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NOTES

An International Bill of Rights for Prisoners of War

by John R. McGinness*

ON AUGUST 12, 1949 plenipotentiaries of sixty-one nations of the world, including the United States and the Soviets, concluded a Convention at Geneva¹ which revised the Geneva Convention of July 27, 1929 relative to the treatment of prisoners of war. Many of these revisions are based upon the experiences of World War II.²

Although neither the United States nor the Soviets have ratified this Convention, the United Nations Forces in Korea have been, and are, under instructions to observe their provisions at all times.³ This Convention appears to be a positive step forward in the clarification of international law as to the rights of prisoners of war, and the duties of detaining powers to them, because never before have such rights and duties been so comprehensively stated, so detailed and specific.

Historically, humaneness has seldom been associated with a Detaining Power's treatment of its prisoners of war.⁴ The 1949 Convention, important provisions of which follow, in an effort to alleviate the prisoners' lot, provides that they may only be transferred by the Detaining Power to a Power which is a party to the Convention, *and* only after the Detaining Power has satisfied itself of the willingness and ability of the transferee power to apply the Convention. (Art. 12.)

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¹ The Geneva Convention of 1949, U. S. Govt. Printing Office, Washington, D. C. (1950).

² Raymond T. Yingling and Robert W. Ginnane, *The Geneva Convention of 1949*, 46 *The American Journal of International Law*, 399 at 401 (July, 1952).

³ 25 *The Department of State Bulletin* 189 (July, 1951).

⁴ William S. Flory, *Prisoners of War: A Study in the Development of International Law*, American Council on Public Affairs, Washington, D. C. (1942).

Warp and woof of the entire document is that prisoners of war must at all times be humanely treated. Any act by the Detaining Power causing death or seriously endangering the health is prohibited. Nor may prisoners be subjected to mutilation, or to medical or scientific experiments. They must at all times be protected, particularly against acts of violence, intimidation, insults and public curiosity. Measures of reprisal are prohibited. (Art. 13.) All prisoners shall be treated alike, without adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria. (Art. 16.)

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners to secure from them information of any kind. Prisoners who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment. (Art. 17.)

The evacuation of prisoners shall always be effected humanely, and in conditions similar to those for the forces of the Detaining Power in their changes of station, insuring their safety during evacuation, and supplying them with sufficient food, potable water, clothing and medical attention. (Art. 20.) Nor may prisoners be held in close confinement, except where necessary to safeguard their health, and then only during the continuation of the circumstances which make such confinement necessary. (Art. 21.)

Prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness. (Art. 22.)

The basic daily food ration is expressly stated as that which shall be sufficient in quantity, quality and variety to keep prisoners in good health and to prevent loss of weight or the development of nutritional deficiencies. Account shall also be taken of the habitual diet of the prisoners. Sufficient drinking water shall be supplied and the use of tobacco permitted. Collective disciplinary measures affecting food are prohibited. (Art. 26.)

The Detaining Power is required to furnish sufficient quantities of clothing, underwear, and footwear to prisoners, making due allowances for the climate of the region. (Art. 27.)

Prisoner of war camps must establish a canteen where foodstuffs, soap, tobacco, and ordinary articles in daily use may be purchased, and the tariff must not be in excess of local prices.

Profits of the camp shall be used for the benefit of the prisoners. (Art. 28.)

Prisoner camps are required to be sanitary and healthful, and provided with sufficient water and soap for personal toilet and laundry. (Art. 29.)

Adequate camp infirmaries shall be provided where prisoners may have the attention they require, as well as appropriate diet. Special facilities are to be provided for the care of the disabled, particularly the blind, and for their rehabilitation, pending repatriation. The cost of treatment, including dentures, spectacles, and other artificial appliances shall be borne by the Detaining Power. (Art. 30.)

Prisoners shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities. Adequate premises shall be provided where religious services may be held. (Art. 34.) Chaplains held by the Detaining Power shall be allowed to exercise freely their ministry amongst the prisoners of the same religion. (Art. 35.)

The Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits, sports and games, and shall take necessary measures to provide prisoners with adequate premises and necessary equipment. Sufficient open spaces shall be provided for this purpose in all camps.

