"International" Due Process for Prisoners Of War: The Need for a Special Tribunal of World Habeas Corpus

Luis Kutner
Nothing is more shoddy or disillusioning than the "civilized" conscience and its attitude toward war. The motivation for a successful war involves killing people. In a state of nonwar, killing another human being is regarded as the worst of all crimes—often the only crime which the law recognizes as justifying counterkilling or homicide. Oft times, counterkilling takes a place with judicial murder or capital punishment. However, when nation states are aggressor defenders or the act of killing becomes cloaked with nobility and patriotism, then the greatest killers are the most decorated, admired, and honored.

Part of planning for war is the dehumanization of defenseless civilians in uniform—prisoners of war. They become members of the wrong creed, class, or race. Degradation and extermination become crimes against
decency and humanity which become the common stuff of history. It is naive and foolhardy to imagine that, in the age of outer space and inner space explorations, mankind has become gentler and more tolerant. The crimes of the Germans of the World War II were atrocious by any low standard in history. The crimes against civilians and prisoners of war become all the more horrendous as having been done in the era of the twentieth century encased in the trappings of what is termed, euphemistically, “civilization.” At some time or other, man will have to wrestle with the problem that aggressive war is not to be carried over to aggressive degradations and extermination of helpless prisoners of war. To do less would be grotesque. The German jailers all adopted an air of self-righteousness and self-exoneration when brought before the several war tribunals. The wickedness of the Germans against military prisoners of war—excluding the civilians—were acts considered gross even amidst the basic wickedness of war. Postwar prosecution is not an antidote for prophylactic rules of law anticipating international warfare as a seeming natural state of humanity. If the lawlessness committed against prisoners of war was an act of state, then the entire state should have been on trial and probably condemned, so that actual political life would cease to exist—but such is not the case. Postwar indignation against war criminals and their accomplices is a tiresome confession of the bankruptcy of all mankind. A high standard of behavior and morality must be established. This rule of conduct can only be buttressed by the rule of law.

Hence, this paper.

I. INTRODUCTION

The evolution toward the conferring of rights upon the individual in international law began in part with the development of the rules of war in the nineteenth and twentieth centuries. The Hague Conventions of 1899 and 1907 recognized that war prisoners and persons residing in enemy occupied territories retained certain rights vis-à-vis the occupying power. Thus, for the first time, the individual was recognized as having a status in international law. With the war crime trials following World War II, the position of the individual was given further recognition, as he was now to be held personally responsible for the commission of certain acts.

If the rights of the individual were to be protected during war, it logically followed that human rights should be given international recognition in time of peace. After World War I, individual rights were protected by the League of Nations Mandate arrangements, the Minorities Treaties involving the states of Central and Eastern Europe, and the International Labor Organization Conventions. The shocking disregard for human rights by the Axis Powers during World War II precipitated
an even greater concern for the international protection of the individual as evidenced by the Preamble to the United Nations Charter, the Universal Declaration on Human Rights, the Genocide Convention, the European Convention on Human Rights and Fundamental Freedoms, and other conventions and declarations.

But in most instances involving the protection of human rights, there is no effective means for the individual to assert his position. He must depend upon a nation state to act on his behalf; and, to this extent, he remains an object rather than a subject of international law. As such, his status is that of a slave. Only by providing a mechanism for asserting his rights can the "oughts," or categorical imperatives, of international law as affecting human rights be transformed into an "is."}

The effective remedy for the individual to assert his rights under international law is by means of the writ of World Habeas Corpus. With the writ of Habeas Corpus, which stems from the thirty-ninth clause of the Magna Carta, an individual who is unlawfully detained or punished may compel his jailer to release him. The principle of Habeas Corpus is recognized in both the Common and Civil law systems, while in Latin America Amparo plays a similar role. Under World Habeas Corpus, an


There are chilling reports that the North Vietnamese are systematically brainwashing hundreds of American soldiers. Amid fanfare, they are brought from secret cells, trodden through anti-American confessions and like Pavlovian dogs salivating on cue are rewarded when they cooperate, punished when they don't.

Neither Hanoi nor the Vietcong have provided lists of names or numbers of prisoners as required by the 1949 Geneva Convention on Prisoners of War. American estimates are more than 158 Air Force and Navy fliers who are imprisoned in North Vietnam, with more than 300 who are missing and possibly held captive, for a total of 458 who are missing in the North. In South Vietnam, there are 21 United States soldier prisoners of war, with 128 missing, for a total of 149.

Ho Chi Minh regards Americans in his hands as war criminals covered by the 1945 Nuremberg Charter. When Ho signed the Convention in 1957, like other signatories, he added a reservation. His declaration was: "That prisoners of war prosecuted and convicted for war crimes or for crimes against humanity, in accordance with the principles laid down by the Nuremberg Court of Justice, shall not benefit from the present Convention . . . ."

Ho claims that the United States violates Article 6 of the Nuremberg Charter which covers "crimes against peace," including "waging of a war of aggression, or a war in violation of international treaties, agreements or assurances." When Ho threatened to try the Americans as war criminals, a worldwide revulsion against the idea—including appeals from Pope Paul VI and U Thant—made him pause. But Ho still clings to his legal right, as he sees it, to do so. The International Committee of the Red Cross are forbidden to visit persons in North Vietnam. Look, July 25, 1967 at 53-55.
individual who is deprived of his rights without due process of law could, after the exhaustion of available domestic remedies, file a writ of appeal to a regional international tribunal with ultimate appeal to a world court.

Under a system of World Habeas Corpus, nine regional tribunals would be established reflecting the cultural constituents of differing legal systems, including a Communist-Orient Circuit consisting of Communist China, North Vietnam, Outer Mongolia, and North Korea; the Union of Soviet Socialist Republics-Eastern European Circuit; the Western European Circuit, which would also encompass the states of Great Britain, Iceland, Ireland, Cyprus, Crete, Israel, and Algeria; the Islamic Circuit; the Southern African Circuit; the Non-Communist Orient Circuit; the Austral-Oceana Circuit; the Latin-American Circuit; and the Anglo-American Circuit.

World Habeas Corpus, as a buckler and shield to protect individual rights, is peculiarly suited as a remedy to protect the rights of prisoners of war as recognized in international law by the Geneva Convention of 1949. These rights cannot be effectively protected by a domestic tribunal, especially in war time, when the availability of an impartial and objective hearing cannot be assured. Persons who are punished for having breached the Convention by treating prisoners inhumanely are usually from the side which was defeated in the conflict and are tried by a tribunal comprised of the victors, a tribunal which cannot be regarded as impartial. Therefore, the rights of prisoners of war can only be effectively protected through the availability of means for appeal to an impartial international tribunal through the invocation of a writ of World Habeas Corpus.

However, while in regard to other instances for the protection of human rights appeal would be made to regionally constituted tribunals, the preferred approach regarding the rights of war prisoners should be to provide for appeal to a single international tribunal. The provisions of the

The growing feeling that prisoners of war are forgotten men and that no one speaks for their freedom has caused the Congress to be concerned, at least academically. It has been suggested that it should be declared war, so that the Geneva Convention would come into play. Cong. Rec., A3786 (daily ed. July 26, 1967).

Secretary of State Dean Rusk tells aids that captured Americans are not prisoners but hostages, that the Communists would demand a *quid pro quo* for treating them decently and that he has no intention of granting any concessions. Chicago Daily News, Aug. 8, 1967, at 14.

Compensation for American prisoners of war and civilian internees taken prisoner during the Vietnam War has been put in legislative form by the United States Senate, S.2260. Cong. Rec., S1179-87 (daily ed. Aug. 9, 1967).

The sponsor of the Bill estimates that as many as 700 Americans are held prisoners in North and South Vietnam; that the compensation for prisoners following World War II provided $2.50 per day to military prisoners and $60 per month for civilian internees was inadequate,—the identical payment structure for prisoners held during the Korean War. The Bill, summarized, would establish the members of the Armed Forces a total of $3.00 per day based upon forced labor or inhuman treatment. Civilian internees will be paid at the rate of $75 per month if they are over the age of 18 and $30 per month if they are under the age of 18. The settlement would be made by the War Claims Settlement Commission with a statutory limitation period of three years following the date of release. *Id.*
Geneva Convention of 1949 require uniform interpretation, which can be best achieved by a single tribunal. Furthermore, the individuals involved are likely to be nationals from different cultures invoking universally recognized principles. The law regarding the treatment of war prisoners is not peculiar to any culture or legal system.

