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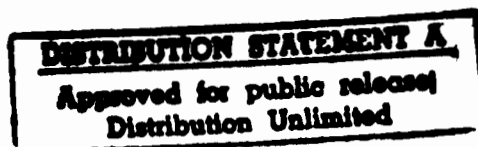
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THE GENEVA CONVENTION

Background, General Principles, and Application

ABTIC Publication G-108



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THE GENEVA CONVENTION

Background, General Principles, and Application

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Preface

This study of the background, general principles, and application of the Geneva Convention has been made to familiarize Air Force personnel with the essential features of this international agreement and to point out the important background events and situations pertinent to the present status of agreements on Prisoners of War.

The machinery for the protection of Prisoners of War is briefly summarized. The rights of a POW derive from several treaties: the Hague Convention of 1899 and 1907, the Geneva Convention of 1929, and today, chiefly from the Geneva Prisoners of War Convention of 1949. Each state is bound only by the treaty which it has accepted. There are, however, certain principles of international customary law which are binding on all states.

Most of the data contained in this study was prepared through Research Studies Institute Contract (AF 01 (600)-1) with Beloit College, Beloit, Wisconsin and Dr. Clyde Eagleton, authority on international law, New York University. Dr. Eagleton was technical expert to the Dumbarton Oaks and San Francisco Conferences, and served in the Department of State during World War II. Presently, Dr. Eagleton is emeritus professor of international law and Director of the Institute of International Law, New York University. He has been, for several years, a member of the editorial board of the American Journal of International Law.

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Historical Background

IN THE DAYS OF antiquity, the individual captor exercised complete freedom with respect to persons captured by them; he might kill, or enslave or hold for ransom.¹ By the eighteenth century, there was a tendency to mitigate the cruel practices of warfare;² and, during the nineteenth century, it was accepted that the treatment of prisoners of war by the captor state should be similar to that accorded its own troops. *The Instructions for the Government of Armies of the United States in the Field*, prepared by Dr. Francis Lieber in 1863, affirmed the principle of humane treatment for prisoners and set forth the view that they were in the hands of the hostile government and not of the individual captors. In July 1874, an International Conference was held at Brussels for the purpose of working out a code of the laws of war. A convention was adopted which, although unratified, was of importance in that it formed the basic text for discussion at the relevant committee of the 1899 Hague Conference. Many of its provisions had to do with prisoners of war.

Hague Conventions of 1899 and 1907 respecting the Laws and Customs of War on Land.

The first general treaties laying down a law for the treatment of prisoners of war were concluded at the Hague Conference of 1899. A number of provisions relating to prisoners of war were drawn up and included as Articles 4-20 of the Regulations annexed to the Hague Convention respecting the Laws and Customs of War on Land. These provisions were re-established, with a few amendments, at the 1907 Hague Conference. The United States and Russia were among those states ratifying the 2nd Hague Convention of 1899 and the 4th Hague Convention of 1907.³

¹For this period, and in general, see W. E. S. Flory *Prisoners of War* (Washington: American Council on Public Affairs, 1942); H. C. Fooks, *Prisoners of War* (Federalburg, Stowell Printing Company, 1924); G. Werner, "Les Prisonniers de Guerre," *Académie de Droit International, Recueil des Cours* (1928-1), 5-103; P. Bordwell, *The Law of War Between Belligerents* (Chicago: Callaghan & Co., 1908).

²The Treaty of Amity and Commerce concluded in 1785 between the United States and Prussia was one of the earliest formal agreements to include provisions for the treatment of prisoners of war. See Malloy, *Treaties*, Vol. II, 1484-1485.

³J. B. Scott, *The Reports to the Hague Conferences of 1899 and 1907* (Oxford: Clarendon Press, 1917), pp. 177, 900.

The Hague provisions regulating the lots of the prisoner of war, although later shown in practice to be insufficient, marked the tremendous change in thinking with respect to the treatment of war prisoners. Article 4 affirmed the principle, by then generally accepted, that prisoners "are in the power of the hostile Government, but not of the individuals or corps who captured them." The principle of humane treatment was stated in the same article; the national standard was set forth with respect to food, quarters, and clothing for prisoners (Article 7); prisoners unsuccessfully attempting to escape were liable only to disciplinary punishment; and provisions were included regarding parole, bureaux for information about prisoners, and relief societies. The matter of repatriation was mentioned only briefly in Article 20.

The effectiveness of the Hague Conventions was impaired by the "general participation clause," which provided that the Convention was binding in a particular war only if all the belligerents in that war were parties to it. Technically, therefore, belligerents would rarely be bound by it. Many states, however, chose to apply the principles laid down in the Hague Conventions; this was the position adopted by the United States.⁴

Toward the end of World War I, a number of bilateral agreements were made between belligerent parties relating to prisoners of war. Among these was an agreement between the United States and Germany concerning sanitary personnel, civilians, and prisoners of war, signed on the same day as the Armistice.⁵

⁴On August 9, 1917, the Secretary of State stated that "Inasmuch as all the powers engaged in the present war are not parties to the convention the Department of State regards it as not binding as between the belligerents in the present war. In so far as the rules set forth in the convention are declaratory of international law, they are of course obligatory as being a part of the law of nations, but not by virtue of the convention in which they are laid down." United States, Foreign Relations, 1918, Supp. II, p. 7.

