

GENEVA CONVENTION III: PRISONERS OF WAR

I. OBJECTIVES

- A. Become familiar with the historic influences on the development of protections for prisoners of war (POWs) during periods of armed conflict.
- B. Understand the legal definition of “prisoner of war,” and the test for determining when that status is conferred.
- C. Understand the basic protections, rights, and responsibilities afforded to Prisoners of War.

II. HISTORY OF PRISONERS OF WAR

- A. “In ancient times, the concept of “prisoner of war”¹ was unknown and the defeated became the victor’s ‘chattel.’”² The captive could be killed, sold, or put to work and the discretion of the captor. No one was as helpless as an enemy prisoner of war.³
- B. Greek, Roman, and European theologians and philosophers began to write on the subject of POWs. However, treatment of POWs was still by and large left to military commanders.⁴
- C. The American War of Independence. For the colonists, it was a revolution. For the British, it was an insurrection. The British, saw the colonists as the most dangerous of criminals, traitors to the empire, and threats to state survival. The British,

¹ See WILLIAM FLORY, PRISONERS OF WAR: A STUDY IN THE DEVELOPMENT OF INTERNATIONAL LAW (1942) (providing a more detailed account of prisoner of war treatment through antiquity).

² COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 4 (Jean S. Pictet ed. 1952).

³ Probably the most famous medieval prisoner of war was England's Richard I of Robin Hood fame. King Richard's ship sank in the Adriatic Sea during his return from the Third Crusade in 1192. While crossing Europe in disguise, he was captured by Leopold, Duke of Austria. Leopold and his ally, the Holy Roman Emperor, Henry VI, entered into a treaty with Richard on St. Valentine's Day, 1193, whereby England would pay them £100,000 in exchange for their king. This amount then equaled England's revenues for five years. The sum was ultimately paid under the watchful eye of Richard's mother, Eleanor of Aquitaine, and he returned to English soil on March 13, 1194. See M. Foster Farley, *Prisoners for Profit: Medieval Intrigue Quite often Focused upon Hopes of Rich Ransom*, MIL. HISTORY, Apr. 1989, at 12. Richard's own confinement did seem to ingrain some compassion for future prisoners of war he captured. Richard captured 15 French knights in 1198. He ordered all the knights blinded but one. Richard spared this knight one eye so he could lead his companions back to the French army. This was considered an act of clemency at the time. MAJOR PAT REID, PRISONER OF WAR (1984).

⁴ See generally, Rev. Robert F. Grady, *The Evolution of Ethical and Legal Concern for the Prisoner of War*, 1-30 (1970) (unpublished Ph. D. dissertation, Cath. Univ.) (on file with the TJAGLCS library) [hereinafter Grady].

- therefore, prepared to try colonists for treason at the war's onset. In time however, British forces begrudgingly recognized the colonists as belligerents and this plan was discarded. However, colonists that were captured were subjected to inhumane treatment and neglect. There were individual acts of mistreatment by American forces of the British and Hessian captives; however, General Washington appears to have been sensitive to the welfare of POWs. He took steps to prevent abuse.⁵
- D. The first agreement to establish prisoner of war (POW) treatment guidelines was likely found in the 1785 Treaty of Friendship between the U.S. and Prussia.⁶
- E. American Civil War. At the outset, the Union forces did not view the Confederates as professional Soldiers deserving protected status. They were considered nothing more than armed insurrectionists. As southern forces began to capture large numbers of Union prisoners, it became clear to Abraham Lincoln that his only hope for securing humane treatment for his troops was to require the proper treatment of Confederate soldiers. President Lincoln issued General Order No. 100, "Instructions of the Government of Armies of the United States in the Field," known as the Lieber Code. The Lieber Code provided several protections for Confederate prisoners.
1. Although the Lieber Code went a long way in bringing some humanity to warfare, many traditional views regarding POWs prevailed. For example, Article 60 of the Code provides: "a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it *impossible* to cumber himself with prisoners."⁷
 2. Confederate policy called for captured black Soldiers to be returned or sold into slavery and for white Union officers serving with black troops to be prosecuted for "exciting servile insurrection."⁸ Captured black Soldiers that could not prove they were free were sold into slavery. Free blacks were not much better off. They were treated like slaves and forced to perform labor to support the Confederate war effort. In response to this policy, Article 58 of the Lieber Code stated that the Union would take reprisals for any black POWs sold into slavery

⁵ JOHN C. MILLER, TRIUMPH OF FREEDOM (1948); REV. R. LIVESAY, THE PRISONERS OF 1776; A RELIC OF THE REVOLUTION COMPILED FROM THE JOURNAL OF CHARLES HERBERT (1854); SYDNEY GEORGE FISHER, THE STRUGGLE FOR AMERICAN INDEPENDENCE (1908).

⁶ See HOWARD S. LEVIE, 60 INTERNATIONAL LAW STUDIES, DOCUMENTS ON PRISONERS OF WAR 8 (1979) [hereinafter Levie, DOCUMENTS ON PRISONERS OF WAR] (providing additional text interpreting the Third Geneva Convention).

⁷ See *id.* at 39; George B. Davis, *Doctor Francis Lieber's Instructions for the Government of Armies in the Field*, 1 AM. J. INT'L L. 13 (1907) (providing a summary of who Doctor Francis Lieber was and the evolution of the Lieber Code).

⁸ VOL. V, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES AT 807-808 (Gov. Printing Office 1880-1901).

by executing Confederate prisoners.⁹ Very few Confederate prisoners were executed in reprisal. However, Confederate Soldiers were often forced into hard labor as a reprisal.¹⁰

3. The Union and Confederate armies operated a “parole” or prisoner exchange system.¹¹ The Union stopped paroling southern Soldiers for several reasons, most notably its significant numerical advantage. It was fighting a war of attrition and POW exchanges did not support that effort. This Union decision may have impacted on the poor conditions in southern POW camps because of the additional strain on resources at a time when the Confederate army could barely sustain itself. Some historians point out that the Confederate POW guards were living in conditions only slightly better than their Union captives.¹²
 4. Captured enemy have traditionally suffered great horrors as POWs. Most Americans associate POW maltreatment during the Civil War with the Confederate camp at Andersonville. However, maltreatment was equally brutal at Union camps. In the Civil War 26,486 Southerners and 22,576 Northerners died in POW camps.¹³
 5. Despite its national character and Civil War setting, the Lieber Code went a long way in influencing European efforts to create international rules dealing with the conduct of war.
- F. The first multilateral international attempt to regulate the handling of POWs occurred in 1907 with the promulgation of the Hague Regulations Respecting the Laws and Customs of War on Land (HR). Although the HR gave POWs a definite legal status and protected them against arbitrary treatment, the Regulations were primarily concerned with the methods and means of warfare rather than the care of the victims

⁹ Francis Lieber, War Department, Instructions for the Government of Armies of the United States in the Field art. 58 (1863) [hereinafter Lieber Code], reprinted in *The Laws Of Armed conflicts* 3 (Dietrich Schindler & Jiri Toman eds., 3d rev. ed. 1988).