Ever recurring international situations are particularly conducive for the establishment of an international tribunal to protect the rights of prisoners of war. The presence of thermonuclear weapons of mass annihilation makes total war unfeasible and requires that all armed conflicts be limited in scope, as in Korea and Vietnam. The adversaries must adhere to certain rules and recognize that there are certain limits beyond which they may not escalate a conflict.

An international tribunal to protect the rights of prisoners of war and to implement the Geneva Conventions could function as a mechanism to limit the scope and intensity of armed conflicts. Such a tribunal could act as a check to prevent an adversary from so shockingly mistreating prisoners as to evoke a dangerous escalation. Conceivably, it could also constitute a step toward the establishment of a legal mechanism for the adjudication of conflicts and the elimination of the prevailing irrational reliance on violence.

This paper traces the historical development of rules regarding the treatment of prisoners of war, presents an analysis of the Geneva Convention of 1949, and considers the means by which World Habeas Corpus could be utilized to implement its provisions.

II. THE GENEVA CONVENTION

The Geneva Convention Relative to the Treatment of Prisoners of War was drafted in April 1949 by delegates from fifty-nine nations with the hope that its high principles would ensure more humanitarian treatment of prisoners of war than was evidenced by the many barbarisms,


On Nov. 2, North Korean soldiers crossed the demilitarized zone and murdered six American soldiers and one South Korean. After killing them, to quote Maj. Gen. Richard G. Ciccolella, "they smashed the heads of the dead men with such savage brutality as to render all recognition impossible."

Since President Johnson's Pacific trip there have been 10 North Korean attacks along the armistice line. How many more years of this do we have to put up with? ... Americans are [being] killed or kidnapped or imprisoned by Communists the world over.

We still don't have all the American prisoners returned from the Korean war; Cuba has murdered Americans and has American citizens in her prisons.

The Inter-American Commission on Human Rights of the Organization of American States, in its report on communist Cuba on Oct. 28 [1966] reported acts of torture of prisoners, arbitrary extraction of blood from those condemned to death, to the point that people had to be tied in an upright position to be executed. Editorial, Chicago American, January 8, 1967.
outrages, and atrocities committed during World War II. Sixty-one na-
tions, including the United States, affixed their signatures between August
12, 1949, and February 12, 1950. The Convention was part of the modern
movement for a world rule of law protecting human rights; and, as such,
it is a noteworthy contribution to the development of international law
and the international protection of human rights. It proclaims the dignity
and worth of persons even when they find themselves in one of the lowest
of human situations—captivity. Through its technical, specific and con-
crete provisions, it attempts to translate into reality the basic concepts of
due process of law and the rights of man. Despite the exigencies and emo-
tionally charged environment concomitant to a state of war, belligerents
are affirmatively obliged by the Convention’s provisions to protect the
safety, health, and mental well-being (including liberty of the mind) of
the hapless men taken prisoner.

However, there is a gap between the statements embodied in the
treaty and the realities of the prison compound. In the international
conflicts in which the United States and other states have been involved
since 1949, such as Korea and Vietnam, the Convention has not been
fully honored. The violation of its principles results in part from the lack
of an international body with jurisdiction to adjudicate alleged violations
of the treaty. Without recourse to such a special adjudicating body, en-
forcement of the minimum standards of the Convention must depend upon
the conscience of individual nations and the force of world public opinion.

A. Historical Background

In early history, the concept of the Prisoner of War was completely
unknown, and there was no protection against maltreatment for individuals
captured in battle. In ancient Greece, where wars were fought principally
for glory, captives, who usually became bondage-slaves, were completely
at the mercy of their captors. The victor sought the total annihilation
of the vanquished. But in ancient Rome, whose wars were generally aimed
at territorial and economic expansion, a captive voluntarily surrendering
could become a freedman enjoying a low form of civil freedom. If van-
quished in combat, the prisoner was usually enslaved.5

A more humane approach developed with the growth of the Christian
doctrines of equality and brotherhood, although, ironically, infidels and
nonbelievers were put to death. The slaughter and sale of prisoners con-
tinued into the Middle Ages. But with the growth of nationalism and na-
tional armies, the soldier came to be regarded as a servant of his govern-
ment and was not personally responsible for its actions. Further progress
was made with the introduction of the principle of ransom, such as the
ransoming of King Richard the Lion-Hearted during the Crusades, and

of prisoner exchanges. By the end of the Thirty Years War with the Treaty of Westphalia (1648), the principle gained acceptance that a captive of war was regarded to be in the custody of the enemy state, rather than the individual captor, so that he could not be killed or enslaved. This principle became the basis for developing a code of humanitarian treatment of prisoners of war.

Montesquieu, in *L'Esprit des Lois* (1748), stated that war confers no other right over prisoners than to disable them from doing any further harm by securing their persons. Rousseau, in *Contrat Social Au Principles de Droit Politique* (1762), and Vatell, in *Le Droit des Gens*, expanded this concept into the quarantine theory that the captor could only remove the prisoner from combat.

The first international attempt to provide for the protection of war prisoners was in the Treaty of Amity and Commerce entered into between Prussia and the United States in 1785. In 1792, the French Legislative Assembly entered a decree attempting to formalize humanitarian rules governing the treatment of war prisoners.

But it was not until the American Civil War that the problem was given thorough consideration. On April 24, 1863, the famous General Order No. 100, written by Frances Lieber, a professor of Political Science at Columbia University, was issued. The "order" furnished much of the basic material for all subsequent documents dealing with this matter. The rules there formulated were given effect in the trial, conviction, and hanging of Captain Henry Wing of the Confederate Army for the cruel treatment and unlawful killing of prisoners who had been in his custody at the Andersonville, Georgia, Prisoner of War Camp. Thus, the precedent was established that the threat of punishment for barbaric activities involving treatment of prisoners of war was the method for deterring such activities.

Numerous multilateral international conferences were adopted during the latter part of the nineteenth and the first half of the twentieth centuries for the codification of humanitarian rules protecting prisoners of war. The Brussels Declaration of 1874 was not ratified and did not become effective, but it became the basis for the detailed provisions of the Hague Conventions of 1899 and 1907 which established the principle that the treatment of prisoners of war should be analogous to that provided the troops of the detaining, or capturing, power. This "assimilation" principle—that the rights of prisoners of war are to be as close as possible to those of members of the Detaining Power's own forces—became an important part of the Geneva Conventions of 1949. However, the effectiveness of the Hague Regulations during World War I was materially

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impaired by the "general participation" clause which made its provisions binding only between the signatories, and inapplicable in the event that a noncontracting power became a belligerent. Germany predicated its disregard of many of the provisions of the Hague Convention on this ground, although the Allied powers regarded the regulations as declaratory of customary international law and binding upon all parties to the conflict.  

In 1929, the International Committee of the Red Cross prepared a draft convention to correct the defects of the Hague Convention, specifying that its provisions were to be effective between the contracting parties even though the Convention had not been ratified by all the belligerents. Generally, the 1929 Convention was disregarded during World War II by Japan in the Far East and the Soviet Union in Eastern Europe, since neither had ratified this Convention. This failure of the Soviet Union was used as an excuse for a German decree issued on September 8, 1941, by General Reinecke stating that the humanitarian rules relative to the treatment of prisoners of war would not be applied to Soviet prisoners. Accordingly, Soviet prisoners were starved, tortured, and shot during the winter of 1941-1942. German Admiral Canaris protested against this treatment in a memorandum to German General Keitel, who replied that, "the objections arise from the military concept of chivalrous warfare. This is the destruction of an ideology. Therefore, I approve and back the measures." These gross departures from minimum international standards of conduct constituted a major part of the indictments against the Germans before the International Military Tribunal at Nuremberg in 1945-1946 and the Japanese before the International Military Tribunal for the Far East in Tokyo in 1946-1947.

The inadequacies and deficiencies of the 1929 Convention and the customary rules to cope with the savagery manifested during World War II led to the 1949 Geneva meeting and the drafting of a new convention for the protection of prisoners of war.  