⁵The chief agreements were:

Copenhagen agreement of 1917 (Germany, Austria-Hungary, Rumania, Russia, Turkey and various National Red Cross Societies).
Agreements between Turkey, Great Britain, and France, signed at Bern, December 28, 1917 and March 15, 1918.
Franco-German agreements signed at Bern March 15, 1918 and April 16, 1918.
Austro-Serbian agreement signed at Bern June 1, 1918.
Arrangement between Germany and Great Britain, signed at the Hague, July 14, 1918.
Convention between Austria-Hungary and Italy, signed at Bern, September 21, 1918.
German-American arrangement signed at Bern, November 11, 1918.
This list is taken from R. M. Frick-Cramer, *The International Committee of the Red Cross & the International Convention Relative to Prisoners of War and Civilians* (Geneva, 1945), p. 4, n. 2. See also Flory, *Prisoners of War*, p. 22.

Geneva Convention of 1929.

The experiences of the various countries in World War I with regard to prisoners of war⁶ confirmed the necessity of revising the articles of the Hague Convention. After much preliminary work by the International Committee of the Red Cross, a Diplomatic Conference was convened in Geneva in 1929 for the purpose of revising rules regarding the treatment of the sick and wounded in armies in the field and with respect to the treatment of prisoners of war. Forty-seven states participated in drawing up Conventions on both subjects.

The 1929 Convention Relative to the Treatment of Prisoners of War⁷ consisted of 97 articles, as compared with the 17 articles of the Hague Convention. All of the latter articles were incorporated into the 1929 Convention with the exception of articles 10-12 relating to release on parole. Many specific provisions were added with the object of providing a larger measure of protection for prisoners of war. The definition of war prisoners within the meaning of the Hague Convention was broadened to include naval and air forces of the belligerent as well as land forces; reprisals were categorically forbidden against prisoners of war; all forms of cruelty were forbidden; work done by prisoners was to have no direct connection with the operations of the war;

⁶See J. W. Garner, *International Law and the World War* (1920), Vol. II, Chs. XXI and XXII.

⁷The text of the Convention is given in *Actes de la Conférence diplomatique de Genève* (Geneva, 1930); also in U. S. Treaty Series No. 846; M. O. Hudson, *International Legislation* (Washington, 1936), Vol. V, p. 21.

provisions with regard to food, clothing and hygiene were considerably expanded. New sections were added on relations of prisoners with the exterior and on penal and disciplinary sanctions, and a procedure for repatriation was included.

The United States, which was one of the participants at the Conference, ratified the Convention in 1931. The total of States Parties to the Convention eventually reached fifty.⁸ The USSR was not included among them.

World War II.

The treatment of Allied prisoners of war by the enemy powers during World War II left much to be desired, and upon the conclusion of hostilities, a large number of German and Japanese officers and men were punished for violations of the laws and customs of war, including murder or ill-treatment of prisoners of war. Although non-compliance with the 1929 PW Convention, rather than inadequacy of the provisions themselves, may be said to be mainly responsible for the state of affairs in World War II, it was nevertheless felt that a revision of the Convention should be undertaken. Such a revision had been suggested as early as 1938 by the 16th International Red Cross Conference, and it had been agreed to convene a Diplomatic Conference for this purpose in the early part of 1940; but the outbreak of World War II prevented it from being held.

⁸A list of States Parties to the 1929 Convention is given in the *Final Record of the Diplomatic Conference of Geneva of 1949* (Berne: Federal Political Dept., 1949), Vol. I, p. 41.

The 1949 Convention

1945: Preliminary Work by International Committee of the Red Cross.

In a memorandum dated February 15, 1945 the International Committee of the Red Cross advised all Governments and National Red Cross Societies that it was undertaking to assemble and centralize preliminary data with a view to the revision of Conventions relative to war victims. Encouraged by the replies urging it to pursue its work in this field, the Committee proceeded to draw up, with the help of Red Cross Societies and Governments, proposals and first drafts on four subjects:

- (1) Establishment of a new Convention for the protection of civilian persons in time of war;
- (2) Revision of the 1907 Hague Convention, adapting to maritime warfare the principles of the 1906 Geneva Convention.
- (3) Revision of the 1929 Geneva Convention for relief of wounded and sick in armies in the field.
- (4) Revision of the 1929 Geneva Convention relative to the treatment of prisoners of war.

The work of the International Committee on these subjects was examined at the Preliminary Conference of National Red Cross Societies, convened in Geneva in July 1946. Delegates from fifty countries were present. The Conference was unanimous in recognizing the necessity of revising the 1929 Convention on Prisoners of War and made many specific recommendations in this regard.⁹

1947: Conference of Government Experts.