¹⁰ George G. Lewis & John Mewha, Dep’t of the Army, Pamphlet No. 20-213: History of Prisoner of War Utilization by the United States Army 1776-1945 (1955).

¹¹ The Dix-Hill Cartel was signed and ratified by both sides on the Civil War on July 22, 1862. It lasted until 1863, failing primarily because of Confederate refusals to parole black POWs, and the rapid return parolees to the battlefield. See HENRY P. BEERS, *THE CONFEDERACY, GUIDE TO THE ARCHIVES OF THE GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA* 234 (GSA 1986).

¹² REV. J. WILLIAM JONES, *CONFEDERATE VIEW OF THE TREATMENT OF PRISONERS* (1876).

¹³ Over one-half of the Northern POWs died at Andersonville. See Lewis L. Laska & James M. Smith, “*Hell and the Devil*”: *Andersonville and the Trial of Captain Henry Wirz, C.S.A., 1865*, 68 MIL. L. REV. 77 (1975).; See also U.S. SANITARY COMMISSION, *NARRATIVE OF PRIVATIONS AND SUFFERINGS OF UNITED STATES OFFICERS AND SOLDIERS WHILE PRISONERS OF WAR IN THE HANDS OF THE REBEL AUTHORITIES*, S. REP. NO. 68 (3d Sess. 1864), for a description of conditions suffered by POWs during the Civil War. FLORY, *supra* note 1, at 19, n. 60 also cites the Confederate States of America, *Report of the Joint Select Committee Appointed to Investigate the Condition and Treatment of Prisoners of War* (1865).

of war. Moreover, the initial primary concern was with the care of the wounded and sick rather than POWs.¹⁴

- G. World War I. The Hague Regulations proved insufficient to address the treatment of the nearly 8,000,000 POWs taken in WWI. Germany was technically correct when it argued that the Hague Regulations were not binding because not all participants were signatories.¹⁵ According to the regulations, all parties to the conflict had to be signatories if the Regulations were to apply to any of the parties. If one belligerent was not a signatory, then all parties were released from mandatory compliance. The result was the inhumane treatment of POWs in German control.
- H. Geneva Convention Relative to the Treatment of Prisoners of War in 1929. This convention complemented the requirements of the 1907 Hague Regulations and expanded safeguards for POWs. This convention applied even if all parties to a conflict were not signatories.
- I. World War II. Once again, all the participants were not signatories to the relevant treaties protecting POWs. Arguably, this was a large contributing factor in the maltreatment of POWs during the war. The gross maltreatment of POWs constituted a prominent part of the indictments preferred against the Germans and Japanese in the post World War II war crimes trials.
1. Prior to World War I, the Japanese had signed, but not ratified, the 1929 Geneva Convention on POWs. They had reluctantly signed the treaty as a result of international pressure but ultimately refused to ratify it. The humane treatment of POWs was largely a western concept. During the war, the Japanese were surprised at the concern for POWs. To many Japanese, surrendering Soldiers were traitors to their own countries and a disgrace to the honorable profession of arms.¹⁶ As a result, most POWs in the hands of the Japanese during World War II were subject to extremely inhumane treatment.
 2. In Europe, the Soviet Union had refused to sign the 1929 Geneva Convention, which provided the Germans with the legal justification to deny its protections to Soviet POWs. In Sachsenhausen alone, some 60,000 Soviet POWs died of hunger, neglect, flogging, torture, and execution in the winter of 1941-42. In turn, the Soviets retained many German POWs in the U.S.S.R. some twelve years after the close of hostilities.¹⁷ Generally speaking, the regular German army, did treat American and British POWs comparatively well. The same

¹⁴ GC III Commentary, *supra* note 2, at 6.

¹⁵ G.I.A.D. DRAPER, THE RED CROSS CONVENTIONS 11 (1958).

¹⁶ Grady, *supra* note 4, at 103.

¹⁷ DRAPER, *supra* note 13, at 49.

cannot be said about the treatment Americans experienced at the hands of the German Schutzstaffel (SS) or Sicherheitsdienst des Reichsführers (SD)¹⁸

3. The post-World War II war crimes tribunals determined that international law regarding the treatment of POWs had become customary international law (CIL) by the outset of hostilities. Therefore, individuals could be held criminally liable for the mistreatment of POWs whether or not the perpetrators or victims were from States that had signed the various international agreements protecting POWs.¹⁹

- J. Geneva Convention Relative to the Treatment of Prisoners of War in 1949 (GC III). The experience of World War II resulted in the expansion and codification of the laws of war in four Geneva Conventions of 1949. International armed conflict triggers the full body and protections of the Geneva Conventions.²⁰ In such a conflict, signatories must respect the Convention in “all circumstances.” This language means that parties must adhere to the Convention unilaterally, even if not all belligerents are signatories. There are provisions that allow non-signatories to decide to be bound.²¹ Moreover, with the exception regarding reprisals, all parties must apply the rules of the treaty even if the protections are not being applied reciprocally. The proper treatment of POWs has now risen to the level of CIL.

- K. 1977 Additional Protocols I to the 1949 Geneva Conventions (AP I). The U.S. is not a party to this Protocol, though it adopts some of its provisions as CIL. It creates no new protections for prisoners of war. However, it expanded the definition of “status”--who is entitled to the POW protections in international armed conflict.²²

III. PRISONER OF WAR STATUS AS A MATTER OF LAW

- A. Important Terminology.
 1. Prisoners of War: A detained person defined in GC III, art. 4. (*See also* FM 27-10, para. 61)

 2. Civilian Internees: 1. A civilian who is interned during armed conflict or occupation for security reasons, for protection, or for offenses against the

¹⁸ Grady, *supra* note 4, at 126.

¹⁹ *Id.*

²⁰ Convention III relative to the Treatment of Prisoners of War. Geneva, August 12, 1949, art. 2.

²¹ Currently, all 194 nations are parties to the 1949 Geneva Conventions. *See* <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>.

²² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, June 8, 1977, arts. 43-45.

detaining power.²³ 2. A term used to refer to persons interned and protected in accordance with the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (Geneva Convention IV).²⁴

3. Retained personnel: Medical and religious personnel retained by the Detaining power with a view of assisting fellow POWs. Under the Geneva Conventions, this is a category distinct from POW or civilian.²⁵
4. Detainee:²⁶ Any person captured, detained, held, or otherwise under the control of DoD personnel (military, civilian, or contractor employee). It includes any person held during operations other than war. This is the default term to use when discussing persons who are in custody of U.S. armed forces.
5. Refugee: A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country.²⁷
6. Dislocated civilian: Dislocated civilian is a generic term that includes a displaced person, an evacuee, expellee, internally displaced person, a migrant, a refugee, or a stateless person.²⁸ A displaced person is a civilian who is involuntarily outside the national boundaries of his or her country.²⁹

B. In order to achieve POW status, **the individual must be the right kind of person in the right kind of conflict**. POW status is only given in an International Armed Conflict (also known as a Common Article 2 conflict (CA2)). The status of POW is not recognized in a Non-International Armed conflict (Common Article 3 conflict (CA3)). Not all hostile actors in a CA2 conflict are entitled, however, to POW status. **Captured persons must also belong to one of the groups described in Article 4 of GC III**. The question of status is enormously important. There are two primary

²³ U.S. DEP'T OF DEFENSE, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 40 (Nov. 8, 2010) [hereinafter Joint Pub. 1-02]; *See also* The Law of Occupation and Post-Conflict Governance chapter of this deskbook.

²⁴ Convention IV relative to the protection of Civilian Persons in Time of War. Geneva, August 12, 1949, art. 79-90.

²⁵ GC III, *supra* note 20, art. 33.

²⁶ U.S. DEP'T OF DEFENSE, DEPARTMENT OF DEFENSE DIR. 2310.01E, The Department of Defense Detainee Program, para. E2.1. (Sep. 5, 2006) [hereinafter DoDD 2310.01E].

²⁷ JOINT PUB. 1-02, *supra* note 23, at 243. *See also* GC IV, *supra* note 24, art. 44; 1951 UN Convention Relating to the Status of Refugees, 189 U.N.T.S. 137.

²⁸ JOINT PUB. 1-02, *supra* note 23, at 86.

²⁹ *Id.*

benefits of POW status. First, **most** POWs receive immunity for warlike acts (i.e., any acts of killing and breaking things are not criminal). Second, POWs are entitled to all the rights, privileges, and protections under GC III. One of those rights is that the prisoner is no longer a lawful target.

C. The Right Kind of Person for GC III protections.

1. Once a conflict rises to the level of a Common Article 2 international armed conflict, parties should look to GC III, art. 4 in order to determine who is entitled to POW status. Traditionally, persons were only afforded POW status if they were members of the regular armed forces involved in an international armed conflict. GC III also includes, members of militias or resistance fighters belonging to a party to an international armed conflict if they meet the following criteria:
 - a. Commanded by a person responsible for his subordinates;
 - b. Fixed distinctive insignia recognizable at a distance;³⁰
 - c. Carrying arms openly;³¹ and,
 - d. Conducting their operations in accordance with the laws and customs of war.
2. In addition, numerous other persons detained by military personnel are entitled to POW status if “they have received authorization from the armed forces which they accompany.” (i.e., possess a GC identity card from a belligerent government). Specific examples include:

³⁰ For an early discussion of the uniform requirement, *see* *Ex parte Quirin*, 317 U.S. 1 (1942) and *Mohamadali and Another v. Public Prosecutor* (Privy Council, 28 July 1968), 42 I.L.R. 458 (1971). The first attempt to codify the uniform requirement necessary to receive POW status occurred during the Brussels Conference of 1874. The Brussels Convention of 1874 spelled out the 4 factor test used in GC III Article 4a(2) today, factors that are widely agreed under CIL as the “defining characteristics of any lawful armed force.” *U.S. v. Lindh*, 212 F.Supp 2d 541, 558 (E.D. Va. 2002). Remember that *Quirin* discussed the state of the law before the modern Geneva Conventions.

³¹ This term carrying arms openly does NOT require they be carried visibly. However, the requirement rests upon the ability to recognize a combatant as just that. AP I changes this requirement in a significant way. Under GC III, a combatant is required to distinguish himself throughout military operations. AP I, art. 44(3) only obligates a combatant to distinguish himself from the civilian population “while they are engaged in an attack or in a military operation preparatory to an attack, or in any action carried out with a view to combat.” AP I Commentary at 527. The United States has opposed this change. Judge Advocates must recognize that with coalition operations, one may have to apply a different standard; our coalition partners may use AP I’s criteria. AP I only requires combatants to carry their arms openly in the attack and to be commanded by a person responsible for the organization’s actions, comply with the laws of war, and have an internal discipline system. Therefore, guerrillas may be covered under an allied interpretation of AP I.

- a. Contractors;³²
- b. War Correspondents;³³
- c. Civilian members of military aircraft crews;³⁴
- d. Merchant marine and civil aviation crews;³⁵
- e. Persons accompanying armed forces (dependents);³⁶ and,
- f. Mass Levies (Levée en Masse).³⁷ **To qualify, these civilians must:**
 - i. Be in non-occupied territory;
 - ii. Act spontaneously to the invasion;
 - iii. Carry their arms openly; and,
 - iv. Respect the laws and customs of war.
- g. This is NOT an all-inclusive list. One's status as a POW is a question of fact. One factor to consider is whether or not the individual is in possession of an identification card issued by a belligerent government. Prior to 1949, possession of an identification card was a prerequisite to POW status.³⁸

³² GC III, *supra* note 20, art. 4(a)(4).

³³ See Hans-Peter Gasser, *The Protection of Journalists Engaged in Dangerous Professional Missions*, 232 INT'L REV. RED CROSS 3 (Jan. 31, 1983); see also KATE WEBB, ON THE OTHER SIDE (1972) (journalist held for 23 days in Cambodia by the Viet Cong).

³⁴ GC III, *supra* note 20, art. 4(a)(4).

³⁵ GC III, art. 4(a)(5).

³⁶ See Stephen Sarnoski, *The Status Under International Law of Civilian Persons Serving with or Accompanying Armed Forces in the Field*, Pamphlet 27-50-260, THE ARMY LAWYER 29 (July 1994). See generally, Memorandum for the Assistant Judge Advocate General (Civil Law), Subj: Civilians in Desert Shield -- Information Memorandum (Nov. 26, 1992).

³⁷ See GC III, *supra* note 20, art. 4(a)(6); U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (18 JULY 1956) [hereinafter FM 27-10] para. 65, which states all males of military age may be held as POWs in an area in which a levée en masse operates. GC III does not discriminate the right to detain by gender, and therefore females may be detained as well.

³⁸ GC III Commentary, *supra* note 2, at 63.

4. Medical and religious personnel (Retained Personnel) receive the protections of GC III.³⁹ Additionally,
 - a. Retained personnel are to be repatriated as soon as they are no longer needed to care for other POWs.
 - b. Of note, retained status is not limited to doctors, nurses, corpsmen, etc. This status also includes, for example, the hospital clerks, cooks, and maintenance workers.⁴⁰

5. Persons whose POW status is debatable:⁴¹
 - a. Deserters/Defectors,⁴²
 - b. Saboteurs,⁴³

³⁹ GC III, *supra* note 20, arts. 4(c) and 33.