At the time of the Korean conflict in 1950, neither the United States, Communist China, nor North Korea had ratified the Convention, but all belligerents announced that they would adhere to the standards of the Convention. The Chinese Communists and North Koreans captured about 7,190 Americans while the United Nations

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7. One instance of misconduct in Germany in World War I was in the case of Nurse Edith Cavell who was captured by the Germans and charged with assisting Allied soldiers to escape. Her trial was secret and execution immediate. The unfair nature of the proceedings and unjust sentence shocked the world.

forces took 120,000 Chinese and North Korean prisoners. By 1962, eighty-one states, including the United States and the Soviet Union had ratified or acceded to the Convention. Of major interest today is the application of the Convention to the conflict in Vietnam. Both North and South Vietnam are signatories to the Convention, and the “National Liberation Front” or Viet Cong has announced it would treat prisoners humanely.

III. PRINCIPLES OF THE GENEVA CONVENTION

A. General Provisions

The provisions of the Convention established minimum standards of treatment for prisoners of war to ensure their well-being and accord them the rights of due process of law. Article 1 obligates the contracting parties “to respect and ensure respect for the present Conventions in all circumstances.” The words, “in all circumstances,” make it clear that the obligations of the Convention are unilateral, rather than reciprocal, and their binding effect in any conflict does not depend upon the extent to which other parties to the Convention respect their obligations thereunder. All belligerents, regardless of their status as aggressor, or victim of aggression, must, during the pendency of a war, receive the benefit of the Convention’s humanitarian principles. As a corollary to this article, and also as provided in article 13, one party to the conflict may not suspend any of the rules as reprisal for actions taken by the other. Reprisals are forbidden in “all cases of declared war between two or more of the ‘High Contracting Parties’ even if the state of war is not recognized by one of them.”

Article 2 states that the Convention shall apply to all armed conflicts, “even if the state of war is not recognized” by one of the contracting parties. It also expressly excludes the “general participation” clause. Non-contracting parties are entitled to the benefits of the Convention if they “accept and apply the provisions thereof.”

Article 3 establishes certain minimum standards to regulate civil wars, insurrections, rebellions, and other conflicts which are not of an international character but which are essentially domestic. It states that persons not taking part in the hostilities are to be treated humanely and certain acts are prohibited:

9. Encyclopaedia Britannica, supra note 6, at 519B.
12. Esgain, supra note 10, at n.33. “There is, however, a segment of international legal thought which would make the rules of wartime applicable to aggressors only, and would permit the defenders to pick and choose among the rules.”
(a) violence to life and person, in particular murder of all kind, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment; and (d) the passing of sentences and the carrying out of executions without proper procedural guarantees for a fair trial. This article is significant as an affirmation of the principle that "the observance of fundamental human rights has, insofar as it is the subject of legal obligations, ceased to be one of exclusive domestic jurisdiction of States, and has become one of legitimate concern for the United Nations and its members."

Article 3 is of special relevance to the conflict in Vietnam. If that war is an internal, domestic conflict, only article 3, which requires humane treatment for prisoners, need be adhered to and the other provisions of the Convention do not apply to captured combatants. However, if the war is of an international character, captured soldiers would be entitled to prisoner of war status under article 4 dealing with international conflicts. Considering Communism's commitment to the success of all wars of "national liberation" and the participation of United States military personnel on a large, escalating scale, it would be unrealistic to consider the conflict as purely domestic. The contention has been made that the war in Vietnam is in an intermediate category—that of an "international civil war," falling between the two traditional types of warfare: civil wars between two factions within a state vying to represent the state as its government, and wars between states in which one makes a declaration of war or commences hostilities on the other. Armed conflicts since 1945 may be generally characterized as "international civil wars."

13. Id. at 547-48.
14. Meeker, The Legality of United States Participation in the Defense of Viet-Nam, 54 DEPT. OF STATE BULL. 474 (1966), 5 INT'L LEGAL MATERIALS 556 (1966). The memorandum's argument was as follows: International law recognizes the right of individual and collective self-defense against armed attack. South Vietnam and the United States, upon the request of South Vietnam, are engaged in such collective self-defense. Their actions are in conformity with international law and the Charter of the United Nations. The United States gave commitments at the Geneva Conference in 1954 to assist South Vietnam in defending itself against Communist aggression from the North. We are also obligated under the SEATO Treaty to the defense of South Vietnam.


Those situations since the drafting of the Convention which have had the characteristics of armed conflicts envisioned by Article 3 included: the British operations
Article 3, together with articles 125 and 126, specifically provides for the use of the International Red Cross, a neutral and impartial body, to perform humanitarian tasks. Its effectiveness in the Vietnamese conflict has been impaired, however, by the failure of North Vietnam and the National Liberation Front to allow its representatives to inspect prison conditions.\textsuperscript{18}

But regardless of whether the Vietnam conflict may be regarded as an international war, there have been reliable reports indicating probable violations of the Convention. Although the Viet Cong have given assurances that their captives will be treated "humanely" their principal position is that, not having signed the Convention, they are not obligated to observe it, though as nationals of a signatory state, they should be so obligated. An instance of mistreatment by the Viet Cong involved an American prisoner of war Navy Lieut. (j.g.) Dieter Dengler, who was shot down over Laos, February 19, 1966, and is alleged to have undergone a six-month ordeal of torture and privation at the hands of his Communist captors.\textsuperscript{17} He was reported to have been tied spread-eagle to posts in villages, handcuffed to other Americans in close quarters at night, and by day, tied upside down to limbs of trees. Masses of ants were spread on his face. Guards beat him when he refused to sign statements concerning United States "aggressors." For the first three months, he reported that the prison diet was "good," a handful of rice each day. Then it was a handful of rice every few days. After an escape on June 29, 1966, and a harrowing trek through the jungle, in which his companion Air Force Lieut. Duane Martin was killed, he was rescued by helicopter. After being flown back to the United States, he said to the press,\textsuperscript{18} "They wanted me—they wanted all of us—to die . . . and as I indicated, we'd rather die free in a bush than [from] those guys not feeding us, or shooting us, and I wanted to be free . . . . Man, it is great to be alive." However, there have also been reports that South Vietnamese forces have tortured their prisoners to elicit information.\textsuperscript{19}

Article 4 defines the categories of persons entitled to prisoner of war treatment. An individual, to be treated as a prisoner of war, must not only

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\item\textsuperscript{16} in Malaya, the Hungarian Revolt of 1956, the Mau Mau movement in Kenya, the Kantanga Rebellion, the Algerian Revolt, and the 1964 Rebellion in the Congo.
\item\textsuperscript{17} There have been violations of Article 3 by both sides in many cases. Furthermore, each side appears to relish the publication of atrocities which are supposed to have been committed by the other party to the military struggle. Such action is hardly conducive to an undertaking to put the Convention into effect unilaterally, regardless of the diligence with which the other party performs its Convention obligations.
\item\textsuperscript{18} On July 20, 1966, Hanoi indicated trials of fliers, but no execution. Later this policy was rescinded. N.Y. Times, July 20, 1966, at 1, col. 1.
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have "fallen into the power of the enemy" but must be in one of the categories enumerated in article 4. Prisoner of war status is accorded, among others, to (1) members of the armed forces; (2) members of volunteer corps and militia who (a) are commanded by a person responsible for their acts or omissions, (b) display a fixed distinctive emblem recognizable at a distance, (c) carry arms openly, and (d) conduct their operations in accordance with the laws and customs of war; (3) persons who accompany the armed forces without actually being members, such as war correspondents, civilian supply contractors, and members of labor service units; and (4) camp followers and inhabitants of an unoccupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invaders. However, members of organized resistance movements will rarely meet the tests established by article 4 since, to accomplish their mission, they must work secretly, wear no uniforms, conceal their weapons and withhold their identity prior to their strike. Also, a spy's status as a captive is, as a matter of customary laws of war, not that of a prisoner of war.

An individual who has taken part in hostilities, but who is not entitled to prisoner of war status, may be treated by the capturing power as a war criminal, subject to the laws of the detaining power. North Vietnam threatened to try American pilots shot down over Hanoi during the bombing raids in July, 1966, as war criminals. These threats, however, brought sharp United States warnings that the pilots were prisoners of war and that North Vietnam would be held responsible for their safety. Hanoi claimed that the pilots were classified as war criminals under the "Nuremberg Charter." Senator Thomas J. Dodd, 112 CONG. REC. 16,224 (daily ed. July 25, 1966), noted that no Luftwaffe pilot was tried as a war criminal because of his participation in the bombing of London, nor was any member of an armed force tried because he had obeyed clearly military orders involving none of the crimes against humanity specified by the Nuremberg Charter. He stated that the American pilots in Vietnam were soldiers performing military duties, and the Nuremberg trials could not be used as a precedent to justify their trial as war criminals. Following international appeals, including pleas by United Nations Secretary General U Thant and Pope Paul VI to spare the lives of the United States pilots, North Vietnamese President Ho Chi Minh issued statements indicating that the prisoners would not be tried and would be treated humanely.

