framework of a particular armistice agreement? The nature of the conflict and the results of the clash of arms surely must dictate the specifics of agreements between the belligerents. Whether one party is completely victorious, or both parties agree to a compromise, has great bearing on the solution of the prisoner of war problem. The fact that one Detaining power may become an Occupying power raises a host of new problems which gave much concern to the delegates in Geneva.

Politics introduces another consideration which affects repatriation.

Fortunately, in Korea, two nations were willing to accept into citizenry the prisoners of war who refused to return to the countries in whose service they had been enrolled at the time of capture. But what would happen in a situation where no nations came forward to accept the stateless prisoners? If the Republics of Korea and China had not taken in the non-repatriates, would the western members of the United Nations Command have offered them protection in their countries? It is possible to imagine that in a general war involving many nations, adherence to the principle of voluntary or non-forcible repatriation will cause the dislocation of great masses of stateless people who refuse to return home and who are not acceptable to detaining powers or host nations.

Influencing any solution in a particular conflict will be the basic philosophies of the nations concerned. Although oriental nations profess adherence to the precepts of the Geneva Conventions, they have, historically, violated them. The oriental disregard for human life and willingness to drag out conflict and negotiations over years and centuries, coupled with the communist doctrine of subjugation of the individual to the needs of the state are in direct opposition to the philosophies of Western nations. This divergence of views was obviously evident in the debates at Panmunjom. Even the most critical observer must marvel at the heroic patience of the UNC delegates and wonder that any agreement ever resulted from the illogical arguments presented and repeated ad nauseam by the communists.

CHAPTER 5

THE UNITED STATES POSITION

Section I. Pre-World War II.

Before discussing a possible course of action for the United States regarding repatriation policies in future conflicts, one should consider her position on the subject as evidenced in the past. Historically, the United States has been a proponent of humane treatment of prisoners of war and their prompt return to their homelands. As a matter of interest, the earliest known treaty between modern states that introduced humane treatment of able-bodied prisoners of war was the Treaty of Friendship of 1785 between the United States and Prussia. This treaty provided for specific duties on the part of the captor and certain emoluments for the prisoners, including prohibition against the use of shackles. Admittedly, the treatment and utilization of prisoners of war during the Revolutionary War left much to be desired when measured by modern standards, but American conduct was in conformance with the then existant rules of war.

As was the custom, repatriation was executed as the result of cartels calling for the prisoners to be set at liberty and returned to their homeland. And, of course, these cartels included or were influenced by ransoms, paroles, and holding of hostages. Perhaps unconsciously, the American authorities introduced voluntary repatriation at the end of the Revolutionary War. For economic reasons, Hessian prisoners were offered a chance to stay in the United States as free citizens. As a result, about 6,000 of them remained after the Treaty of Paris.

Repatriation was not an issue during the Civil War. There was some exchange of prisoners during combat and some recruitment of prisoners into military units of the detaining side, but in the main, all prisoners of war were returned home shortly after the surrender at Appomattox. Of special note, however, was a statement of the US position on asylum, as set forth in General Order 100, "Instructions for the Government of the Armies of the United States in the Field," 1863. Articles 42 and 43 of the order required US forces to protect the rights and privileges, as freemen, of former slaves. It denied any claims of service on these persons by any former owner or belligerent state. Although no longer specifically applicable, the US has held to the position that there is no duty upon a detaining power to compel the return of a prisoner who seeks asylum.

On 11 November 1918, at Berne, the United States and Germany signed a Prisoner of War Agreement which provided, inter alia, that prisoners of war entitled to repatriation, could renounce their rights thereto. In 1935-1936, the United States took a leading role in the Chaco Conference which settled the conflict between Bolivia and Paraguay. Included was an agreement that during the exchange of prisoners of war, an individual could declare to remain in the country of the detaining power or be released in the country of transit (Argentina).[a]

Section II. World War II.

In January, 1945, the Judge Advocate General of the Army ruled that customary law and the Hague and Geneva Conventions did not compel a detaining

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[a] 2, p 118-4

power to return a prisoner of war seeking asylum within its land. However, at the end of World War II, the US repatriated all of its prisoners without exception. This was done even though many German and Italian prisoners desired to remain in the United States, claiming that they had been born in the United States or their parents were US citizens, or for other reasons. This policy of full repatriation was upheld by the Circuit Court of Appeals, June, 1946.

Therefore, it can be seen that throughout its history, the United States has, on the one hand, championed voluntary repatriation, and on the other has repatriated prisoners of war against their desires. Perhaps the post World War II policy was a pragmatic solution necessitated by the requirements of economics: to release jobs in the United States for returning service men and to expedite the rebuilding of shattered Europe. Nevertheless, it points up the fact that although she is inclined morally, humanely, and legally to support a policy of voluntary repatriation, the United States can, should the situation demand, deny asylum to prisoners of war who do not wish to return to their homelands.

CHAPTER 6

DISCUSSION SUMMARY

Expeditious repatriation of prisoners of war after the cessation of active hostilities is an established requirement of international law, and a duty incumbent on all detaining powers. It is presumed that it is the natural desire of every prisoner of war to return expeditiously to his country of origin. Repatriation is a right of the individual and this right cannot be denied by a detaining or protecting power nor by the home state. It is incumbent on all parties to assist the prisoner of war to fulfill this right.