The use of weapons against prisoners, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances. (Art. 42.)

Prisoners may be compelled to work only on projects which have no direct connection with prosecution of the war. Among such projects are prisoner camp administration, maintenance, agriculture, and industries connected with the production or extraction of raw materials. Work in manufacturing is permitted, with the exception of the metallurgical, machinery, chemical industries, and labor on public works and buildings which have no military character or purpose. Prisoners may also be required to work on transport and handling of stores which are not military in purpose, commercial business, crafts, and arts, domestic service, and public utility projects having no military character. (Art. 50.) Nor may any prisoner be assigned to work which

would be considered humiliating for a member of the Detaining Power's own forces. The removal of mines or similar devices is considered as dangerous labor. (Art. 52.)

The working day has been set as "not excessive," and must in no case exceed that permitted for civilian workers employed on the same work. A noon rest of not less than one hour is required, with a day of rest on Sunday. Vacation of eight days with pay is provided for prisoners who have worked for one year. (Art. 53.) The pay of prisoners shall at no time be less than one-fourth of one Swiss franc (because of its international monetary stability), for a full working day. (Art. 62.) Further provision is made for a monthly advance of pay in Swiss francs to all prisoners. (Art. 60.)

Prisoners are permitted to send to, and receive from the exterior, mail and parcels, in particular foodstuffs, clothing, medical supplies and articles of a religious, educational or recreational character, including books, devotional articles, scientific equipment, examination papers, musical instruments, sport outfits, and materials allowing prisoners to pursue their studies or their cultural activities. (Art. 72.)

Prisoners are permitted to elect prisoner representatives from among their own nationality or language for the purpose of representing them before the military authorities of the Detaining Power, the Protecting Power, or the International Red Cross. (Art. 79.) These representatives are required to further the physical, spiritual and intellectual well-being of the prisoners.

DISCIPLINARY SANCTIONS.

Prisoners are subject to the laws, regulations and orders in force in the armed forces of the Detaining Power. Where acts committed by prisoners are declared punishable, whereas the same acts would not be punishable if committed by a member of the Detaining Power's forces, such acts shall entail disciplinary punishment (as opposed to penal punishment). (Art. 82.) The Detaining Power is enjoined to ensure that the greatest leniency is adopted, imposing disciplinary rather than judicial measures. Trial by military court is required, unless existing laws of the Detaining Power permit civil courts to try a member of its own armed forces for the offense alleged to have been committed by the prisoner. (Art. 84.)

No prisoner may be punished more than once for the same act or on the same charge (Art. 86), nor may he be deprived of the benefits of the present Convention although tried and convicted by the Detaining Power for acts committed prior to capture. (Art. 85.) When fixing the penalty, Courts of the Detaining Power are required to take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance, and that he is in its power as a result of circumstances independent of his own will. Collective punishment for individual acts, corporal punishment, imprisonment in premises without daylight, and, in general, any form of torture or cruelty, are forbidden (Art. 87), nor shall prisoners be subject to more severe treatment than that applied in respect of the same punishment to members of equivalent rank of the armed forces of the Detaining Power. (Art. 88.)

Disciplinary punishments applicable are:

- (1) A fine not exceeding 50 per cent of the advances of pay and working pay which prisoners would otherwise receive.
- (2) Discontinuance of privileges granted over and above the treatment provided for by the present Convention.
- (3) Fatigue duties not exceeding two hours daily. (Not applicable to officers.)
- (4) Confinement.

In no case shall disciplinary punishments be inhuman, brutal or dangerous to the health of prisoners of war. (Art. 89.)

A maximum penalty of thirty days may not be exceeded, even if the prisoner is answerable for several acts at the same time when he is awarded punishment, whether such acts are related or not. A period not exceeding one month shall intervene between pronouncement of the award of disciplinary punishment and the execution. (Art. 90.)

Prisoners who have made good their escape and who are recaptured, shall not be liable for any punishment for the prior escape. They are deemed to have succeeded in escaping (1) when they have rejoined their own forces or those of an allied power, (2) when they have left the territory of the Detaining Power or its ally, or (3) when they have joined a ship flying the flag of their country or its ally, the ship not being under control of the Detaining Power. (Art. 91.)