Article 5 provides that an individual's status as a prisoner of war

20. DRAPER, THE RED CROSS CONVENTIONS OF 1949 at 52 (1958) [Hereinafter cited as DRAPER].
21. Id. at 66.
is vested the moment he has surrendered and is no longer capable of resistance until his final release and repatriation. At the beginning of American participation in World War I, an American commander believed that he could condition the commencement of captivity and announced to a group of enemy soldiers that they would not be treated as prisoners of war until they had removed the land mines their troops had placed on the battlefield. He was quickly overruled by his superior officers.

Article 6 provides that “no special agreements shall adversely affect the situation of prisoners of war... nor restrict the rights which it [the Convention] confers upon them.” Hoping that “special agreements” might provide benefits greater than those provided by its terms, the 1929 Geneva Convention in Article 83 has reserved to the parties the right to make such agreements. However, the contrary result occurred and during World War II the Vichy government in France entered into special agreements with Germany authorizing the Germans to use French prisoners in German war industries as “slave laborers.”

Article 7 precludes the prisoner from renouncing the rights which the Convention accords him, preventing him from returning to a civilian status or joining the armed forces of the detaining power. Some of the conferees considered the “right to a freedom of choice,” a fundamental right of man. But the Conference was persuaded that, in time of war, prisoners do not in fact have the mental freedom to make a free choice. “Broadly speaking, article 7 is significant for it recognizes protected persons as subjects of international law with direct rights and obligations thereunder.”

Articles 8 and 11 provide for the functioning of a Protecting Power which is a neutral state entrusted by a belligerent with the protection of its nationals who may be in the power of a capturing state. “During World War II, the burden of acting as Protecting Powers was borne principally by Sweden and Switzerland, which represented virtually all belligerents.” No Protecting Power was appointed for United Nations prisoners during the Korean War. The functions of a Protecting Power include, among others, “the transmission of correspondence and information, the inspection of facilities, the supervision of the distribution of relief, and the representation of prisoners in judicial proceedings.” If no neutrals are available in future wars, article 10 authorizes the parties,

24. FLORY, PRISONERS OF WAR 39 (1942):
It is difficult to determine the point at which an enemy individual may no longer be lawfully attacked. Prisonership probably begins when he is no longer capable of resistance, because he either has been overpowered or is weaponless, when he has voluntarily and individually ceased to fight, or when his chief has surrendered his command.
25. Esgain, supra note 10, at 564.
26. Id. at 565 n.100.
27. Id. at 565.
by agreement, to entrust such functions to an organization "which offers all guarantees of impartiality and efficacy."\(^{28}\)

**B. General Protection of Prisoners of War**

Part II of the Convention provides for the general protection of prisoners of war. Articles 12 to 16 reaffirm the basic principle that prisoners of war are in the hands of the Detaining Power and not in those of the individual soldiers or military units who have captured them. They must be treated humanely. Any acts by the Detaining Power causing death or seriously endangering the health of a prisoner of war are prohibited.\(^{29}\) No prisoner may be subjected to physical mutilation or to medical or scientific experiments not justified by his medical needs.\(^{30}\)

His honor and person must be respected.\(^{31}\) He must be protected against acts of violence or intimidation and against insults or public curiosity.\(^{32}\)

\(^{28}\) Draper, *supra* note 20, at 58, states: "So great a reliance has been placed upon the role of the... Protecting Power that the admission... that there may be circumstances in which there will be no protecting power gives cause for alarm." Draper contends that a serious defect of the Geneva Convention of 1949 is that it was framed on the classical assumption that modern armies are natural entities, whereas in our modern age it is more common to have different national contingents of troops operating under a unified command such as the United Nations or NATO.

\(^{29}\) Murder is the offense against prisoners of war most frequently punished in the past, and it constituted a war crime under customary international law even before the Convention. Levine, *supra* note 6, at 446 n.50, itemizes cases of inhuman treatment which occurred during World War II—death marches, tying prisoners of war to posts and beating them, forced marches with inadequate supplies, flogging, and overworking.


The authors of the Convention wished expressly to prohibit mutilation and medical experiments which are a particularly reprehensible form of attack on the human person. This prohibition is also included in Article 130. The intention was to abolish forever the criminal practices inflicted on thousands of persons during the Second World War.

[Hereinafter cited as Pictet].

\(^{31}\) Id., at 144-45:

Respect for the person goes far beyond physical protection and must be understood as covering all the essential attributes of the human person... Captivity restricts the blossoming of personality more than any other mode of life, but its harmful effects must not exceed the hardship imposed by captivity itself... The Convention contains no express reference to freedom of opinion; and yet this right, which is one of the fundamental elements of personality, may be threatened today because of the ideological nature of conflicts, either by those who guard the prisoners, if the Detaining Power endeavors to weaken the morale of detainees or to win them over to its cause, or by their own fellow prisoners.

See later discussion of Article 17. At p. 145, Pictet states:

The sentiment of honor is one of the factors of personality... [The prisoner of war] must be protected against libel, slander, insult and any violation of secrets of a personal nature, and they must be so protected not only *vis-à-vis* their guards, but also (although this is sometimes more difficult to achieve) *vis-à-vis* their fellow prisoners.

\(^{32}\) N.Y. Times, July 8, 1966, at 3, col. 1, stated that it was charged that North Vietnam had violated Article 13 of the convention which provides that prisoners of war be protected against intimidation, insults and public curiosity by parading captured American pilots through the streets of Hanoi to the angry shouts and jeers of the populace.
He must be provided with maintenance free of charge, and, subject to considerations of age, sex, rank, and health, they must be treated alike without adverse distinctions based on race, nationality, religion or political belief. Measures of reprisal against prisoners of war are prohibited. Furthermore, since the ultimate responsibility for the proper treatment of war prisoners is on the captor state, a transfer of prisoners to other powers may be made only if the transeree power is a contracting party and is willing to apply the rules of the Convention.

C. Specific Provisions concerning Captivity—Internment, Quarters, Food and Clothing, Hygienic and Medical Attention

Part III of the Convention, Articles 17 to 108, is replete with prohibitions placed upon the Detaining Power and its personnel in the treatment of prisoners of war, all designed to ensure due process for such prisoners. A few of these will be considered.

Article 17 provides that every prisoner of war, when questioned, is bound to give only his name, rank, date of birth, and serial number. "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever." Nations have always accepted interrogation of prisoners of war as a lawful action by a captor nation; and if a prisoner chooses to betray his country, there is no violation of the Convention unless illegal

This affirmative duty of protection of a Detaining Power was violated during World War II in which there were numerous instances of civilians being permitted to commit acts of violence upon prisoners of war without any attempt being made to protect them by those in whose custody they were. Allied airmen forced to land in Germany were sometimes killed by the civilian population, and the police were instructed not to interfere with these killings. Levie, supra note 6, at 453.

33. Picter, supra note 30, at 53, states on the question of maintenance:
Can a Power legitimately plead that it is impossible for it to provide prisoners with the minimum maintenance required by the Convention? In our view, the reply to this question must be in the negative. If the Detaining Power is unable or unwilling to fulfill its obligations with respect to maintenance, it should no longer detain prisoners of war. The treatment accorded to the armed forces of the Detaining Power is not a determining factor, since in general the principle of assimilation comes second to standards which are expressly laid down.

34. Id. at 135:
Whether the case involves a coalition of States, an international armed force or any other organization within which military personnel of several States fight side by side, one general principle prevails; whenever it is impossible or difficult, for any reason to determine which is the State which has captured a prisoner of war and consequently is responsible for him, this responsibility is borne jointly by all the States concerned . . . There must be no possibility for a group of States which are fighting together to agree to hand over to one of their members not a party of the Convention all or some of the prisoners whom they have captured jointly, thus evading the application of the Convention.

The United States has been criticized for handing its prisoners of war over to the South Vietnamese government for internment. But since South Vietnam is a party to the Convention, there is no violation of our duty in this respect.