Voluntary repatriation has been practiced through the years and has its basis in humanitarian considerations, numerous treaties and cartels, and the principle of asylum. A prisoner of war, because of fear of reprisal, lack of sympathy with the home government, or other political or personal reasons may not wish to return to the country from whose forces he was captured or to his country of origin. Such an individual has the right to seek asylum in the country in which he is detained or some other country which may accept him. However, the granting of asylum is a right of a state and not an obligation. It would appear that the plea for and granting of asylum is a private matter between the state aued and the individual. Should the suit be granted, it must be a duty of the state to withhold the individual from general repatriation and protect him against any action on the part of the power on which he formerly depended.

Non-forcible repatriation is generally considered to be a facet of voluntary repatriation and became an international issue during the Korean

Armistice discussions. The special situation in the Korean conflict and the unique categorization of oriental prisoners of war brought to light a situation wherein the prisoner of war not only desired to avoid return to the country from whose forces he was captured, but would resist such return to the point of suicide. It is evident that the detaining or protecting power could not treat such an individual in a humane manner if physical force had to be used to return him to the power from which he was captured. There is considerable evidence that persons returned against their wills to the Soviets after World War II committed suicide or maimed themselves. Many of those who did get back to the USSR were executed or incarcerated. There can be no doubt that the scenes witnessed in Europe as a result of the forcible return of former Soviet citizens influenced many Americans in Korea to support the cause of the prisoners who would not return to communist control.

Logically, before a detaining power accepts the plea of the prisoner seeking asylum, it must determine that conditions are such in his homeland that he would indeed suffer deprivations should he return. This determination is in itself a major problem if communist countries are involved, since they have always denied entrance to fact finding or impartial bodies, including the International Red Cross. Probably determination will have to be based on assumptions gathered from official and unofficial intelligence reports and observations. But once the determination is made, the detaining power cannot, in all conscience, deny asylum by forcing the prisoner of war into conditions which will expose him to mental and physical duress, or even death.

CHAPTER 7

CONCLUSIONS

The great debates in 1952-1953 on the subject of repatriation of prisoners of war have established the legality of the principle of voluntary or non-forcible repatriation. This principle was based largely on the humanitarian purpose of the Geneva Conventions, the desire of the convention delegates to protect the individual rights of the prisoners of war and assure them humane treatment, and on the precedent found in numerous treaties between nations. In any future conflict it can be assumed that the principle will be recognized and included in repatriation agreements. However, because of the danger this principle presents to communist power, it can be expected that communist nations will do everything they can to prevent its application. Therefore, it will be advantageous, if not necessary, that non-communist parties to a conflict announce their intentions to apply the principle of non-forcible repatriation and to abide by the humanitarian spirit of the Geneva Conventions. Such action should preclude long discussions on the merits of the basic doctrine and limit debate to the feasibility of application.

CHAPTER 8

RECOMMENDATIONS

The United States should take the initiative to have the signatory nations called together to amend the Geneva Convention of 1949, particularly that relating to the treatment of prisoners of war. The delegates of the United States should make special effort to revise Article 118 of the latter convention to include necessary clarifying language to preclude future misunderstanding. The revision should, in effect, admit to the discretion of a detaining power to grant or withhold asylum, and make it clear that force cannot be used against prisoners of war to effect or prevent their repatriation.

As an interim measure, until Article 118 can be revised, the United States should adopt a policy on repatriation of prisoners of war and announce it to the world. Such a policy should contain these salient points:

a. Prisoners of war held by the forces of the United States will be released and repatriated as expeditiously as possible after the cessation of active hostilities.

b. The United States may, at its discretion, grant asylum to prisoners of war who do not desire to be repatriated.

c. The United States may, at its discretion, assist a prisoner of war to find asylum in any country of his choice.

d. In no case will the forces of the United States, or their instruments, use force against the prisoners of war to prevent or effect their return to their homelands.

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ANNEX 1

GENEVA CONVENTION RELATIVE TO THE TREATMENT OF

PRISONERS OF WAR

12 August 1949

SECTION II. RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE CLOSE OF HOSTILITIES

Article 118.

Prisoners of War shall be released and repatriated without delay after the cessation of active hostilities.

In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph.

In either case, the measures adopted shall be brought to the knowledge of the prisoners of war.

The cost of repatriation of prisoners of war shall in all cases be equitably apportioned between the Detaining Power and the Power on which the prisoners depend. This apportionment shall be carried out on the following basis:

a. If the two Powers are contiguous, the Power on which the prisoners of war depend shall bear the costs of repatriation from the frontiers of the Detaining Power.

b. If the two Powers are not contiguous, the Detaining Power shall bear the costs of transport of prisoners of war over its own territory as

far as its frontier or its port of embarkation nearest to the territory of the Power on which the prisoners of war depend. The Parties concerned shall agree between themselves as to the equitable apportionment of the remaining costs of the repatriation. The conclusion of this agreement shall in no circumstances justify any delay in the repatriation of the prisoners of war.