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# CAN THE STATUS OF PRISONERS OF WAR BE ALTERED?

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### CAN THE STATUS OF PRISONERS OF WAR BE ALTERED?

[Persons, who were in Germany during the last moments of the Nazi regime, witnessed a phenomenon full of interest for the history of prisoners of war.

During these moments, when the "collapse of legality" (to use a favourite expression of the historian Ferrero) took the form of wide-spread upheaval both of institutions and of individuals,] and Germany was at the same time drained of her own life-blood and filled to overflowing with thousands of foreigners forcibly impressed to work on German soil, [there was one institution, one probably of few, which retained all its strength, its permanence and its power of protection. That institution was the prisoners of war camps enjoying the benefits of the 1929 Convention. The inmates of these camps, tensely awaiting their liberation, strengthened by their attitude the organisation and the discipline deriving from their clearly defined international status, and passed through this troubled period almost with impunity.]

Many foreigners moreover, compelled to work as civilians with the German population around them, were at pains at this time to seek refuge in the approaches to the camps in the hope of benefiting by the protection and the relative stability represented by these elements of order amid the welter of disintegration.

Amongst them were former prisoners of war, who at a particular moment had complied with the inducements of the

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Detaining Power, and agreed to become civilian workers. Some of these perhaps found the security they were looking for in the neighbourhood of the prisoners' camps; but many others, having cut themselves off from the life of their former comrades in captivity, were more readily exposed to the last of the fighting, which sometimes continued up to the very approaches of the camps. /517

We have here, it would seem, a double phenomenon, from which a fertile lesson may be drawn. The status which International Law, and especially the 1929 Convention, accords to prisoners of war, shows the extent to which it was able to give these victims effective protection against certain consequences of their misfortune. It has doubtless not had, and never will have, the effect of exempting prisoners of war from the vicissitudes of war and of history; but the experience of captivity, especially when it is prolonged, is in itself sufficiently painful and uncomfortable not to make it unnecessary to dwell on the point. It has at least been able to afford those who have benefited by it the comforting assurance that they have not been at the arbitrary mercies of the enemy by whom they were detained.

Can it not further be said that, in saving a category of victims from the hazards of the law of the strongest, the international status of the captives represents a challenge in a world torn by war, in which the populations are beset on all sides? Thanks to it, hundreds of thousands of individuals escape the devouring needs of the conflicting States, need of labour for war manufactures, need of combatants to make war, and need of partisans for ideological purposes—need in short of individuals on every front.

It is not therefore surprising if pressure, whether open or disguised, was exerted in many cases on prisoners in the last world war to induce them to renounce their status, at any rate partially. Sometimes they were forced to do so by the Detaining State. Sometimes also they voluntarily agreed to such renunciation, yielding to the temptation of what they believed to be freedom. Thousands of prisoners thus found themselves, like the civilian workers above-mentioned, deprived in greater or

lesser degree of the status which was theirs as prisoners of war, and lost its benefits.

The situation is one which has been of lively interest to all who have at heart the condition of prisoners of war. The International Committee of the Red Cross conveyed its apprehensions on this point to the belligerents in its appeal of 23 August 1943, in which it gave forcible<sup>518</sup> expression to the results of its extensive experience and of the many representations which it made in the matter. The appeal is still worth quoting in full.

The International Committee of the Red Cross desire to draw the particular attention of the belligerents to the situation with regard to rights the PW have acquired, both under the terms of the Hague and Geneva Conventions, and according to the general principles of international law, regardless of the time of capture during the present conflict.

It would appear that, according to information received by the International Committee, certain categories of prisoners have, as a result of diverse circumstances, been deprived of their PW status and of the conventional rights arising therefrom. The Committee therefore earnestly recommend that the Powers concerned ensure that the provisions by which the prisoners benefit, be safeguarded under all circumstances and until the termination of hostilities<sup>1</sup>.

The authors of the new Geneva Conventions of 1949, and especially those who were concerned with the treatment of prisoners of war, naturally paid great attention to this problem.