35. Identity cards for prisoners of war are also provided for, the intention being that at no time shall a prisoner be without means of identification.
means were used by the interrogators. However, during the Korean conflict the North Korean and Chinese Communist forces used "brainwashing" techniques on captured United Nations' personnel. Prisoners were coerced into giving information of military value or to confessing to acts of bacteriological warfare. The brainwashing by the Communists did not make many converts, but it did achieve propaganda advantages, especially among the uncommitted Asian nations. The purpose of the Communists was to use prisoners of war to further their interests and to extend the battlefield into the prisoner of war compound. Apparently, the prisoner of war was to be still considered a combatant and not removed from the battlefield. "If this apparent trend were to continue it would seriously threaten the improved conditions of prisoners afforded by the Geneva Conventions."

Article 38, providing that a Detaining Power shall "encourage the practice of intellectual, educational and recreational pursuits, sports and games amongst prisoners . . . ." may provide a legal basis for programs of indoctrination to encourage prisoners to change their political outlook. An "educational" program could be construed as a program of political indoctrination, rather than the mere encouragement of intellectual diversion. During World War II, the United States developed an educational

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The United States estimates that 6,000 American prisoners of war [in the Korean conflict] died from starvation, exposure due to inadequate clothing, beatings or the physical and mental abuse of being kept in solitary confinement in pits, boxes or small cells. Prisoners were terrorized repeatedly by being placed before mock firing squads. Solitary confinement was used in conjunction with cunning psychological techniques.

Id. at 532-33.

Two United States soldiers, Sgt. George Smith and Sgt. Claude McClure, were captured by the Viet Cong in 1965, held prisoner for two years, and upon their release were charged by a military tribunal, in November, 1965, with "furnishing and delivering to the Viet Cong certain documents, statements and writings inimical to the United States' interest." 25 FACTS ON FILE 491 (1965). However, in April, 1966, they were cleared of the charges of having aided the enemy after claiming that they had been "brainwashed." 26 FACTS ON FILE 148 (1966).

37. ENCYCLOPAEDIA BRITANNICA, supra note 6, at 520. See also Prugh, Prisoners at War: The POW Battleground, 60 DICK. L. REV. 123 (1956), which states that the rioting of Communist prisoners in the Koje-Do and Cheju-Do compounds and the holding of an American general captive were part of the Communist plan to make the prisoner of war a prisoner at war. Throughout the violence and rioting of the compounds, the Communists hoped to influence negotiations at the truce talks.

The fight had been continued and the war extended even where the representatives of one side were the captor and the other side the captive. Id. at 131.

38. The Geneva Convention makes no reference to the standard of conduct which a belligerent may require of its own personnel who may become prisoners; and to remedy this, the President on Aug. 20, 1955, issued Exec. Order No. 10631, 20 Fed. Reg. 6057 (1955), prescribing a six-point Code of Conduct for members of the armed forces of the United States. The Order defined the rules governing United States soldiers' deportment in the unfortunate event of capture. All of the Code provisions were designed with the realization that they would be subject to and consonant with the Geneva Conventions. Note, Misconduct in the Prison Camp: A Survey of the Law and an Analysis of the Korean Cases, 56 COLUM. L. REV. 709 (1956).
program to create among prisoners of war detained within the United States an understanding of American ways of life and to make them sympathetic to America after their repatriation.

Under article 23, prisoners of war must receive shelter from air bombardment to the same extent as the local, civilian population. This is an instance where local, national standards, not absolute ones, are used as a basis for protection of prisoners. There is some fear that North Vietnam might place American prisoners of war in areas where American bombs might drop, causing them to be killed by their own forces. 112 CONG. REC. 15,311 (daily ed. July 18, 1966). In contrast to this, article 26, providing that "the basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health..." does not follow the principle of assimilating the treatment of prisoners of war to those of the forces of the Detaining Power. Western soldiers could not stay healthy on the diet of dried fish and rice customary for Oriental men.

Articles 29 to 32 concern questions of hygiene and medical attention. Monthly medical inspections are required, including a record of the weight of each prisoner of war. Articles 34 to 37 stress the right of prisoners of war to enjoy religious worship.

D. Discipline

By article 39, each prisoner of war camp commander must make known the Convention's provisions to the camp staff, and he is responsible for its application under the direction of his government. Many violations of the 1929 Geneva Convention occurred because camp guards and prisoners of war were ignorant of the Convention's provisions. Article 127 provides for dissemination of the text of the Convention. Pursuant to these articles, General William C. Westmoreland, Commander of the United States Forces in Vietnam, issued an order in October, 1965, that United States soldiers were to treat captured Viet Cong guerrillas humanely.39 Articles 46 to 48 concerning the transfer of prisoners of war after their arrival in camp resulted from the memory of the horrors of the 1942 Death March at Bataan in the Philippines.

E. Labor of Prisoners of War

Articles 49 to 57 concern the conditions of labor for prisoners of war. Article 50 enumerates the classes of work on which prisoners can be compelled to work. By article 52, the removal of mines or similar devices has been defined as dangerous labor in which no prisoner of war can be

39. The order was distributed to United States troops in the form of a pocket sized leaflet and urged the soldiers not to "mistrat your prisoner, humiliate or degrade him... Not even a beaten enemy will surrender if he knows his captors will torture or kill him." 25 FACTS ON FILE 43 (1965).
compelled to work. Article 55 is of special interest since it requires the verification of the fitness of the war prisoner for work by medical examination at least once a month.\(^{40}\)

**F. Financial Resources of Prisoners of War**

The minute detail of the Convention is illustrated in articles 58 to 68 covering the subject of financial resources of prisoners of war. Article 60 fixes a monthly advance of pay. During World War I, the United States fixed a gratuity of $3.00 a month for each prisoner of war who was paid in commodities at post exchange prices and fixed a rate of 80 cents a day for labor, which was credited to the accounts of the prisoners. Upon repatriation at the end of the war, the prisoners were given certificates of credit which were cashable in designated banks in their home countries.\(^{41}\)

**G. Relations of Prisoners of War with the Exterior and the Authorities**

Articles 69 to 77 consider the relations of prisoners of war to the outside world with a provision for the sending and receiving of mail and relief shipments. One of the most bitter features of captivity is the ignorance of the prisoner of conditions at home. There have been complaints that families and dependents of American prisoners of war are experiencing financial neglect and need. They are having administrative difficulties with income tax returns and other official documents requiring the absent soldier's signature. 112 Cong. Rec. 19,820 (daily ed. Aug. 25, 1966).

Articles 79 to 81 deal with the office of prisoner of war representatives who may represent prisoners before the Detaining Power's military authorities. Article 78 establishes the right of prisoners to complain of violations of the Convention by the Detaining Power. As many requests and complaints may be made as wanted; even if found to be unfounded, they cannot give rise to punishment.

**H. Sanctions**

Article 85 is of significance in providing for a reversal of the treatment given prisoners of war at the war crimes trials the Allies conducted

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after World War II. The article asserts that "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." The Soviet Union and other members of the Communist bloc, including China and North Vietnam, asserted the reservation upon ratifying the Convention, that the Convention's benefits and procedural safeguards should not be applicable to prisoners of war tried for pre-capture offenses as war criminals. During the Korean War, prisoners who made "confessions" to the use of germ warfare found that their statements could be used to convict them as war criminals and deprive them of their status as a prisoner of war.

Under article 85 prisoners of war tried for war crimes have the benefits of the Convention, including a right to the substantive and procedural rights enumerated in articles 84 to 88 and 99 to 108.

Penal and disciplinary sanctions, provided for in articles 82 to 108, are of special interest in considering the due process rights of prisoners of war. Article 82 provides that certain offenses, which would be subject to severe punishment if committed by troops of the Detaining Power are, when committed by prisoners of war, to be considered as only disciplinary infractions. The reasoning is that military codes are designed to enforce the discipline and loyalty of the armed forces, but prisoners of war owe no loyalty to the Detaining Power, and it is unreasonable to hold them accountable to such standards. Articles 89 and 90 establish a disciplinary code "in miniature" which supersedes and replaces the legislation of the Detaining Power. Article 91 gives full realization to the fact that it is a prisoner's duty to his own country to effect an escape if possible. Acts committed solely in furtherance of an escape are to be dealt with lightly, although the prisoner can be punished more severely if, in the course of his escape, he commits violence against life or limb, or against public property, or commits theft for self-enrichment.