⁴⁰ See COMMENTARY: I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCE IN THE FIELD 218-58 (Jean S. Pictet ed.) 1952. See generally, ALMA BACCINO-ASTRADA, MANUAL ON THE RIGHTS AND DUTIES OF MEDICAL PERSONNEL IN ARMED CONFLICTS (ICRC, 1982); and Liselotte B. Watson, *Status of Medical and Religious Personnel in International Law*, JAG J. 41 (Sep-Oct-Nov 1965).

⁴¹ See Levie, *supra* note 6, at 82-84; Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 1952 BRITISH YEARBOOK OF INTERNATIONAL LAW, reprinted in MIL. L. REV. BICENTENNIAL ISSUE 487 (1975)(Special Ed.); Albert J. Esgain and Waldemar A. Solf, *The 1949 Geneva Convention Relative to the Treatment of Prisoners of War: Its Principles, Innovations, and Deficiencies*, MIL. L. REV. BICENTENNIAL ISSUE 303 (1975)(Special Ed.).

⁴² See Memorandum from Headquarters Department of the Army, DAJA-IA, subject: Distinction Between Defectors/Deserters and Enemy Prisoners of War (22 Jan. 1991). See also Levie, *supra* note 6, at 77 - 78; James D. Clause, *The Status of Deserters Under the 1949 Geneva Prisoner of War Convention*, 11 MIL. L. REV. 15 (1961); L.B. Schapior, *Repatriation of Deserters*, 29 BRIT. YB. INT'L L. 310 (1952).

⁴³ At the core of this debate is whether *individual* members of the armed forces under Art. 4A(1) must nonetheless satisfy all Art. 4A(2) requirements to get POW status *and* combatant immunity, even if the *overall group* that the soldier claims membership in has been determined to be a lawful armed force. For example, all the way up to World War II, soldiers who had violated the laws of war were not entitled to POW status to begin with. Early cases such as *Ex parte Quirin* (317 US 1, 31 (1942)) stated that eight German saboteurs were not entitled to POW status because they did not distinguish themselves as combatants and engaged in a sabotage mission behind enemy lines. Also, FM 27-10 (1956) stated that members of the Armed Forces who deliberately concealed their status to pass behind enemy lines to gather information or wage war forfeited their right to be treated as POWs. The ICRC in a separate study authored by Jean-Marie Henckaerts, supported the argument that combatants do not have the right of prisoner of war status if they fail to distinguish themselves while engaged in a military operations. However, more recent scholarship disputes this, and supports the proposition that captured soldiers from a lawful armed force, who violate the laws of war *as individuals*, maintain POW status but can be tried and punished for their individual violations. For example, Hays Parks noted that historically, members of the regular armed forces received POW status once they were identified as such, no matter how they were attired when captured. Note that POW status here does not mean that a captured soldier receives combatant immunity for the act of wearing an enemy uniform. Combatant immunity is not absolute and members of the armed forces can still be punished for violations of the laws of war, such as spying. An example of this are the German "Greif" SS Commandos at the Battle of the Bulge

- c. Military advisors;⁴⁴
 - d. Belligerent diplomats;⁴⁵
 - e. Mercenaries⁴⁶ (AP I, art. 47).
 - f. U.N. personnel during U.N. peace missions.⁴⁷
6. Spies are not entitled to POW status (HR, art. 29, and AP I, art. 46).

E. When POW's Status is in Doubt.

- 1. Article 5, GC III: "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."
- 2. AR 190-8⁴⁸ provides guidance on how to conduct an Article 5 Tribunal.

in 1944. They wore U.S. uniforms in an attempt to cause havoc behind US lines. While it is unclear as to whether they were officially given POW status after capture, General Eisenhower gave them protections similar to POWs, since they were tried by military tribunals in December 1944, before conviction and execution by firing squad. Pictet's Commentaries to GC III provide an in-depth discussion of this issue. For more information see W. Hays Parks, *Special Forces Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L. L. 2 (Fall 2003) at 76. See also JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, eds. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. I, RULES (Cambridge: Cambridge University Press, 2005) Rule 106, at 386. See also GARY SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 223 (2010). See also HOWARD S. LEVIE, 59 INTERNATIONAL LAW STUDIES, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 36-37 and 82-83(1977).

⁴⁴ If a neutral nation sends a military advisor or some other representative that accompanies an armed force as an observer then that person, if taken into custody of the armed forces of the adverse Party, would not be considered a POW. The military representative could be ordered out of, or removed from the theater of war. On the other hand, if military representatives take part in the hostilities, act as a "military advisor," and render "military assistance to the armed forces opposing those of the belligerent Power into whose hands they have fallen, they arguably fall within the ambit of Article 4(A) and that they are therefore entitled to prisoner-of-war status." Levie, *supra* note 43, at 83-84.

⁴⁵ If a belligerent diplomat, in addition to his political office, is a member of the regular armed forces or is accompanying the armed forces in the field in one of the categories included in GC III, art. 4(A), then he is subject to capture and to POW status. Levie, *supra* note 43, at 83, n342.

⁴⁶ See generally AP I, *supra* note 22, art. 47 (indicating that mercenaries do not qualify for Prisoner of War status; the United States is not a party to AP I and objects to this specific provision); John R. Cotton, *The Rights of Mercenaries as Prisoners of War*, 77 MIL. L. REV. 144 (1977). However, the 6 factor test used in AP I art. 47 is rather strict and virtually all American security contractors would not meet this definition.

⁴⁷ See Convention on the Safety of United Nations and Associated Personnel, G.A. Res. 59, U.S. GAOR 49th Sess., U.N. Doc. A/RES/49/59 (Dec. 9, 1994).

- a. A General Court-Martial Convening Authority appoints the tribunal.
- b. There are to be three voting members, the president must be a field grade officer, and one nonvoting recorder, preferably a Judge Advocate.
- c. The standard of proof is “preponderance of the evidence.” The regulation does not place the burden of proof or production on either party. The tribunal should not be viewed as adversarial as the recorder need not be a judge advocate and there is no right to representation for the subject whose status is in question.
- d. If a Combatant Commander has his own regulation or policy on how to conduct an Article 5 Tribunal, the Combatant Commander’s regulation controls. For example, *see* CENTCOM Regulation 27-13.⁴⁹

IV. PRIMARY PROTECTIONS PROVIDED TO PRISONERS OF WAR

A. Protection “Top Ten.”⁵⁰

1. Humane Treatment.⁵¹ (GC III, art. 13)
2. Prohibition against medical experiments. (GC III, art. 13)
3. Protection from violence, intimidation, insults, and public curiosity.⁵² (GC III, art. 13)

⁴⁸ U.S. DEP’T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES para. 1-6(a) (1 Oct. 1997) [hereinafter AR 190-8].