In their anxiety to strengthen the status of the captives they were at pains to do what they could to close all the breaches which the exercise of pressure or acts of authority had opened in the edifice of the prisoners' status.

In this connection reference should be made at the outset to the principle which they put at the beginning of each of the Conventions, taking it from the 1929 Convention but giving it a very much wider scope. The principle, under which "The High Contracting Parties undertake to respect and to ensure

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<sup>1</sup> Report of the International Committee of the Red Cross on its activities 1939-1947, vol. I, page 546.

respect for the present Convention in all circumstances", may at once be quoted against any State which on whatever pretext seeks to alter the status of its prisoners.

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But the efforts of the authors of the Convention also assumed a more exact and more complete form in a number of other passages of the new Prisoners of War Convention, though they were not concentrated in a single, readily recognisable provision. It is proposed accordingly in the present article to show how the Prisoners of War Convention deals with the different cases where prisoners have been "transformed", and to indicate the provisions by which it proposes to prevent a repetition of these practices.

It is not for us to pass judgment on the historical situations to which we shall thus have to allude. Our purpose in referring to them is to give prominence to the deeply rooted reasons for the inalienable character conferred upon the status of prisoners of war. It is to show, to, that the new status is sufficiently elastic to allow of certain transformations. We may further note that, with the return of peace, delegates of the States, meeting in conference, cannot but agree that particular abuses committed by belligerents in the fever of war might have been avoided.

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For the sake of clarity and method it is proposed to classify under three heads the different transformations of prisoners of war which are to be considered, although this classification does not reflect intrinsic differences—namely (*a*) transformations "by authority" (where the status of prisoners is altered by a unilateral decision of the Detaining Power), (*b*) transformations which may be called "voluntary" (where the alteration is to all appearance requested by the prisoner himself), and (*c*) licit transformations or "pseudo-transformations" (where the alteration is not contrary either to the letter or the spirit of the Geneva Convention).

## A. TRANSFORMATIONS "BY AUTHORITY"

### I. "Anticipated" transformations.

The first case to be considered is that of the transformation of combatants, who did not become prisoners of war. The paradox is only apparent. The combatants in question, on falling into the hands of the enemy, were denied the status of prisoners, though they completely fulfilled the conditions required by the Law of Nations. It may therefore fairly be considered that, in denying them such status and imposing on them another form of treatment, the Detaining State was simply transforming actual prisoners of war. In this category of what may be called "anticipated" transformations there are two cases, which received special attention from the authors of the new Geneva Conventions.

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The first of these cases was that of the German and Japanese troops, who fell into the hands of the enemy on the capitulation of their countries in 1945. These troops, who were called "Surrendered Enemy Personnel", were in most cases treated by the Detaining military authorities as being without the right to benefit by the 1929 Convention relative to the Treatment of Prisoners of War.<sup>1</sup>

On what did the Detaining military authorities base their attitude? One of these authorities contended that these surrenders *en masse* were probably not contemplated by the signatories of the Conventions of the Hague and Geneva. It is true that the text of 1929 speaks of "captured" combatants; but in both theory and practice it had always admitted that the term also covered members of armed forces falling into the hands of their adversary as a result of a surrender *en masse*.<sup>2</sup> No one objected to prisoner of war status being accorded to the German troops who surrendered in Tunisia, or to the French troops who fell into the hands of the Germans in 1940.

<sup>1</sup> Hereinafter called for short "the 1929 Convention" or "the text of 1929".

<sup>2</sup> See for example on the point H. C. Fooks, *Prisoners of War*, 1924, page 112.

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Another plea, which was implied in justification of the Surrendered Enemy Personnel designation, was to the effect that the unconditional surrender was tantamount to a blank cheque for the Detaining Powers in the matter of their treatment of the troops fallen into their hands as a result of the capitulation. It is true that Article 83 of the text of 1929 reserves to the High Contracting Parties the right to conclude special conventions on all questions relating to prisoners of war concerning which they may consider it desirable to make special provision. But it cannot logically be deduced from this Article (which will be discussed in further detail below) that one of the Contracting Powers is free to renounce the application of the Convention altogether in the case of certain of its soldiers.