The safeguards and rules to be followed in judicial proceedings are stated in articles 84 to 88 and articles 99 to 108. Rearranging the sequence so as to proceed from the pre-trial to the trial to the post-trial due process rights of prisoners of war, the following can be stated in summary:

42. *In re* Yamashita, 327 U.S. 1 (1946). In 1945, General Yamashita, Commander of the Japanese forces in the Philippines, was convicted under an order which authorized the military commission to consider depositions, affidavits, hearsay and other evidence not admissible in either a court martial or other military proceeding. On appeal from the denial of General Yamashita's petition for a writ of habeas corpus, the Supreme Court of the United States held that the procedural safeguards of the United States Articles of War and the Geneva Convention of 1929 were intended to apply only to offenses committed by prisoners of war subsequent to their capture. The rationale of the *Yamashita* case became a precedent for the international military war crimes trials. Article 85 makes it clear that a reversal of that doctrine was intended.


As a jurisdictional matter, the Protecting Power, the prisoner's representative, and the accused prisoner of war must receive a specification of the charge and notice of the time and place of trial at least three weeks in advance thereof. Article 104.

A prisoner of war may be tried only by a military court, unless members of the armed forces of the Detaining Power may be tried by civil courts for the offense charged, and the court must be one offering the essential guarantees of independence and impartiality. Article 84. He must be tried by the same courts and according to the same procedure as are members of the armed forces of the Detaining Power. Article 102. He may not be tried or sentenced for having committed an act which was not forbidden by the law of the Detaining Power or by international law in force at the time the act was committed, and he must be afforded an opportunity, with the assistance of qualified counsel, to present a defense. Article 99. He has the right to defense counsel, a competent interpreter, if necessary, particulars of the charge, time to prepare his defense, opportunity to consult with his counsel freely and privately, opportunity to confer with defense witnesses, and normally the presence of representatives of the Protecting Power at the trial (article 105) (if the trial is not in camera for reasons of national security). He may only be sentenced to those penalties provided for in respect to members of the armed forces of the Detaining Power who have been convicted of the same offense; and the court must take into consideration the fact that the accused prisoner of war is not bound by any duty of allegiance to the Detaining Power and is its prisoner as a result of circumstances beyond his control. Article 87.

After the trial, notice of the judgment and sentence and appellate rights of the prisoner of war as well as his decision to use or waive his appellate rights must be reported immediately to the Protecting Power, to the prisoner's representative, and to the prisoner of war himself in a language he understands, if he wasn't present when the sentence was pronounced; and, if the sentence has become final, or, if the death sentence has been adjudged additional detailed information must be furnished the Protecting Power. Article 107.

The convicted prisoner of war is entitled to the same appellate rights as are members of the armed forces of the Detaining Power, and he must be fully informed of those rights. Article 106. He retains, even if convicted of a pre-capture offense, all of the benefits of the Convention. Article 85. He may not be tried twice for the same offense. Article 86. The death sentence may not be executed until six months after notification thereof has been given to the Protecting Power. Article 101. Sentenced prisoners of war may not receive more severe treatment that that applied in respect of the same punishment to members of the armed forces of the Detaining Power. Article 88. Sentences and confinement must be
served in the same establishments and under the same conditions as in the case of members of the armed forces of the Detaining Power, which conditions must conform to the requirements of health and humanity. The prisoner of war retains his rights to make complaints concerning the conditions of his confinement, and to receive the visits of the representatives of the Protecting Power. Article 108. In addition, pre-trial confinement must not exceed three months and the period spent in pre-trial confinement must be deducted from any sentence of imprisonment passed upon the prisoner and be taken into account in fixing any other penalty.

IV. IMPLEMENTATION OF THE CONVENTION

The execution of the Convention and Sanctions for “grave breaches” are specified in articles 129 and 130. Under article 129, each party to the Convention, whether or not a belligerent, places itself under an obligation to search out persons alleged to have committed any grave breach, bring such person to trial, or, if it prefers, to turn the person over to another party for trial where such party has made out a prima facie case against him. Each party also undertakes to enact “any legislation necessary to provide effective penal sanctions.” Thus, violations of the Convention are not to remain unpunished and neutral countries cannot offer sanctuary to persons violating the Convention. To date, only a few states have enacted legislation to implement article 129. The United States believes its existing military law, the United States Penal Code, and state criminal laws are adequate to fulfill its obligations under the Convention. [However, there are two objections to this view: (1) Under United States law, its legislation is limited to offenses committed within the territorial jurisdiction of the United States, and (2) treaties require legislative enactment to make their provisions effective and are considered by United States courts as being enforceable only after the enactment of such legislation. Retroactive or ex post facto prohibitions are respected.]

Article 130 lists the following grave breaches: “wilful killing, torture or inhumane 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 the prisoner of war of the rights of a fair and regular trial . . . .”

45. Levie, supra note 6, at 458-59.
46. Picter, supra note 30, at 475, states:
In any case of doubt which might be to the disadvantage of prisoners of war, those provisions (which are imperative and are contained in Articles 82 to 108) must outweigh the corresponding legislation of the Detaining Power, and the latter must in any event afford as a minimum the safeguards specified in the Convention. The rules of the Convention, therefore, outweigh the principle of assimilation of prisoners of war to the armed forces of the Detaining Power.
47. Esgain, supra note 10, at 582, states that eight nations—the Netherlands, Switzerland, Yugoslavia, Czechoslovakia, Belgium, Ethiopia, Thailand and the United Kingdom—have such legislation giving the universal jurisdiction contemplated by the Convention.
48. Numerous instances of the commission of grave breaches enumerated in article 130
criticism has been made that many types of misconduct deserving severe punishment are considered non-grave breaches, and nations need only use administrative rather than legislative sanctions to punish such breaches. In a text on Soviet Law and Procedures it is noted that: “An examination of the reports of the war crime trials after World War II discloses that numerous accused were tried and convicted for the following serious offenses which, if committed now, would be non-grave breaches under the 1949 Geneva Prisoner of War Convention: (a) the use of prisoners of war for prohibited classes of work, such as the construction of fortifications on the front lines; (b) the compulsory use of prisoners for unloading arms and ammunition from military aircraft; (c) the compulsory employment of prisoners in the production of armament; (d) the compulsory employment of prisoners in unhealthy conditions; (e) the utilization of unsanitary or inadequate housing facilities for prisoners; (f) the giving of false information to the protecting powers concerning the conditions of prisoners of war; (g) exposing prisoners to public humiliation; (h) abandoning responsibility for the protection of prisoners by transferring them to unauthorized civilian organizations; and (i) the infringement of the religious rights of prisoners.”

V. PRISONER FREEDOM

Termination of captivity and repatriation are considered in articles 109 to 119. After the Korean conflict, the Communists insisted that all prisoners of war be repatriated, by force, if necessary. They argued that under article 7 providing for the nonrenunciation of rights and article 118 providing for repatriation without delay all prisoners must be repatriated regardless of their wishes. But the United Nations General Assembly on December 3, 1952, adopted a Resolution asserting that the forcible repatriation of prisoners who, because of fear of punishment for ideological reasons reject repatriation, would be incompatible with the spirit of the Geneva Convention. The doctrine of nonforcible repatriation means simply that asylum may be granted by a Detaining Power to prisoners of war who seek it.

To sum up, the Geneva Convention on prisoners of war sets high standards of treatment for such prisoners. However, no international convention can be drafted so as to preclude those who are intent on violating its principles from so doing if they believe the violations are necessary to attain their goals in an armed conflict. This problem of the enforcement

came to light in September, 1950, when United Nations command troops moved into territory previously held by the Communists. However, under the provisions of the Armistice Agreement [since the Korean conflict ended in a stalemate, not a victory], it was necessary to repatriate those individuals who deserved punishment without such punishment.

of proper treatment of prisoners of war may have its greatest impact in the ideological "cold war" which the world is fighting today for men's minds. Despite their ratification of the Geneva Convention, the Chinese and Soviet bloc's standards regarding due process and human rights differ from those prevailing in the West. Lacking an international criminal court to enforce the sanctions of the Convention, the best deterrent to the mistreatment of captured prisoners is reliance upon the arousing of world opinion through publication of the violations and breaches of the Convention and full adversary proceedings in a special tribunal as herein proposed.