⁴⁹ U.S. CENTRAL COMMAND REGULATION 27-13, CAPTURED PERSONS, DETERMINATION OF ELIGIBILITY FOR ENEMY PRISONER OF WAR STATUS (7 Feb. 1995)

⁵⁰ For an excellent discussion regarding the “Top Ten” protections, *see* Major Geoffrey S. Corn and Major Michael L. Smidt, “*To Be or Not to Be, That is the Question,*” *Contemporary Military Operations and the Status of Captured Personnel*, ARMY LAWYER. June 1999.

⁵¹ The requirement that POWs must at all times be humanely treated is the basic theme of the Geneva Conventions. GC III Commentary, *supra* note 2, at 140. A good rule of thumb is to follow the “golden rule.” That is, to treat others in the same manner as you would expect to be treated or one of your fellow service members to be treated if captured. In other words, if you would consider the treatment inhumane if imposed upon one of your fellow service members, then it probably would violate this provision.

⁵² Trial of Lieutenant General Kurt Maelzer, Case No. 63, *reprinted in* UNITED NATIONS WAR CRIMES COMMISSION, XI LAW REPORTS OF TRIALS OF WAR CRIMINALS 53 (1949) (parading of American prisoners of war through the streets of Rome). *See* Gordon Risius and Michael A. Meyer, *The Protection of Prisoners of War Against Insults and Public Curiosity*, 295 INT’L REV. RED CROSS 288 (July 27, 1993). This article focuses on the issue of photographing POWs.

4. Equality of treatment. (GC III, art. 16)
5. Free maintenance and medical care. (GC III, art. 15)
6. Respect for person and honor (specific provision for female POWs included). (GC III, art. 14)
7. No Reprisals. (GC III, art. 13)
8. No Renunciation of Rights or Status. (GC III, art. 7)
9. The Concept of the Protecting Power, especially the ICRC. (GC III, art. 8)
10. **Immunities for warlike acts, but not for pre-capture criminal offenses, or violations of the law of war.**⁵³

B. Post-Capture Procedures

1. Authority to detain can be expressly granted in the mission statement; implied with the type of mission; or inherent under the self defense/force protection umbrella.
2. The protection and treatment rights, as well as the obligations begin “. . . [F]rom the time they fall into the power of the enemy . . .”⁵⁴ (GC III, art. 5)
3. POWs can be secured with handcuffs (flex cuffs) and blindfolds, as well as shirts pulled down to the elbows, as long as it is done humanely (cannot be for humiliation/intimidation purposes).
 - a. Protect against public curiosity.

⁵³ GC III does not specifically mention *combatant immunity*. Rather, it is considered to be customary international law. Moreover, it can be inferred from the cumulative effect of protections within GC III. For example, Article 13 requires that prisoners not be killed, and Article 118 requires their immediate repatriation after cessation of hostilities. Although Article 85 does indicate that there are times when prisoners of war may be prosecuted for precapture violations of the laws of the detaining power, the Commentary accompanying Article 85 limits this jurisdiction to only two types of crimes: a prisoner of war may be prosecuted only for (1) war crimes, and (2) crimes that have no connection to the state of war. See Corn and Smidt, *supra* note 50, at n. 124.

⁵⁴ During Desert Storm some Iraqi Commanders complained that the Coalition forces did not fight “fair” because our forces engaged them at such distances and with such overwhelming force that they did not have an opportunity to surrender. Additionally, some complained that they were merely moving into position to surrender. However, the burden (and risk) *is upon the surrendering party* make his intentions clear, unambiguous, and unequivocal to the capturing unit.

- i. GC III, Art. 13 does not *per se* prohibit photographing a POW. The prohibition extends to photographs that degrade or humiliate a POW. With respect to POWs, there is some value added in disseminating photographs since it gives family members assurance that their loved one is alive. Bottom line: strict guidelines required.⁵⁵
 - ii. This is in stark contrast to Iraq's and North Vietnam's practice of parading POWs (usually downed pilots) before the news media.
 - b. POW capture tags. All POWs will, at the time of capture, be tagged using DD Form 2745.⁵⁶
4. Property of Prisoners. (GC III, art. 18)
- a. Weapons, ammunition, and equipment or documents with intelligence value will be confiscated and turned over to the nearest intelligence unit. (AR 190-8)
 - b. POWs and retained personnel are allowed to retain personal effects such as jewelry, helmets, canteens, protective mask and chemical protective garments, clothing, identification cards and tags, badges of rank and nationality, and Red Cross brassards, articles having personal or sentimental value and items used for eating except knives and forks.⁵⁷ (See GC III, art. 18; AR 190-8)
 - c. But what about captured persons not entitled to POW status?⁵⁸ (See GC IV, art. 97)

⁵⁵ AR 190-8 provides: "Photographing, filming, and video taping of individual EPW, CI, and RP for other than internal Internment Facility administration or intelligence/counterintelligence purposes is strictly prohibited. No group, wide area or aerial photographs of POW, CI and RP or facilities will be taken unless approved by the senior Military Police officer in the Internment Facility commander's chain of command. AR-190-8, *supra* note 48, para. 1-5(4)(d).

⁵⁶ AR 190-8, *supra* note 48, para. 2-1.a.(1)(b), (c). This provision is routinely overlooked, as noted in After Action Reviews from Operation Iraqi Freedom.

⁵⁷ Ltr, HQDA, DAJA-IA 1987/8009, Subj: Protective Clothing and Equipment for EPWs. *See also* GC III Commentary, *supra* note 2, at 166, n. 2.

⁵⁸ GC IV, art. 97 essentially allows the military to seize, but not confiscate, personal property of those civilians protected by GC IV. The difference is important. Confiscate means to take permanently. Seizing property is a temporary taking. Property seized must be receipted for and returned to the owner after the military necessity of its use has ended. If the property cannot be returned for whatever reason, the seizing force must compensate the true owner of the property. *See* Elyce K.K. Santerre, *From Confiscation to Contingency Contracting: Property Acquisition on or Near the Battlefield*, 124 MIL L. REV. 111 (1989), for a more detailed discussion of the distinction between, requisition, seizure, and confiscation of private property and when it is lawful to do each.

5. Rewards for the capture of POWs are permissible, but they must avoid even the hint of a “wanted dead or alive” mentality.⁵⁹
6. What can I ask a POW? Anything!
 - a. All POWs are required to give: (GC III, art. 17)
 - i. Surname, first name;
 - ii. Rank;
 - iii. Date of birth; and,
 - iv. Service number.
 - b. What if an POW refuses to provide his rank? Continue to treat as POW, **but at the lowest enlisted rank.**⁶⁰
 - c. No torture, threats, coercion in interrogation (Art. 17, GC III). **It’s not what you ask but how you ask it.**⁶¹ See the chapter on Intelligence Law and Interrogation Operations in the Operational Law Handbook for a more detailed discussion.
 - d. The U.S. military ID card doubles as the Geneva Conventions identification card. Note: Categories are I to V, which corresponds to respective rank. (GC III, art. 60)

V. POW CAMP ADMINISTRATION AND DISCIPLINE

- A. Responsibility. (GC III, art. 12). The State (Detaining Power) is responsible for the treatment of POWs. POWs are not in the power of the individual or military unit that

⁵⁹ The U.S. issued an offer of reward for information leading to the apprehension of General Noreiga. Memorandum For Record, Dep’t of Army, Office of the Judge Advocate General, DAJA-IA, Subj: Panama Operations: Offer of Reward (Dec. 20, 1989). This is distinct from a wanted “dead or alive” type award offer prohibited by the Hague Regulations. See FM 27-10, para. 31 (interpreting HR, art. 23b to prohibit “putting a price upon an enemy’s head, as well as offering a reward for an enemy ‘dead or alive’”).