It must indeed be admitted that the situation of the German or Japanese combatants after the capitulation was somewhat different from that of their comrades, who were taken prisoner in the course of the hostilities. The German or Japanese combatants in question fell into the hands of the enemy *after* the total cessation of hostilities, and as a result of that cessation. In many cases they had not even been in contact with the enemy. In the Far East the majority of the Japanese troops, when they laid down their arms in obedience to their Supreme Command, were still separated from the enemy forces by hundreds, or thousands, of kilometres by land or by sea. In many places they were to wait several weeks more before they saw the first contingents of the Allied armies arrive, and came materially within the "power" of the latter. Nor must it be forgotten that in the case of Germany the capitulation was a political, as well as a military, act. It was the German Government, which capitulated, and thereafter ceased to exist. It was no longer therefore a case of joint partners in the 1929 Convention.

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The treatment of the Surrendered Enemy Personnel was on the whole similar to the treatment of prisoners of war: it was even in some cases more favourable. In certain respects however it had serious disadvantages. Members of the Surrendered Enemy Personnel were deprived of their personal belongings without any receipts being given for them: they had no spokesmen: the officers received no pay, and the other

ranks who were compelled to work received no wages. The penal safeguards, for which the Convention provided, did not exist for them.

Even worse than these very tangible disadvantages was the actual fact of the unilateral establishment of a special category of prisoners. In itself hard to justify, it raised a serious question of principle. The lot of these prisoners, deprived of their international legal status, was entirely dependent on the arbitrary will, good or bad, of the Detaining Power. This was fully realised by the experts who were called upon to revise the text of 1929; and as a result of their labours the establishment of such a special category of prisoners is henceforward prohibited by two provisions of the revised Convention.

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[Article 4, which enumerates the categories of persons entitled to be considered prisoners of war, specifically states that these people are entitled to the benefit of the Convention when they "have fallen into the power of the enemy". This wording, which has throughout replaced the expression "captured", ought to show clearly that the treatment established by the Convention is not confined to combatants taken prisoner in the course of combat, but applies equally to those who fall into the power of the enemy as the result of surrenders or capitulations *en masse*.]

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Again the argument based on the *unconditional* character of the surrender can now be countered by a specific provision in the shape of Article 6. [Article 6 lays down that "no special agreement shall adversely affect the situation of prisoners of war, as defined by the present Convention, nor restrict the rights which it confers upon them". This Article (to which we shall return) is applicable to an armistice or capitulation agreement, and will henceforth prevent the conqueror from dictating the conditions he pleases in regard to the treatment he proposes to give to the troops of his adversary. Furthermore under the new Convention the disappearance of the State of Origin of the prisoner would not affect his status: every prisoner is entitled under Article 6 to this status until his final release and repatriation.]

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The case of Surrendered Enemy Personnel is indeed instructive in more respects than one. What were the underlying

reasons at the origin of this new category of prisoners? One of the Governments concerned contended that, even if it had been admitted that surrendered troops had the status of prisoners of war, it would have been impossible in many respects to apply the Prisoners of War Convention to them.

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Here we have the real reason—namely, the material impossibility (which will be readily appreciated) of handling, in accordance with the rules of the Convention, hundreds of soldiers who have fallen all at once into the power of the enemy, where such treatment necessitates the provision of a very large number of guards and officials, who may well be needed for other urgent duties in connection for example with the recovery of the nation devastated by the war. But was it indispensable for that reason to have recourse to the dangerous precedent created by the establishment of the special category of Surrendered Enemy Personnel? Would it not have been better to plead the—temporary—material impossibility? Though the Experts consulted in 1947, and later the diplomats assembled at Geneva in 1949, refused to make explicit mention in the Convention of such a material impossibility<sup>1</sup> for fear of the abuses which such a mention might entail, they admitted clearly that there were circumstances akin to *force majeure*, which justified exceptions of a temporary character to the rule. The International Committee of the Red Cross for its part would certainly have understood the fact of the capitulated troops, while ranking as prisoners of war with full rights, not being at once treated in all respects in accordance with the Geneva Convention.