The Preliminary Conference of National Red Cross Societies was followed by a Conference of Government Experts which met in Geneva from April 14-26, 1947. On the basis of the proposals submitted by the International Committee of the Red Cross, of the opinions expressed by the National Red Cross Societies and of drafts prepared by several Governments, the Conference adopted

⁹International Committee of the Red Cross, *Summary Report on the Work of the Preliminary Conference of National Red Cross Societies* (Geneva, 1947).

preliminary drafts on the four subjects.¹⁰ It was aided in its work by an article-by-article commentary on each of the four Conventions drawn up by the International Committee of the Red Cross.¹¹ The drafts adopted by the Conference of Government Experts were then submitted in September 1947 to a Commission of National Red Cross Societies, which gave its general approval and made a number of suggestions of its own.

1948: 17th International Red Cross Conference at Stockholm.

Draft revised Conventions¹² were then submitted by the International Committee of the Red Cross to the 17th International Red Cross Conference, which met at Stockholm in August 1948. The Conference approved with certain amendments the draft conventions placed before it, and these drafts were taken as the bases for discussion at the Diplomatic Conference of 1949.

1949: Diplomatic Conference of Geneva.

Thus, after long and intensive preparation on the part of the International Committee of the Red Cross, Government representatives and experts, and National Red Cross Societies, a Diplomatic Conference was finally convened in Geneva by the Swiss Federal Council.¹³ The Conference, which met from April 21 to August 12, 1949

¹⁰International Committee of the Red Cross, *Summary Report of the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* (Geneva, 1947), 156 p.

Members of the United States Delegation to the Conference of Government Experts were: Chairman: Albert E. Clattenburg, Jr., Chief, Special Projects Division, Department of State; Delegates: Alwyn Freeman, Department of State; Brig General Blackshear M. Bryan, Provost Marshall General, U.S.A.; Harold W. Starr, American National Red Cross.

¹¹International Committee of the Red Cross, *Preliminary Documents Submitted to the Commission of Government Experts...* (Geneva, 1947), 3 Vols.

¹²International Committee of the Red Cross, *Draft Revised or New Conventions for the Protection of War Victims* (Geneva, 1948), 245 p.

¹³*Final Record of the Diplomatic Conference of Geneva of 1949* (Bern: Federal Political Dept., 1949), 3 Vols. in 2.

The Conventions adopted were issued by the Swiss Federal Council. Certified copies are published as Department of State Pub. No. 3938, *See*, concerning the PW Convention: J. V. Dillon, "Genesis of the 1949 Convention Relative to Treatment of Prisoners of War," 5 *Miami Law Quarterly* (December 1950), 40-43; W. G. Downey, Jr., "Revision of the Rules of Warfare," 43 *Proceedings of the American Society of International Law* (1949), 182-188; J. A. Gutteridge, "The Geneva Conventions of 1949," 26 *British Yearbook of International Law* (1949), 294-326; Jean Pictet, "Le problème des sanctions disciplinaires et pénales dans la III^e convention de Genève du 12 Août 1949," 29 *Revue de Droit International* (January/March 1951), 52-63; J. S. Pictet, "The New Geneva Conventions for the Protection of War Victims," 45 *American Journal of International Law* (1951), 462-475.

was attended by delegations from fifty-nine States. Observers included representatives from several other States and a number of international organizations. The USSR, which had not participated in any of the preliminary meetings up to this point, was represented by a large delegation at the 1949 Conference. Four new Conventions were adopted, one of which was concerned with prisoners of war. All, however, were intended to protect human beings in time of war, and quite a number

of articles are common to all four Conventions.

Signatures and Acceptances.

A survey of the parties bound to the 1929 and 1949 Conventions is given in the following table.¹⁴

¹⁴The list for 1929 was taken from the *Final Record of the 1949 Conference* (see note 13 above). It was checked at the United Nations on January 14, 1952 and the following discrepancies noted: Iceland and Iraq are not listed as having acceded; on the other hand, a "Republic of Slovakia" is recorded as of 1939 (League of Nations Treaty Series, Vol. 197, p. 316). Note that ratifications or accessions to the 1949 Convention become effective six months after deposit. No reservations were made to the 1929 Convention.

STATE	1929 CONVENTION		1949 CONVENTION		Reservation to Article
	Signed	Acceptance	Signed	Acceptance	
Afghanistan	-	-	X	-	-
Albania	-	-	X	-	10, 12, 85
Argentina	-	X	X	-	**
Australia	X	X	X	-	-
Austria	X	X	X	-	-
Belgium	X	X	X	-	-
Bolivia	X	X	X	-	-
Brazil	X	X	X	-	-
Bulgaria	X	X	X	-	10, 12, 85
Burma	-	X	-	-	-
Byelorussian SSR	-	-	X	-	10, 12, 85
Canada	X	X	X	-	-
Ceylon	-	-	X	-	-
Chile	X	X	X	12 Oct 50	-
China	X	X	X	-	-
Colombia	X	X	X	-	-
Cuba	X	-	X	-	-
Czechoslovakia	X	X	X	19 Dec 50	10, 12, 85
Denmark	X	X	X	27 Jun 51	-
Dominican Repub.	X	-	-	-	-
Ecuador	-	-	X	-	-
Egypt	X	X	X	-	-
El Salvador	-	X	X	-	-
Estonia	X	X	-	-	-
Ethiopia	-	-	X	-	-
Finland	X	-	X	-	-
France	X	X	X	28 Jun 51	-
Germany	X	X	-	-	-
Gt Britain (UK)	X	X	X	-	-
Greece	X	X	X	-	-
Guatemala	-	-	X	-	-
Holy See	-	-	X	22 Feb 51	-
Hungary	X	X	X	-	10, 12, 85
Iceland	-	X	-	-	-
India	X	X	X	9 Nov 50	-
Iran (Persia)	X	-	X	-	-
Iraq	-	X	-	-	-