⁶⁰ GC III, *supra* note 20, art. 17, para. 2. See also GC III Commentary, *supra* note 2, at 158-59.

⁶¹ 15 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 105 n. 2 (1949); See also Stanley J. Gold and Lawrence J. Smith, *Interrogation Under the 1949 Prisoners of War Convention*, 21 MIL. L. REV. 145 (1963); GC III Commentary, *supra* note 2 at 163-64; Levie, *supra* note 43, at 106-09.

captured them. They are in the hands of the State itself, of which the individuals or military units are only agents.⁶²

B. Locations

1. Land only for POWs. (GC III, art 22, 46). However, during the Falklands War, the British temporarily housed Argentine POWs on ship while in transit to repatriation. POWs *can* be transported by sea, it is the permanent or semi-permanent internment of POWs which is prohibited.
2. Not near military targets.⁶³ (GC III, art. 23). During the Falklands War, several Argentine POWs were accidentally killed while moving ammunition away from their billets.
3. Non-POW detainees can be held for longer periods at sea as long as the conditions are humane under CA3. CA3 *does not* prohibit extended detention at sea. Certain detainees, specifically suspected Somali Pirates, have been held aboard U.S. Navy warships for brief periods. In one particular case, the detainee was held for over two months. Suspected Al Qaida leader Abu Anas Al-Libi was transferred all the way from Libya to the United States in October 2013 onboard the USS SAN ANTONIO (LPD 17). Note: The Navy's International and Operational Law Department (Code 10), promulgated a newsmailer in 2014 supporting this position.
3. POWs must be assembled into camps based upon their nationality, language, and customs. (GC III, art. 22)
 - a. Generally, cannot segregate prisoners based on religion or ethnic background.⁶⁴ However, segregation by these beliefs may be required when they are a basis for the conflict. Such as in Yugoslavia: Serbs, Croats, and Muslims; Rwanda: Hutus, Tutsis; and Iraq: Sunni and Shia.

⁶² GC III Commentary, *supra* note 2, at 128-29.

⁶³ Iraq used U.S. and allied POWs during the Persian Gulf War as human shields in violation of GC III, arts. 19 and 23. *See Iraqi Mistreatment of POWs*, DEP'T OF STATE DISPATCH, Jan. 28, 1991, at 56 (Remarks by State Department Spokesman Margaret Tutwiler). *See also* DEP'T OF DEFENSE, FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR 619 (April 1992)[hereinafter DOD PERSIAN GULF REPORT].

⁶⁴ GC III, *supra* note 20, art. 34. One of the most tragic events of religious discrimination by a detaining power for religious reasons was the segregation by the Nazis of Jewish-American POWs. Several Jewish American Soldiers were segregated from their fellow Americans and sent to slave labor camps where "they were beaten, starved and many literally worked to death." MITCHELL G. BARD, FORGOTTEN VICTIMS: THE ABANDONMENT OF AMERICANS IN HITLER'S CAMPS (1994). *See also* Trial of Tanaka Chuichi and Two Others in UNITED NATIONS WAR CRIMES COMMISSION, XI LAW REPORTS OF WAR CRIMES TRIALS 62 (1949) (convicting Japanese prison guards, in part, for intentionally violating the religious practices of Indians of the Sikh faith).

- b. Political beliefs. GC III, art. 38 encourages the practice of intellectual pursuit. However, the U.N. experience in POW camps demonstrated that pursuit of political beliefs can cause great discipline problems within a camp. In 1952, on Koje-do Island, riots broke out at the POW camps instigated by North Korean POW communist activists. Scores of prisoners sympathetic to South Korea were murdered by North Korean POW extremist groups. During the rioting, POWs captured the camp commander, Brigadier General Dodd.⁶⁵

C. What Must Be Provided?

1. Quarters equal to that provided to Detaining forces (GC III, art. 25); total surface and minimum cubic feet.
2. Adequate clothing considering climate. (GC III, art. 27)
3. Canteen.⁶⁶ (GC III, art. 28)
4. Tobacco.⁶⁷ (GC III, art. 26)
5. Recreation. (GC III, art. 38)
6. Religious accommodation. (GC III, art. 34)
7. Food accommodation (GC III, arts. 26, 34); if possible, utilize enemy food stocks and let POWs prepare their own food.
8. Copy of GC III in POWs own language. Copies available at: www.icrc.org.
9. Due process. (GC III, arts. 99-108)

⁶⁵ DEP'T OF THE ARMY, OFFICE OF THE PROVOST MARSHALL, REPORT OF THE MILITARY POLICE BOARD NO. 53-4, COLLECTION AND DOCUMENTATION OF MATERIAL RELATING TO THE PRISONER OF WAR INTERNMENT PROGRAM IN KOREA, 1950-1953 (1954); *see also* WALTER G. HERMES, TRUCE TENT AND FIGHTING FRONT 232-63 (1966); DEP'T OF STATE, DEP'T OF STATE BULLETIN: THE COMMUNISTS WAR IN POW CAMPS 273 (Feb. 6, 1953); Harry P. Ball, *Prisoner and War Negotiations: The Korean Experience and Lesson*, in 62 INT'L LAW STUDIES: THE USE OF FORCE, HUMAN RIGHTS AND GENERAL INT'L LEGAL ISSUES, VOL. II, 292-322 (Lillich & Moore, eds., 1980).

⁶⁶ The U.S. does not provide POWs with a canteen, but instead provides each POW with a health and comfort pack. Memorandum from HQDA-IP, Subject: Enemy Prisoner of War Health and Comfort Pack (29 Oct. 1994).

⁶⁷ *See* Memorandum from HQDA-IO, subject: Tobacco Products for Enemy Prisoners of War (12 Sep. 1994). During Desert Storm, the 301st Military Police POW camp required 3500 packages of cigarettes per day. *Operation Desert Storm: 301st Military Police EPW Camp Briefing Slides*, available in TJAGSA, ADIO POW files. *See also* WILLIAM G. PAGONIS, MOVING MOUNTAINS: LESSONS IN LEADERSHIP AND LOGISTICS FROM THE GULF WAR 10 (1992), for LTG Pagonis' views about mandatory tobacco purchases for POWs.