VI. THE IMPLEMENTATION OF WORLD HABEAS CORPUS FOR PRISONERS OF WAR

An International Tribunal empowered to hear the writs of World Habeas Corpus should be impartial and objective. Ideally, the judges should be persons who have severed all of their national ties and are, so to speak, citizens of the world. Indeed, if the International Court of Justice is to evolve into a truly effective institution for the rule of law in the international community, it must be composed of such persons. Unfortunately, no such international tribunal exists today and qualified persons who are devoid of national ties cannot be readily found. Though an individual may profess to be fair minded, if he expects to return to live among his own countrymen, he may be influenced by his national ties when serving on a tribunal which decides a matter wherein the interests of his own nation are involved. This has been the situation with regard to decisions by the International Court of Justice.

Since the judges of the International Tribunal are unlikely to be above all nations, the Tribunal, to assure a degree of objectivity, should contain representatives of the belligerents along with neutral representation. The Tribunal could be organized on either a stand by or ad hoc basis to meet the juridical needs of each armed conflict. The judges would consist of nationals of the belligerent states who would, by mutual agreement, designate a certain number of nationals from neutral states to serve with them. In the case of a civil war, the Tribunal would contain representatives of the opposing factions. Where the conflict is characterized as a United Nations police action or is undertaken under the authority of, or to implement, a Security Council or General Assembly Resolution, the Tribunal would consist of United Nations representatives—who would, generally, be nationals from those states who have committed units to the military action—and representatives from the State or States against which the action has been undertaken. The total number of neutral representatives on the Tribunal could equal the number of belligerent representatives.

50. Esgain, supra note 10, at 591.
Each case involving the rights of a prisoner would be heard by a panel consisting of a national from his home country or of the unit to which he had been attached when he was captured, a representative of the Detaining Power, and a Neutral. The panels under the aegis of the Red Cross would travel to the prison compounds, and other areas where prisoners are being held, to hear the petitions, and the prisoners would be given the right to counsel, interpreters, present evidence, cross examine witnesses, and conduct investigations. An appeal could be made to the Tribunal meeting en banc by either the Detaining Power or the petitioning prisoner. The panel could also refer a matter for determination by the entire Tribunal to seek clarification as to the meaning of a provision of the Geneva Convention.

If an individual is detained during an armed conflict and is denied prisoner of war treatment under article 4 of the Geneva Convention, he could petition by Writ of World Habeas Corpus to the Tribunal to determine his status. Thus, for example, the American fliers who were taken prisoner by the North Vietnamese and were threatened with being tried as war criminals could petition the Tribunal to determine their status.

A prisoner would also have the right to invoke the Writ of World Habeas Corpus where the detaining power refuses to provide him with humane treatment as provided in articles 17 and 18 of the Convention. If he were subjected to torture, brainwashing, starvation, inadequate medical and hygienic facilities, forced or dangerous labor, or the denial of representatives to whom they may present grievances, he could invoke the Writ to assert his rights.

The Writ of World Habeas Corpus would also be available to protect the prisoner's rights in the application of the penal and disciplinary provisions under articles 82 to 108. Where he is punished under proceedings which are not in accord with the procedures to assure due process under articles 84 to 88 and 99 to 108 which provide that the accused prisoner of war receive a specification of the charge, notice of the time and place of trial, time to prepare defense, to be heard by an independent court, to have counsel, present evidence, and have the right of appeal, he would be entitled to petition by Writ of World Habeas Corpus to free him from what would constitute an illegal detention and to restore to him his full rights as a prisoner of war. The Writ could also stay the imposition of the death penalty. The prisoner could also invoke the Writ to assure that, as provided in article 88, he is not given a more severe punishment than would be the case for members of the armed forces of the Detaining Power. He could also use the Writ if, as provided by article 108, he is denied the rights to make complaints concerning the conditions of his confinement and to receive the visits of the Protecting Power.
The presence of an International Tribunal would be particularly useful in implementing articles 129 and 130 which impose an obligation upon each party to the Convention to search out persons alleged to have committed a grave breach, to bring them to trial or to turn them over to another party for trial where such party has made a prima facie case against them. Generally, such persons are brought to trial if they have been identified with the defeated belligerent and are tried by a tribunal which has been established by the victors, though there have been exceptions. To assure justice, such persons regardless of nationality should be tried by an International Tribunal. If, however, they are to be tried by a national tribunal, they should have the right to petition the International Tribunal by the Writ of World Habeas Corpus to review the proceedings. If a system of World Habeas Corpus is to be instituted to protect prisoners of war, article 130 should specify that a refusal to comply with a directive of the International Tribunal, whether issued by a panel or en banc, would constitute a “grave breach.”

The International Tribunal could, by Writ of World Habeas Corpus, hear petitions determining the rights of prisoners to repatriation or to protection from forcible repatriation, thus resolving the controversy which prolonged the truce negotiations and hostilities in the Korean conflict.

Of particular concern to the International Tribunal would be article 85 regarding prosecution of prisoners by the Detaining Power for acts committed prior to their capture. Thus, a prisoner could be tried for war crimes. By the Writ of World Habeas Corpus, he could not only assure that the proceedings against him would be in accord with the substantive and procedural rights which are enumerated in the Convention but also seek a determination as to what would constitute a war crime and the extent to which the defense of superior orders may be asserted. If a prisoner has committed grave breaches of the Convention, genocide, or mass murder, he may be justly tried, though such matters should be heard before an International Tribunal. However, war crimes are usually regarded as encompassing activities which are beyond the scope of usual military actions. But the technology of modern war has created weapons which are so destructive that a case could be made that their use is criminal. The author of the controversial play, The Deputy, has contended that the allied fliers who bombed the City of Dresden during World War II committed an act which was as criminal as that perpetrated by the Nazi officers at the Warsaw Ghetto. An argument can be made that the use of thermonuclear weapons would constitute a war crime. A bombardier who dropped an atomic bomb; a technician who turned the switch to release a missile with a thermonuclear warhead; and a commander who ordered the use of thermonuclear missiles may be held

accountable for their acts, even though the purpose was to achieve certain military objectives. The mere fact that the accused acted in obedience to the orders of a superior does not of itself relieve him from responsibility. But the problem still remains as to the point at which an individual is to be held responsible for his acts and as to which acts are to be regarded as constituting war crimes.

In determining the status of persons as prisoners of war, the International Tribunal may be called upon to consider such questions as whether a state of war actually exists and, conceivably, whether a state, in engaging in military actions, is acting in accord with the principles of international law. However, given the present state of international relations, states will be reluctant to confer such authority on an International Tribunal, particularly regarding the latter question. But if a belligerent should seek to try a prisoner of war as an "aggressor" or perpetrator of aggressive war, or for allegedly committing criminal acts, and he appeals by Writ of World Habeas Corpus to the Tribunal, it may well be confronted with this question. In determining the issue, the Tribunal may be making a judicial determination of the dispute which had precipitated the conflict. Thus, the extension of World Habeas Corpus to prisoners of war could be a major step toward the replacement of war as a means for resolving disputes with the rule of law.

In using law to make war more humane, the individual has been recognized as having certain rights and responsibilities. By commencing to protect these rights in time of war, a precedent was established which extended to the protection of human rights in peace time. But, if these rights, now recognized by international law, are to be effective, the individual must have the means for asserting his rights before an International Tribunal. The remedy recognized by most legal systems for a denial of individual rights is the Writ of World Habeas Corpus which can provide an individual with access to an International Tribunal where a municipal authority has denied him fundamental rights. This remedy is particularly suitable in implementing the provisions of the Geneva Convention of 1949 on Prisoners of War.

International law has conferred rights and responsibilities upon individuals who have become prisoners of war. World Habeas Corpus emerges as the effective remedy for giving effect to these rights. The need for limiting the scope of international conflict because of the dangers of mutual annihilation requires adherence to the rules of warfare by all belligerents. The presence of an International Tribunal to implement some of these rules can serve as a further mechanism to limit the scope

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52. One writer contends that what should really be probed in these cases is the mens rea of the accused. DINSTEIN, THE DEFENCE OF 'OBEDIENCE TO SUPERIOR ORDERS' IN INTERNATIONAL LAW (1965).
and intensity of armed conflict. The functioning of such a tribunal can be a step toward the establishment of the rule of law as a means for resolving international disputes.