STATE	1929 CONVENTION		1949 CONVENTION		Reservation to Article
	Signed	Acceptance	Signed	Acceptance	
Irish Free State	x	-	x	-	-
Israel	-	x	x	6 Jul 51	-
Italy	x	x	x	-	**
Japan	x	-	-	-	-
Jordan	-	-	-	29 May 51	-
Latvia	x	x	-	-	-
Lebanon	-	-	x	10 Apr 51	-
Liechtenstein	-	x	x	21 Sep 50	-
Lithuania	-	x	-	-	-
Luxemburg	x	-	x	-	**
Mexico	x	x	x	-	-
Monaco	-	x	x	5 Jul 50	-
Netherlands	x	x	x	-	-
New Zealand	x	x	x	-	**
Nicaragua	x	-	x	-	-
Norway	x	x	x	3 Aug 51	-
Pakistan	-	x	x	12 Jun 51	-
Paraguay	-	-	x	-	-
Peru	-	-	x	-	-
Philippines	-	x	x	-	-
Poland	x	x	x	-	10, 12, 85
Portugal	x	x	x	-	**
Rumania	x	x	x	-	10, 12, 85
Siam (Thailand)	x	x	-	-	-
Spain	x	x	x	-	**
Sweden	x	x	x	-	-
Switzerland	x	x	x	31 Mar 50	-
Syria	-	-	x	-	-
Transjordan	-	x	-	-	-
Turkey	x	x	x	-	-
Ukrainian SSR	-	-	x	-	10, 12, 85
U. of S. Africa	x	x	-	-	-
U. S. S. R.	-	-	x	-	10, 12, 85
United States	x	x	x	-	-
Uruguay	x	-	x	-	-
Venezuela	x	x	x	-	-
Yugoslavia	x	x	x	21 Apr 50	10, 12

**See following page.

Reservations.

Most of the reservations attached to the Convention of 1949 were made by the states of the Soviet group (Albania, Bulgaria, Byelorussian SSR, Hungary, Poland, Rumania, Czechoslovakia, Ukrainian SSR, USSR), and are the same in substance. They deal with three articles:

Article 10: refuses to allow an organization to

assume the functions of a Protecting Power without the consent of the state of the PW.

Article 12: in case of transfer of PW by the Detaining Power to another power, holds the Detaining Power responsible for treatment of PW.

Article 85: does not feel bound to apply the Convention to PW who have been convicted of war crimes under the Detaining Power. (This

claim to unilateral decision is potentially important; see below).

Yugoslavia made the same reservations for Articles 10 and 12 but not for Article 85. Other reservations were:

Argentina: will not apply the Convention, except for Article 3 to conflicts not of an international character.

Spain: will grant no more than the same procedures and penal and disciplinary sanctions as for her own armed forces; limits meaning of In-

ternational Law in Article 99.

Italy: reserves last paragraph of Article 66.

Luxemburg: will apply its national law to cases "now under consideration."

Portugal: reserves rights under uncertain meaning of Articles 3 and 4; regarding Article 60, will not pay PW more than 50 percent of pay due her own soldiers; and makes reservation to Article 10 similar to that of the Soviet group.

New Zealand: reserves views regarding reservations of other States.

Present Protection of Prisoners of War

Conventional obligations regarding PW

The various agreements, the varied parties thereto, and the reservations attached, make it necessary to study the situation of each state separately, so far as the Conventions are concerned. Thus, states are technically not bound by the Hague Regulations of 1899 and 1907 if one party to the conflict does not accept them. Fifty states—not including the Soviet Union—are bound by the 1929 Convention; fifteen thus far by the 1949 Convention, though it may be expected that many others will come along. The 1949 agreement replaces the one of 1929 among its signatories (Article 134); as to their relations with non-signatories who are parties to the 1929 Convention, nothing is said (but the fundamental principles of both are the same); in their relations to Powers bound by the Hague Conventions of 1899 or 1907, the 1949 Convention is complementary to Chapter II of the Regulations (Article 135)—whatever that may mean to a state not bound by the 1949 Convention. Powers parties to the 1949 agreement are bound in their relations with each other, even if non-signatories are in the conflict; they are also bound to such non-signatories if the latter accept the Convention and apply it in practice. Nor can a party to the conflict escape its obligations by denunciation made during the conflict (Article 142).

It may be suggested that the 1949 Convention is too elaborate, and that many of its detailed requirements will prove impossible of execution in modern war. A state blockaded and bombed and deprived of supplies may be unable to live up to the standards set; in any case, the maintenance of hundreds of thousands, even millions, of PW is a very heavy burden on any state. We may expect failure to live up to the detailed provisions of the 1949 Convention; nevertheless, it represents much advance, and sets goals in terms of legal rights which can be fairly pursued.