10. Hygiene (GC III, art. 29); separate baths, showers and toilets must be provided for women prisoners of war.
- D. POW Accountability.⁶⁸ (GC III, arts. 122, 123)
1. Capture notification–PWIS (Prisoner of War Information System). This system was utilized during Operations Desert Storm and Operation Uphold Democracy. The PWIS is now known as the National Detainee Reporting Center (NDRC).
 2. POW deaths. (GC III, arts. 120, 121). Any death or serious injury to a POW requires an official inquiry. Look to theater-specific SOPs to provide additional guidance on the appointing authority and routing system for the investigation or inquiry into a POW death or serious injury.
 4. Reprisals against POWs are prohibited. (GC III, art. 13)
- E. Transfer of POWs. (GC III, arts. 46-48)
1. Belligerent can only transfer POWs to nations which are parties to the Convention.
 2. Detaining Power remains responsible for POW care.
 - a. There is no such thing as a “U.N.” or “coalition” POW.⁶⁹
 - b. To ensure compliance with the GC III, U.S. Forces routinely establish liaison teams and conduct GC III training with allied forces prior to transfer POWs to that nation.⁷⁰
- F. Complaints and Prisoners’ Representatives.

⁶⁸ See Vaughn A. Ary, *Accounting for Prisoners of War: A Legal Review of the United States Armed Forces Identification and Reporting Procedures*, Pamphlet 27-50-261, THE ARMY LAWYER (Aug. 1994), at 16, for an excellent review of the United States system of tracking POWs. See also Robert G. Koval, *The National Prisoner-of-War Information Center*, MILITARY POLICE, June 1992, at 25.

⁶⁹ See Albert Esgain & Waldemar Solf, *The 1949 Geneva Convention Relative to the Treatment of Prisoners of War: Its Principles, Innovations, and Deficiencies*, MIL. L. REV. BICENTENNIAL ISSUE 303, 328-330 (1975)(Special Ed.), for a discussion of the practical problems faced with this provision.

⁷⁰ See, e.g., Memorandum of Agreement Between the United States of America and the Republic of Korea on the Transfer of Prisoners of War/Civilian Internees, signed at Seoul February 12, 1982, T.I.A.S. 10406. See also UNITED STATES FORCES KOREA, REGULATION 190-6, ENEMY PRISONERS TRANSFERRED TO REPUBLIC OF KOREA CUSTODY (3 Apr. 1992). See also DoD PERSIAN GULF REPORT, *supra* note 63, at 583.

1. The primary rights and duties/oversight responsibilities of Prisoner Representatives are set forth in the following articles of GC III: 57, 78-81, 98, 104, 107, 125, and 127.
 2. There is the potential for conflict of the Prisoner Representative duties with the Code of Conduct Senior Ranking Officer (SRO) requirement.⁷¹
 3. The SRO will take command, regardless of the identification of the Prisoners Representative.
- G. POW Labor.⁷² (GC III, arts. 49-57)
1. Rank has its privileges.
 - a. Officers cannot be compelled to work.
 - b. NCOs can be compelled to *supervise only*.
 - c. Junior enlisted can be compelled to do manual labor.
 - d. If enlisted POWs work, they must be paid.
 - e. *Retained Personnel shall not be required to perform any work outside their medical or religious duties.* This is an absolute prohibition that includes work connected to the administration and upkeep of the camp. (GC I, art. 28(c))
 2. Compensation.⁷³ (GC III, art. 60). 8 days paid vacation annually? (GC III, art. 53)
 3. Type of Work.
 - a. Work cannot be unhealthy or dangerous, unless the POW volunteers. Work cannot be humiliating. (GC III, art. 52)

⁷¹ See U.S. DEP'T OF DEFENSE, DEP'T OF DEFENSE INSTRUCTION 1300.21, CODE OF CONDUCT TRAINING AND EDUCATION (8 Jan. 2001).

⁷² See Howard S. Levie, The Employment of Prisoners of War, 23 MIL. L. REV. 41, and Levie, *supra* note 43, at 213-254. See generally, Frank Kolar, *An Ordeal That Was Immortalized: Not all was fiction in the story of the bridge on the River Kwai*, MIL. HISTORY, Feb. 1987, at 58.

⁷³ See U.S. DEP'T OF ARMY REGULATION 37-1, FINANCIAL ADMINISTRATION: ARMY ACCOUNTING AND FUND CONTROL ch. 36 (30 Apr. 1991).

- b. Work such as camp administration, installation, and maintenance is authorized, as well as work relating to agriculture; commercial business, and arts, and crafts; and domestic service without restriction to military character or purpose.⁷⁴
- c. Industry work (other than in the metallurgical, machinery, and chemical industries); public works and building operations; transport and handling of stores; and public utility services is authorized provided it has no military character or military purpose. (GC III, art. 50)
- d. Work in the metallurgical, machinery, and chemical industry is strictly prohibited. (GC III, art. 50)

H. Camp Discipline.

- 1. Disciplinary sanctions.
 - a. Must relate to breaches of camp discipline.
 - b. Only four types of punishments (UCMJ Art. 15-type punishments) are authorized (GC III, arts. 89, 90). The maximum punishments are:⁷⁵
 - i. Fine: ½ pay up to 30 days.
 - ii. Withdrawal of privileges, not rights.
 - iii. 2 hours of fatigue duty per day for 30 days.
 - iv. Confinement for 30 days.
 - c. Imposed by the camp commander. (GC III, art. 96)
- 2. Judicial sanctions.
 - a. POWs: Pre-capture v. post-capture.
 - i. Pre-capture: General court-martial or federal or state court prosecution if they have jurisdiction over U.S. Soldier for the same offense.⁷⁶ (GC III, arts. 82, 85)

⁷⁴ GC III Commentary, *supra* note 2, at 150-51.

⁷⁵ GC IV provides the same maximum punishments for civilian internees. *See* GC IV, art. 119.

- ii. Post-capture: any level court-martial allowed under UCMJ. Jurisdiction for post-capture offenses is found under Art. 2(9), UCMJ (GC III, arts. 82 and 102).
 - iii. Court-martial or military commission.⁷⁷ (GC III, art. 84). [But note effect of GC III, art. 102, is that U.S. must use a court-martial unless policy is changed to allow trial of a U.S. service members before a military commission.]
- b. Due process required.
- i. POWs: same due process as that provided to the Detaining Power's own military forces. (GC III, arts. 99-108)
 - ii. Right to appeal. (GC III, art. 106)

I. Escape.

1. When is an escape deemed successful?⁷⁸ (GC III, art. 91)

⁷⁶ See 10 U.S.C. § 802(a)(9) and 18 U.S.C. § 3227.