VII. CONCLUSION: A WORLD HABEAS CORPUS TRIBUNAL

A basic step in mankind’s continuing struggle toward achieving human dignity will be for the nations of the world to develop an effective means of protecting prisoners of war from cruel and inhuman treatment during their wartime confinement. A serious procedural defect in the Geneva Convention’s machinery for enforcing its provisions is the lack of a permanent, impartial international tribunal with power to consider petitions for writs of habeas corpus by, or on behalf of, individual prisoners of war. In the past, the only real deterrent to abuse of such prisoners has been the fear of punishment at the end of hostilities, should the offending nation be the loser. The Nuremberg trials have been criticized on these grounds, as being principally the meting out of punishment by the victors on the vanquished.

53. In Hingorani, supra note 4, the author, Dean of the Faculty of Law, University of Gorakhpur, states:

A person’s liberty may have been temporarily curtailed due to the incidence of war, but he doesn’t lose his right to life and security of person, including immunity from torture or cruel or inhuman or degrading treatment or punishment.

Id. at 226.

54. A writ of habeas corpus is “a writ issued by a judge or court of justice commanding the person to whom it is directed to bring the body of a person in his custody before that or some other court for a specified purpose. [It is a] well-established remedy for violation of personal liberty.” 11 ENCYCLOPAEDIA BRITANNICA 55 (1959).

The writ of habeas corpus is limited in that it can only be used against unlawful imprisonment. However, imprisonment involving cruel and inhuman treatment is by its nature unlawful as being in derogation of the natural rights of man.

55. Bridges, The Case for an International Court of Criminal Justice and the Formulation of International Criminal Law, 13 INT’L L.Q. 1255 (1964). The author states that although international crimes are infrequently committed in peace time, ad hoc tribunals are undesirable.

However impartial and incorruptible members of an ad hoc tribunal might in fact be, the mere fact that the tribunal had been set up expressly to try crimes arising out of particular circumstances would suggest, however unjustly, that the tribunal is not impartial, that the matters to be tried have been prejudged and that the tribunal has been set up to give a false impression that justice is being done.

Id. at 1271.

Oppenheim, 2 INTERNATIONAL LAW 586 (7th ed. Lauterpacht 1952) states:

[Assuming the possibility of a legal [regulation of war in conditions of modern] warfare—which assumption is still part of international practice—the establishment, in advance, of an impartial international judicial organ for that purpose, open to all belligerents and to neutrals, is a requirement both of justice and of the effectiveness of International Law . . . . Undoubtedly there is a distinct possibility that in any major or general war a judicial authority thus created may be swept away by the victor. But there is equally no doubt that he would not be able to do this without exposing himself to the irrebuttable accusation that his attempt to punish war crimes in his own way is no more than a pretext for wreaking vengeance upon the defeated or that he himself has been guilty of war crimes likely to be condemned by an impartial tribunal.

In addition, dangerous precedents can be established when an individual state kidnaps a criminal and tries him before its own national courts, as in the case of Eichmann.
Establishment of an International Court of Habeas Corpus under United Nations auspices (but autonomous and independent of the political influences of that organization), by treaty between the nations of the world would afford individual prisoners of war the procedural means and forum to protest treatment violating their fundamental human rights. Recourse to an international body is necessary since it is highly dubious that a belligerent state would punish its own nationals for such violations. On the contrary, the sort of crimes committed during World War II and the Korean conflict indicate that such mistreatment has been tacitly approved, if not actively stimulated and encouraged, by capturing nations for the achievement of their military or political purposes. The availability of an International Writ of Habeas Corpus would do much to ensure increased respect and observance of the standards of the Geneva Convention. Violators could expect to face international accountability for their misdeeds during the progress of the conflict. Prisoners would not feel helpless and powerless against continuing cruelty and suffering with their only hope being escape or their country’s quick victory.

In addition, in this area the proposed Writ of World Habeas Corpus would not encounter the delicate problem of allowing an individual to sue his own state before an international body, with the consequent deterioration of the allegiance relationship between that citizen and his state. The Writ would be used principally when a signatory state has mistreated a captured citizen of another state, involving no violation of the doctrine of state sovereignty. Breaches of the Geneva Convention are, by definition, international crimes against mankind, and the power to try
and punish international criminals belongs to international society and not individual states. 69

Most modern authorities on international law consider individuals as subjects and not objects of international law. 60 As subjects of international law—as active international personalities—prisoners of war should have available the right, through the representative Protecting Power or the International Committee of the Red Cross, to petition for the Writ of Habeas Corpus, "the great shield of human liberty." If the Writ is granted, the Detaining Power would produce the prisoner before the regional court of World Habeas Corpus, and the court would then proceed to determine whether the prisoner's detention involved conditions contrary to the provisions of the Geneva Convention or shocking to the conscience of mankind. 61 States could no longer ratify the Convention and then not fulfill its provisions, claiming good faith; their actions would be subject to review by an international tribunal. The world community could no longer ignore or condone abuse of captured men who had simply performed military services for their own states. 62

On December 12, 1963, the General Assembly of the United Nations designated the year 1968 as the Year for Human Rights for the purpose of commemorating the twentieth anniversary of the adoption of the Universal Declaration of Human Rights. A committee has been established to recommend a program in furtherance of human rights and fundamental freedoms. As part of this program, it would be opportune for the international community to consider the establishment of a World Court of Habeas Corpus. A resurgence of interest in the creation of such a tribunal is to be expected. It should be noted that public outrage at the mistreatment of prisoners of war could arouse national indignations which would then hinder peaceful solutions to a war. The door would be opened to a nuclear holocaust and the complete dehumanization of war.

59. U. UDOMA, WORLD HABEAS CORPUS states: "The right to life and liberty of the individual in the States is of such fundamental importance that its enforcement should not be allowed to be controlled entirely by individual States."

60. M. ST.KOROWICZ, INTRODUCTION TO INTERNATIONAL LAW 332 (1959). The author proposes that the International Court of Justice should not be engaged in the settlement of disputes between individuals and states, but should only have jurisdiction over disputes between international organizations and states. He believes that special regional or universal tribunals should settle cases arising between individuals and foreign states or international organizations, i.e., the European Commission on Human Rights.

HINGORANI, supra note 4, at iii, states: "Gradually, the individual has been transformed from an object of international compassion into a subject of international right."

61. HINGORANI, supra note 4, at viii, states that many of the provisions of the Geneva Convention are out of date and fail to take account of many of the problems facing the detaining power under conditions of modern warfare. It could be disastrous if they become so anachronistic as to be of no effect as a guide to rights and privileges of prisoners.

62. But where it is possible to meet the standards of the Convention and where a belligerent fails to do so, then there is jurisdiction for international sanction. Their basic philosophy grounded on a belief in human dignity is still valid.
fare. It is thus very necessary to provide prisoners of war with an effective means of legal recourse to prevent violations of their rights of due process.\textsuperscript{63}

\textsuperscript{63} In 1951, the General Assembly of the United Nations invited the International Law Commission to produce a draft statute for an International Court of Criminal Justice. The first draft statute may be found in the Official Records of the General Assembly, Seventh Session, Supplement No. 11 (A12136). A second draft statute is in the Official Records of the General Assembly (July 27-Aug. 20, 1953), Ninth Session, Supplement No. 12 (A12645) and also, the Sept. 1, 1953 United Nations Bulletin, p. 193. The International Law Commission reported that it was possible and desirable to establish such a court. However consideration of this proposal was deferred in 1954 when the General Assembly decided that until the related problem of defining aggression could be resolved no further progress could be made in the creation of an international criminal court. GA Resolution 898 (LX) 1954 and GA Resolution 1187 (XII) 1957, written analysis of the draft statute has been “disappointingly meagre.” See Parker, \textit{An International Criminal Court: The Case for Its Adoption}, 38 A.B.A.J. 641 (1952); Finch, \textit{An International Criminal Court: The Case Against Its Adoption}, 38 A.B.A.J. 644 (1952); Ely, \textit{Proposal for an International Criminal Court: A Critique and an Alternative}, 57 Dick. L. Rev. 46 (1952). Sager, \textit{An International Criminal Tribunal in American Law}, 11 How. L.J. 607 (1965) reluctantly concludes that the United States is barred from participation in such an international tribunal by virtue of the Sixth Amendment providing for trial by jury in “all criminal prosecutions.” For a detailed analysis of the procedural and constitutional aspects of specific articles of the drafts, see \textit{Mueller \& Wise}, supra note 56, at 526.