International Law.

A large part of the 1949 Convention may be regarded as reaffirmation of principles of customary international law, which is binding upon all

states, regardless of whether they have accepted any treaty concerning PW. This is indeed stated in the 1949 Convention itself (Article 142), which asserts that even after denunciation parties "remain bound to fulfill (obligations) by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience." It was affirmed by the Nuremberg Tribunal: "The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition"; and, "Prisoners of war were ill-treated . . . not only in defiance of the well-established rules of international law, but in complete disregard of the elementary dictates of humanity."¹³ Mr. Molotov, for the Soviet Union, on 7 November 1941, protested against the "outrageous violation by the German Government of the elementary principles and regulations of international law and of the International Agreement signed by representatives of Germany itself."¹⁴ Textbooks of international law affirm certain principles for the treatment of PW as principles of international law.¹⁵

It would doubtless be difficult to maintain many of the detailed provisions of the Conventions as generally accepted international law, but a few general principles are beyond question. Members of the Armed Forces combatants certainly and doubtless noncombatants also, have a right to special protections. They are the captives of a state, not of individuals, and this state is re-

¹³Judgment of the Nuremberg Tribunal, pp. 40, 45 quoted in *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: Published for the United Nations War Crimes Commission by His Majesty's Stationery Office, 1948), pp. 220, 223. This book as a whole is a vindication of the above assertion.

Reports of cases are to be found in *Law Reports of Trials of War Criminals Selected and Prepared by the United Nations War Crimes Commission* (London: Published for the United Nations War Crimes Commission by His Majesty's Stationery Office), 1947-. Hereinafter cited as *Law Reports*. Vol. XI contains a number of cases.

¹⁴*History of the United Nations War Crimes Commission*, p. 88. It is to be noted that Germany justified her brutal treatment of Russian PW on the ground that the Soviet Union would not allow inspection of PW camps under the 1929 Convention. See M. Juncos, *Warrior Without Weapons* (New York: Macmillan, 1951), p. 206.

¹⁵C. G. Fenwick, *International Law* (3rd ed. New York: Appleton-Century-Crofts, 1948), pp. 574-576; L. Oppenheim, *International Law* (6th ed. by Lauterpacht, London: Longmans, Green & Co., 1946), Vol. II, pp. 291-306; G. H. Hackworth, *Digest of International Law* (Washington: Government Printing Office, 1943), Vol. VI, pp. 277, 278, 281 et cetera; and see the *Masao Case*, *Law Reports*, Vol. XI, pp. 60-61, in which the tribunal rejected the plea of a Japanese general to the effect that Japan was not bound by the 1929 Convention and held him guilty under international law, for mistreatment of PW during evacuation.

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sponsible for maintaining them while in captivity, at least as well as it does its own forces. The PW is not a criminal, but an honorable man, entitled to respect; he must be treated in humane fashion; he cannot be tortured or insulted. He cannot be made to do labor which would help against his own country; his private property must be protected; he must be given fair trial when under accusation; he must be accounted for to his own country, and allowed to communicate with the outside world, especially as regards his health and legal status. His attempts to escape cannot be regarded as a crime.

These and doubtless other principles may be regarded as international law, binding on all states regardless of whether they have signed a treaty or not. Violations have been, and will be, punished as war crimes, where possible. On the other hand, the detailed rules of application of such principles laid down in the Convention of 1949 cannot be regarded as binding on non-signatories; and among its signatories, questions may be raised concerning certain of its provisions. When does war, or "active hostilities," of an international character, begin or end, bringing into play, or ending the obligations of the Convention? Who are entitled to the special status of PW? More persons, apparently, than the "combatants" of the past.¹⁸ What is meant by the Power "on which the PW depends"? Can the country of which he is a national protect him if he was captured while serving in the armed forces of another state?¹⁹ Reprisals against PW are forbidden, but are they not in fact necessary, and inevitably employed as a sanction? Can a PW be killed to prevent escape, or in other emergency? Must he be returned, after hostilities, to his own Country even though he is unwilling, or thereby endangered? Can he be held indefinitely, on the unilateral decision of the Detaining Power, on the charge of "war crimes"?

Many such questions of interpretation, procedure and sanctions will doubtless arise even where conscientious observance of the Convention is attempted. Article 11 of the Convention authorizes the Protecting Power to attempt to bring the parties together for discussion of any disagreement as to the meaning of the Convention. If a specific complaint is made, an inquiry

¹⁸See H. Strebcl, "Die Genfer Abkommen vom 12 August 1949. Fragen des Anwendungsbereichs," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. XIII (1950) pp. 118-145.
¹⁹See Hackworth, *Digest of International Law*, Vol. VI, p. 276.

must be instituted; if procedure cannot be agreed upon, an umpire may decide. The United States opposed any form of compulsory arbitration, having in mind the known antipathy of the Senate for such an obligation. Resolution I adopted by the 1949 Conference urged Parties to refer disputes concerning the Convention to the International Court of Justice; but no obligation was created to do so.