Prisoners who attempt to escape and are unsuccessful in the sense of the above paragraph shall be liable to disciplinary punishment only, even though it is a repeated offense. Even though subject to special surveillance after recapture, such surveillance must not affect the state of health, must be conducted in a prisoner of war camp, and must not entail the suppression of any safeguard granted them by this Convention. (Art. 92.) No escape or attempt to escape, even if a repeated offense, is to be deemed an aggravated circumstance where a prisoner is subject to judicial proceedings in respect to an offense committed during his escape or attempt to escape. Where, in an attempt to escape, offenses are committed with the sole intention of facilitating escape which do not entail violence against life or limb, such as offenses against public property, theft without intention of self-enrichment, the drawing up or use of false papers, or the wearing of civilian clothing, such offenses shall entail disciplinary punishment only. (Art. 93.) Periods of confinement awaiting disposal of an offense against discipline shall not exceed fourteen days. (Art. 95.) Prisoners of war shall not in any case be transferred to prisons, penitentiaries, convict prisons, etc. to undergo disciplinary punishment therein. (Art. 97.) No moral or physical coercion may be exerted on a prisoner in order to induce him to admit himself guilty of the act of which he is accused. (Art. 99.)

PENAL SANCTION FOR VIOLATIONS OF THE CONVENTION.

Under the provisions of Articles 129 and 130, parties to the Convention undertake to enact legislation designed to provide effective penal sanctions for persons committing, or ordering to be committed against persons or property which the Convention protects, acts of wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the armed forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

REPATRIATION.

During the Korean War the United Nations have consistently adhered to the policy that communist prisoners of war may

choose whether or not they desire to be repatriated at the cessation of hostilities.

The Soviets, confronted with the possibility of defection of their captive populations, and also perhaps, of many of their own armed forces in any future conflict, naturally oppose this policy of election. Large migrations through our lines would pose vital logistic decisions for us, and would undoubtedly result in retaliation against such of our nationals as the Soviets might hold as prisoners. More calamitous problems, however, would be involved if we were to lose a war to them.

The attitude of the United States on the repatriation problem at the close of World War II is evidenced by the promptness with which our country repatriated its German prisoners of war. It had actually completed its program of repatriation as early as June 30, 1947.⁵

Article 118 of the 1949 Convention succinctly states:

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

This provision appears substantially unchanged from similar provisions of the 1929 Geneva Convention,⁶ as well as from the similar provisions of the Hague Conventions of 1899⁷ and 1907.⁸

It may be soundly contended, however, that the entire 1949 Convention relative to the treatment of prisoners of war, is a document concerned with the minimum rights of prisoners, and such may be inferred from Article 7 of the General provisions, which states:

"Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present convention * * *"

and the second paragraph of Article 6:

⁵ 23 The Department of State Bulletin 132 (July 24, 1950).

⁶ Geneva Convention of 1929. Art. 75 "* * * In any case, repatriation of prisoners shall be effected with the least possible delay after the conclusion of peace." *Ibid.*, Vol. IV, p. 5242, U. S. Govt. Printing Office, Washington, D. C., 1938.

⁷ First Hague Convention of 1899, Art. XX (Regulations Respecting the Laws and Customs of War on Land). "After the conclusion of peace, the repatriation of prisoners of war shall take place as speedily as possible." *Treaties, Conventions, International Acts, Protocols and Agreements*, Vol. II, p. 2051, U. S. Govt. Printing Office, Washington, D. C. (1910).

⁸ Second Hague Conference, 1907 (Convention Respecting the Laws and Customs of War on Land) Art. XX "After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible." *Ibid.*, p. 2285.

“Prisoners of war shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in aforesaid or in subsequent agreements, *or where more favorable measures have been taken with regard to them by one or other of the Parties to the conflict.*” (Italics are the writer’s.)

Where more generous and humane measures have been adopted by Detaining Powers as to those prisoners who fear death or sentences to slavery upon repatriation, the humanitarian provisions of this document appear repugnant to forceable repatriation in instances where prisoners have manifested a desire for asylum with the Detaining Powers.⁹

⁹ The opinions expressed in this paper are those of the author, and not necessarily those of the Government of the United States.