It would have been possible to apply the 1929 Convention even in circumstances not covered by any explicit legal provision: and it would have been more prudent, having regard to the consequences, to endeavour to adapt it to the situation created by capitulations, rather than fail to apply it to such a situation. The 1949 Convention precludes any ambiguity on the point.

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<sup>1</sup> See in this connection the *Report on the Work of the Conference of Government Experts, Geneva, 1947* pages III-III4, and *Final Record of the Diplomatic Conference of Geneva 1949*, vol. II-A, page 323, and vol. II-B, pages 279-281.

The second case of "anticipated" transformation, which the authors of the revised Convention had in mind, affected a smaller number of prisoners, but was no less important than the first case.

With the development of certain forms of war, which bring guerilla fighters, commandos or parachuted troops into the scene, or mingle civilians and combatants together, it frequently becomes difficult to decide rapidly whether a particular captured individual does, or does not, belong to one of the categories admitted to the/benefit of prisoner of war status. Moreover certain of these categories, especially partisans, were not defined sufficiently clearly by International Law. Numbers of prisoners in consequence were not made subject to the treatment laid down in the Convention until after a process of identification, which was sometimes rather lengthy.

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There were unfortunately Detaining Powers which made this process last much longer than was necessary, and by so doing kept combatants who had fallen into their power, and of whose qualifications as prisoners of war there was no question whatsoever, in a precarious position without the benefit of the status accorded by the Convention. One author quotes the case of American prisoners, who for three years were considered by the Japanese to be mere "war captives", and not prisoners enjoying the rights attaching to their status as such.<sup>1</sup> It will also be remembered that the political commissars of the Soviet Army were denied outright the status of prisoners of war, with the tragic consequences which the world knows.

In their anxiety to avoid the abuses to which such identification processes (though intelligible enough in themselves) were liable to give rise, the authors of the new Geneva Convention guarded against the danger in various ways.

In the first place, by specifying in Article 4 the different categories of combatants entitled to the benefits of the Convention, they helped to reduce the number of doubtful cases. There might however still be such cases. Accordingly they

<sup>1</sup> *Bulletin No. 6 of the Institute of War Policy*, Georgetown University, Washington D.C., February 1947, page 22.

also inserted secondly in Article 5 a new provision of far-reaching significance, which fully meets the requirements of legal evolution. Under Article 5, if there is any doubt as to whether a person, who has committed a belligerent act, belongs to one of the categories referred to, he is to be treated as a prisoner of war until such time as his status has been determined by a competent tribunal. The Convention further provides in Article 5 that it shall apply to the categories in question "from the time they fall into the power of the enemy"./

Thus, owing to the effect of these various supplementary provisions, it will no longer be possible for a State to deprive captured combatants of prisoner of war status on the pretext that their actual combatant status is subject to confirmation. The only combatants who can be deprived of such status are such as *obviously* do not comply with the conditions required by International Law. Cases of this kind are probably less numerous; and a belligerent who tried to invoke them arbitrarily would be taking a very great responsibility on himself in the eyes of history.

## 2. *Transformations during captivity.*

Let us now consider certain transformations "by authority", which have deprived of their rights prisoners of war who were nevertheless regarded and treated as such by the Detaining State.

We have already seen the effect on the fate of prisoners of war of the inferences which it has proved possible to draw in regard to the fate of prisoners of war from an unconditional surrender, and which might be yet more readily drawn in the case of a crushing defeat of the enemy—that is to say, his complete collapse. In the case of the German and Japanese troops these consequences were fortunately not extended to the troops made prisoner before the surrender. That was, however, done in the case of the Yugoslav and Polish prisoners

[The Third Reich after the total occupation of Poland and Jugoslavia let it be understood that prisoners of war from these countries could no longer be considered as such; their

respective States having ceased to exist, the position of Power of Origin of these captives belonged henceforward to the Reich. This attitude was never, it is true, announced officially, nor did it receive uniform practical application, since a number of Polish and Yugoslav combatants, especially the officers, retained the status of prisoners of war until 1945.