It should be noted that at least 12 nations have made a reservation to GC III, art. 85. The reservation in essence would deny a POW their protected status if convicted of a war crime. North Vietnam used their reservation under Art. 85 to physically beat American pilots and threaten trials as war criminals. See MARJORIE WHITEMAN, 10 DIGEST OF INTERNATIONAL LAW 231-234 (1968); James Burnham, *Hanoi's Special Weapons System: threatened execution of captured American pilots as war criminals*, NAT'L REV., Aug. 9, 1966; *Dangerous decision: captured American airmen up for trial?*, NEWSWEEK, July 25, 1966; *Deplorable and repulsive: North Vietnam plan to prosecute captured U.S. pilots as war criminals*, TIME, July 29, 1966, at 12-13. See generally, Joseph Kelly, *PW's as War Criminals*, MIL REV Jan. 1972, at 91.

⁷⁷ See Major Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion on the Constitutional and Jurisdictional Distinctions Between the Two Courts*, ARMY LAW., Mar. 2002. For a historical use of military commissions, see Major Michael O. Lacey, *Military Commissions: A Historical Survey*, ARMY LAW., Mar. 2002.

⁷⁸ Between 1942 and 1946, 2,222 German POWs escaped from American camps in the U.S. At the time of repatriation, 28 still were at large. One remained at large and unaccounted for in the U.S. until 1995! None of the German POWs ever successfully escaped. During World War II, 435,788 German POWs were held on American soil (about 17 divisions worth). Of all the Germans captured by the British in Europe, only one successfully escaped and returned to his own forces. This German POW did this by jumping a prisoner train in Canada and crossing into the U.S., which at that time was still neutral. ALBERT BIDERMAN, MARCH TO CALUMNY: THE STORY OF AMERICAN POW'S IN THE KOREAN WAR 90 (1979); Jack Fincher, *By Convention, the enemy within never did without*, SMITHSONIAN, June 1995, at 127; see also ARNOLD KRAMMER, NAZI PRISONERS OF WAR IN AMERICA (1994). See A. Porter Sweet, *From Libby to Liberty*, MIL. REV., Apr. 1971, at 63, for an interesting recount of how 109 union Soldiers escaped a Confederate POW camp during the Civil War. See ESCAPE AND EVASION: 17 TRUE STORIES OF DOWNED PILOTS WHO MADE IT BACK (Jimmy Kilbourne ed., 1973), for stories of servicemen who successful avoided capture after being shot down behind enemy lines or those who successfully escaped POW camps after capture. The story covers World War I through the Vietnam War. According to this book, only three Air Force pilots successfully escaped from captivity in North Korea. Official Army records show that 670 Soldiers captured

- a. Service member has rejoined their, or an ally's, armed forces;
 - b. Service member has left the territory of the Detaining Power or its ally; (i.e., entered a neutral country's territory);
 - c. Service member has joined a ship flying the flag of the Power on which he depends, or of an Allied Power, in the territorial waters of the Detaining Power, the said ship not being under the control of the last named Power.⁷⁹
2. Unsuccessful escape.
- a. Only disciplinary punishment for the escape itself (GC III, art. 92).⁸⁰
 - b. Offenses in furtherance of escape.
 - i. Disciplinary punishment only:⁸¹ if sole intent is to facilitate escape and no violence to life or limb, or self-enrichment (GC III, art. 93). For example, a POW may wear civilian clothing during escape attempt without losing their POW status.⁸²
 - ii. Judicial punishment: if violence to life or limb or self-enrichment (GC III, art. 93).
3. Successful escape.

managed to escape and return to Allied control. However, none of the successful escapees had escaped from permanent POW camps. *See* Paul Cole, I POW/MIA ISSUES, THE KOREAN WAR 42 (Rand Corp. 1994). *See also* George Skoch, *Escape Hatch Found: Escaping from a POW camp in Italy was one thing. The next was living off a war-torn land among partisans, spies, Fascists and German Patrols*, MIL. HIST., Oct. 1988, at 34.

⁷⁹ *See* SWISS INTERNMENT OF PRISONERS OF WAR: AN EXPERIMENT IN INTERNATIONAL HUMANE LEGISLATION AND ADMINISTRATION (Samuel Lindsay ed., 1917), for an account of POW internment procedures used during World War I.

⁸⁰ *See also* GC IV, *supra* note 24, art. 120, for similar treatment of civilian internees who attempt escape.

⁸¹ *But see* 18 U.S.C. § 757 which makes it a felony, punishable by 10 years confinement and \$10,000 to procure “the escape of any prisoner of war held by the United States or any of its allies, or the escape of any person apprehended or interned as an enemy alien by the United States or any of its allies, or . . . assists in such escape . . . , or attempts to commit or conspires to commit any of the above acts. . . .”

⁸² *Rex v. Krebs* (Magistrate's Court of the County of Renfrew, Ontario, Canada), 780 Can. C.C. 279 (1943). The accused was a German POW interned in Canada. He escaped and during his escape he broke into a cabin to get food, articles of civilian clothing, and a weapon. The court held that, since these acts were done in an attempt to facilitate his escape, he committed no crime.

- a. Some authors argue no punishment can be imposed for escape or violence to life or limb offenses committed during escape if later recaptured. (GC III, art. 91)
 - b. However, most authors posit that judicial punishment can occur if a POW is later recaptured for his previous acts of violence.
 - c. Issue still debated, so U.S. policy is not to return successfully escaped POW to same theater of operations.
4. Use of force against POWs during an escape attempt or camp rebellion is lawful. Use of deadly force is authorized “only when there is no other means of putting an immediate stop to the attempt.”⁸³
- J. Repatriation of Prisoners of War.⁸⁴
- 1. Sometimes required before cessation of hostilities (GC III, art. 109).
 - a. Seriously sick and wounded POWs whose recovery is expected to take more than 1 year (GC III, art. 110).
 - b. Incurably sick and wounded (GC III, art. 110).
 - c. Permanently disabled, physically or mentally (GC III, art. 110).
 - 2. After cessation of hostilities.
 - a. GC III, art. 118, provides: “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”
 - b. U.N. command in Korea first established principle that POWs do not have to be repatriated, if they wish to remain behind.⁸⁵

⁸³ GC III Commentary, *supra* note 2, at 246. Compare *Trial of Albert Wagner*, XIII THE UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF THE TRIAL OF WAR CRIMINALS, Case No. 75, 118 (1949), with *Trial of Erich Weiss and Wilhelm Mundo*, XIII THE UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF THE TRIAL OF WAR CRIMINALS, Case No. 81, 149 (1949). “The use of weapons against prisoners of war, 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.” GC III, *supra* note 20, at 42.

⁸⁴ For a thorough list of resources on this issue, see BIBLIOGRAPHY ON REPATRIATION OF PRISONERS OF WAR (1960), copy maintained by the TJAGLCS Library.

⁸⁵ See R.R. Baxter, *Asylum to Prisoners of War*, BRITISH YEARBOOK INT’L L. 489 (1953).