Sanctions.

The means of enforcing international law are notoriously weak; they become much weaker in time of war. Nevertheless, some pressures are available which can be used on behalf of PW. The visits and inspections of delegates of the Red Cross, Protecting Powers, or others are an important check-rein on carelessness or brutality—where such visits are permitted.²⁰ Even a dictatorship seeks to have a favorable public opinion, and is inclined to better treatment of PW when arraigned before the bar of public attention. If not, a state may desire to assure good treatment for its own men in enemy hands by reciprocal good treatment of PW in its power; how potent this feeling may be depends upon the respect felt for human life. Germany was responsive to threats of reprisal against her soldiers held abroad; the United States and England hold life in such high regard that they are at a disadvantage in such bargaining; the worst mistreatment of Russian prisoners of war by Germany did not bring the Soviet Union to respect the Convention of 1929; in the Far East life is held so cheap that there is little bargaining power, especially when combined with Communist control and severity.

Beyond this, however, is the possibility of severe penalty against individuals guilty of inhuman treatment of PW. For centuries it has been true that a belligerent government might try for violations of the law of war, enemy persons within its power—or for that matter, members of their own personnel. The victor state, it is true, has the better opportunity to reach such persons, but this opportunity exists also for the defeated state. Finally, we have now the precedent of the international tribunal at Nuremberg and Tokyo, which executed or punished many persons for their in-

²⁰See, for example, the experiences of a Red Cross delegate M. Junod, in his book, *Warrior Without Weapons* (New York: Macmillan, 1951).

humane conduct to PW.²¹ Whatever controversy there may be concerning the legal status of these trials, there is little doubt that some such tribunals will be established for future wars, and less doubt that the precedent will serve as a powerful deterrent for the future.

The 1949 Geneva Conventions are part of a great wave of development toward the statement and protection of the rights of the individual human being. It is manifested in the Declaration, and a projected Covenant, of Human Rights; in the Nuremburg and Tokyo Tribunals, in the work of the International Law Commission of the United Nations with regard to a code of Offences against the Peace and Security of Mankind, and another as to Rights and Duties of States; or in the Genocide Convention. Insofar as PW are concerned, this wave has helped secure a wider coverage of persons, and a wider protection for each such person. Far more persons are covered than actual combatants; the distinction between combatants and non-combatants is breaking down here as elsewhere, and one may look forward to a time when protection will be given by international authority to all persons whether PW or not.

²¹See the list of cases in *History of the United Nations War Crimes Commission and the Development of the Laws of War*, cited in note 15 above, pp. 519-546; W. B. Cowles, "Trial of War Criminals (Non-Nuremburg)," 42 *American Journal of International Law* (1948), 314-317. Brief surveys of these trials, not confined to PW, are: "Nuremburg Trials, War Crimes and International Law," by Telford Taylor, in *International Conciliation*, No. 430 (April, 1949); and "The Tokyo Trial," by S. Horowitz, *Ibid.*, No. 465 (November, 1950).

On the other hand, there are factors which make the situation of the PW more difficult. Chief among these is the low moral standard prevailing throughout the world today, and particularly among nations. War has spread over the world and now includes peoples unaccustomed to the standards which Western nations, for long the only important warmakers, have had centuries to learn. To many of them life is cheap, and brutality long accepted. Further, modern war is of such tremendous scope that its refinements are spread thin and the burden of being decent becomes enormous; brutality and terror have become weapons of war; new weapons and methods raise new problems as to what is humane and what is brutal. And always, war unleashes the worst of human vices and weaknesses and gives opportunity for their exercise. For future wars, such factors must be considered, particularly since such wars are likely to be with peoples not so well accustomed to international law, and who are inspired by nationalistic fervor, or Communist or Fascist methods, or perhaps by the concept of a Holy War. It is difficult to think that highly civilized peoples would permit mutilation, mass murder, or biological experimentation such as was practiced by Germans and Japanese in World War II. It is probable that such extreme misconduct will be held down; the PW will, however, have to face individual brutality to extort information or confessions, and may sometimes be used for blackmail, extortion or reprisals.

Special Questions Relating to Air Force Personnel

There was a day when airmen were regarded with special favor, and a code of chivalry prevailed for them. That day, it is to be feared, is gone; on the contrary, bombing from the air arouses fear and a desire for revenge on those who drop the bombs or shoot from the air, and propaganda stirs up popular passions so that the airman is in more danger from the civilians into whose hands he may fall.

While in the air.

According to Spaight, "normally, . . . it is impossible to accept surrender in the air."²² Perhaps it would be possible to devise a surrender signal, but its acceptance by ground forces might be quite dangerous to them. The enemy cannot safely assume that a disabled aircraft will surrender or not be able to escape; his duty is to assure its destruction.

The problem is brought up to date by the paratrooper. In earlier days, it was regarded as inhumane to shoot a helpless parachutist; the projected code of 1923 declared it to be illegal. Such a person today is not necessarily engaged in emergency preservation of his life; he may be armed for attack, a very dangerous foe, whom the enemy is entitled to shoot in the air if he can. Aside from this danger, he may be a spy, or flying supplies, or engaged in other activity harmful to the enemy. The 1949 Convention can give him little protection, but he may call upon the general humanitarian principle that no more harm should be done to an enemy person than is needed to subdue him.²³

On the ground.

It may be the duty of the flier to destroy his plane, when he has landed in enemy territory; it may equally be the duty of his enemy to capture it undamaged, as far as he can. The flier,

then, may be attacked to prevent him from damaging the plane; he may not be punished after capture for having made the attempt. This is a risky period; it would be inhumane to shoot the flier if he makes no resistance, but his effort to destroy his plane is to be regarded as resistance. When he surrenders, or is overpowered, the 1949 Convention applies, and no harm should be done to him.²⁴

The flier is more apt—since he may come down far behind the lines of combat—to fall into the hands of civilians, and he is in especial danger from them, because they are not so well informed as to his rights, and because of the emotional reaction of the crowd against attack from the air. During World War II, German officials deliberately encouraged civilians to attack airmen who were forced down; and the Tokyo outrage of April 18, 1942 is to be recalled. In both cases, the mistreatment of airmen was punished as a war crime.²⁵

Uniforms.

The flier may take off, not properly dressed, or he may shed his uniform in attempting to escape.²⁶ To be in uniform is highly important, though it is not the only proof of combatant status. The assumption would usually be that the person out of uniform is engaged in espionage or other illegal act; the burden of proof would be upon him. To be in another uniform than his own is especially dangerous.

²²After capture, there seems to be no possible differentiation to be made between the airman and other PW. A number of cases of airmen may be cited in which the usual rules apply. Thus, in the trial of *Killinger and Others* (*Law Reports*, Vol. III, p. 67) officers were held guilty for mistreatment during interrogation—beating and lack of medical attention. As to prohibited work, see *ibid.*, Vols. IV, p. 118, VII, p. 27; IX, p. 1; XI, p. 1. Germans who exposed American PW to public curiosity (marching them down the streets of Rome) were punished. *Trial of General MacLair*, *ibid.*, Vol. XI, p. 53. All defendants were found guilty in the Case of Max Welen and Others (known as Staling Luft III Case) in which fifty Allied airmen, recaptured after attempted escape, were shot. *ibid.*, Vol. XI, p. 31. Two cases of unfair trial in Japan are given in *ibid.*, Vol. V, pp. 66, 66.

²³In the "Eisen Lynching Case," three British airmen were killed by civilians. The German captain in whose charge they were and who permitted them to be killed, together with a civilian, were executed, and several others were penalized. *Law Reports* (as cited in note 15, above), Vol. I, p. 88. On the other hand, two German policemen who shot a captured airman when he made an abrupt motion to his pocket were acquitted as acting in self-defense. *Case of Weiss and Munde*, *ibid.*, Vol. XIII, p. 149.

²⁴Spaight, *op. cit.*, gives examples at pp. 100-101. It is said that Chennault's "Flying Tigers" were careful as to uniforms. In connection with this American Volunteer Group, a question may be raised as to their status under the 1929 or 1949 Conventions.

²²J. M. Spaight, *Air Power and War Rights* (3rd ed. London: Longmans, Green & Co., 1947), p. 128. In general Spaight is the best authority for air warfare, though already out of date in some respects.

²³A farmer who shot an American parachutist was condemned to life imprisonment. There was no surrender, but no overt resistance. The United Nations War Crimes Commission commented that the mere fact of bailing out did not automatically entitle the airman to PW status and this may have been one of the reasons why his penalty was reduced to ten years. *Case of Jomi Hangobi*, *Law Reports* cited in note 15 above, Vol. XIV, p. 86.

Air attack as a war crime.

There have been proposals to treat as war criminals airmen who attack civilians, unfortified towns, et cetera. Such proposals may now be regarded as out of date; air attack is no longer exceptional, but a routine and accepted part of the war effort. An air attack may be inhumane

because unnecessary for the military purpose; in this sense, it might be regarded as a war crime. It cannot be so regarded if the action taken is a useful or demanded part of the war effort. There remains, however, the fact that reservations made by some states to Article 85 of the 1949 Convention leave to the state a unilateral determination as to what is a war crime.

United Nations Enforcement Action

The United Nations action against aggression in Korea is an entirely new situation, raising questions as to the applicability of the law of war. War, however difficult to define, has hitherto been regarded as a conflict between states, in which each party has equality of legal rights. United Nations enforcement action, however, is action by the organized community of nations against an offender, an entirely different relationship, in which the legal rights of the parties are not necessarily equal or the same. It could be argued that one party (the aggressor) has no rights, and the other party (the United Nations) has all rights. We need not enter into this theoretical problem, which will doubtless occupy statesmen and thinkers for years to come.

The United Nations and PW.

The United Nations, however, was faced with practical problems, for which it was quite unprepared, when it undertook military action in Korea; except for the laws of war, there were no rules available to guide its forces. Insofar as PW were concerned, there was no doubt that the United Nations would conduct its part of the conflict in as humanitarian a fashion as possible. The United Nations Commander reported in September, 1950 that he had extended his proclamation for United States forces, with regard to PW, so that it would apply to all forces in the UN Command.²⁷ He reported also that accredited Red Cross delegates had been received, that a PW Information Bureau was established, and that capture cards were regularly mailed to Geneva. The Fifth Report noted that "the standard Republic of Korea Army ration" and a "gratuitous tobacco issue" were provided.²⁸ The Red Cross was permitted to purchase reading materials for the PW, which were "not censored"; and PW were allowed to receive parcels.²⁹ It was later reported that camps were being improved and winterized, water systems

added, and large supplies of warm bedding provided.³⁰

This meticulous observance of the 1949 Convention was not matched by the other party to the conflict, whose conduct has given rise to several points of discussion. Atrocities committed against United Nations personnel when captured were so numerous that a war crimes division was established "for the investigation and apprehension of persons suspected and accused of having perpetrated conventional war crimes"; definitely excluded from this jurisdiction are "the so-called international crimes of waging aggressive warfare and crimes against humanity, such as genocide."³¹

Apparently, the Communist command kept some sort of record of PW, though it is not known how accurate the list was. Various discrepancies appeared in the lists submitted to the United Nations Command, particularly with regard to South Korean PW who, it is suggested, were being forced to fight or work with the Communist forces.

A new question arose out of the truce discussions, at which United Nations representatives proposed that only those PW be returned who wished to be returned. It is clearly the obligation of a Detaining Power, under Article 118 of the 1949 Convention, to "release and repatriate" all PW; the only case in which the PW is given a choice is while wounded or sick during hostilities, under Article 109. Would a cease-fire arrangement be equivalent to "cessation of active hostilities"? In any case, though nothing is said in the Convention concerning cartels, it is obviously within the power of the antagonists to agree upon such terms of exchange, during hostilities as they may wish. There is every indication that Communist authorities will demand the return of all their men, whether or not against their will. In general, one may ask, concerning such a situation, who would care for the thousands or perhaps hundreds of thousands who would prefer

²⁷"Third Report of the UN Command Operations in Korea," Department of State Publication, No. 3062.

²⁸"Fifth Report of the UN Command Operations in Korea," Department of State Publication, No. 3986. See also UN Doc. S/2412.

²⁹"Sixth Report of the UN Command Operations in Korea," Department of State Publication, No. 4006. The 1949 Convention does not forbid censorship of reading matter. See Article 76.

³⁰"Ninth Report of the UN Command Operations in Korea," Department of State Publication, No. 4051. See also UN Doc. S/1996; S/2053; S/2170; S/2246; S/2377; S/2410.

³¹A journalist's description of a United Nations camp at Kojedo may be found in the Saturday Evening Post, January 5, 1952, at p. 32.

³²"Eighth and Ninth Reports of the UN Command Operations in Korea," Department of State Publication No. 4051.

not to return to their own countries—if for no other reason than they could live at higher standard in the prison camp than at home?

Soviet Union.

From the conduct of the Communists in Korea one may make deductions concerning treatment of PW by the Soviet Union. Numerous cases of mistreatment of captives have been reported.³² The Judge Advocate General of the Eighth Army, according to the *New York Times* of November 15, 1951, charged that more than 2500 UN prisoners of war (aside from far more South Koreans) had been killed by Communist forces, even though the Chinese claimed to comply with the Geneva Convention. Instead of official data, confirmed by Red Cross inspection, they issued "highly colored propaganda" which was entirely misleading; this propaganda charged that United Nations PW were subjected to inhuman torture.³³

The Soviet Union is in general unwilling to

limit itself by treaty obligations and has little respect for such treaties as it does contract, except where it stands to gain by observance.³⁴ It did not accept the PW Convention of 1929 and, while it signed the 1949 Convention, it has not ratified it. With regard to its own men it is indifferent;³⁵ consequently, the threat of reprisals means little. So many states charged it with holding their soldiers after World War II that an investigation was conducted by the United Nations. The Japanese reported some 350,000 PW not returned; the Soviet Union replied that all Japanese had been repatriated except some 1500 held for war crimes.³⁶ The pressure of public opinion will doubtless have some effect, as it apparently has in Korea; but the status of PW in Communist hands will have to be regarded as uncertain.

³²See H. D. Steiner "Mainsprings of Chinese Communist Foreign Policy," *American Journal of International Law*, Vol. 44 (1950), p. 99.

³³"In regard to the rules concerning prisoners of war the Government of the USSR does not consider itself bound by any international agreements whatsoever. At the present time the penalty for premeditated surrender into captivity not necessitated by combat conditions is death by shooting, according to par. 14 of the Regulations on Military Offences." *Great Soviet Encyclopedia*, Vol. XIV, p. 285.

³⁴"Information Transmitted by Governments Concerning Prisoners of War." UN Doc. A/AC. 46/1 Add. 1 and 2. Reports from other Governments may be found in the additional documents to A/AC. 46/1.

³⁵See UN Doc. S. 2096; S. 2107; S. 2156; S. 2217; S. 2408.

³⁶Cablegram of 19 November 1951 to the President of the General Assembly. UN Doc. A/1972.