But most of the others were transformed after the occupation of their countries into civilian workers the Detaining Power assuming the rights of the States/it had annexed or occupied, and demobilising and "liberating" accordingly the prisoners in question, in order to transform them into civilian workers.

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In this way combatants in regular enjoyment of prisoner of war status found themselves deprived overnight of this essential safeguard, and introduced to the hazards of the lot of civilian forced labourers in an enemy country.]

The spirit of the 1929 Convention, and even any reasonable interpretation of it, were certainly against any such subterfuge. But the letter of the Convention was not sufficiently clear on the point. It was necessary therefore to give it precise form, in order to avoid any such transformations.

This was done by Article 5, the Article already quoted, which is the key-stone of the whole edifice erected to prevent transformations of prisoners of war. (Under Article 5 the benefits of the Convention, which the prisoners are to enjoy from the moment of their falling into the power of the enemy, are to be theirs until their "final" release and repatriation. The word "final" clearly indicates that the prisoner of war is not to forfeit his status until he has been restored to the position he had before capture.)

(Further, the new Convention was able to take into account a special contingency. It may happen that prisoners of war are repatriated to an occupied country, and that the Occupying Power accordingly wishes to take steps with a view to its security in regard to these ex-combatants. In such a case, under Article 4, No. B, combatants who are again taken into captivity must be given the benefits of the Prisoners of War Convention. Consequently, any release and repatriation of prisoners of war with the sole purpose of exempting them

from the application of the Convention, in order to reintern them under another name, are henceforth prohibited.)

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The new Convention for the protection of civilians contributes to the same end. Prisoners of war finally released and repatriated in an occupied country will in future be protected, on becoming civilians, by the said Convention, which among other things prohibits all deportation. They cannot be made to work except on their national territory, and then only under the conditions and with all the safeguards for which Article 51 provides.

A second transformation "by authority" is that of prisoners charged with breaches of the laws of war.

It is common knowledge that at the end of the Second World War the Allied Governments picked out a number of prisoners amongst those in their hands, and charged them with war crimes, especially combatants belonging to particular organisations which they considered guilty, such as the Gestapo, the S.S. etc., or to bodies of troops suspected of having taken part in acts contrary to the law of nations. These prisoners were either "released", only to be placed in special camps with civilians charged with the same offences, or were put in prison directly, where the charges against them were more definite. The International Committee of the Red Cross, when it expressed anxiety as to their lot, was given to understand that these prisoners were no longer to be considered as prisoners of war on the generally admitted principle that prisoners of war could not cite in their defence the laws of war which they had violated.

The practical consequences of their transformation, are not always sufficiently well known. The "principal war criminals", for example the accused at Nuremberg, generally had the benefit of the procedural safeguards of a system as advanced (if not more so) as that which is applicable to ordinary criminals. On the other hand, there were a very much larger number of prisoners accused of similar offences, who got no such benefit.

The brutal deprivation of the treatment to which they were entitled under the Convention meant for many prisoners, against whom no definite charge was made, a notable aggravation

of their lot, and a long delay before any sentence was passed in affirmation of their guilt or innocence.

The 1929 Convention provided a number of safeguards in favour of prisoners of war who were the subject of legal proceedings, on the lines approximately of the safeguards provided by the law of civilised States for ordinary criminals. There was no explicit reference in this Convention to offences committed by the/prisoners of war before their capture. Interpreting this silence in a negative sense, the majority of the Allied tribunals decided in general that the legal safeguards provided by the Convention for prisoners of war were not applicable to those of them who were charged with war crimes. This interpretation, which is undoubtedly disputable,<sup>1</sup> placed certain prisoners of war in a difficult position; and the International Committee of the Red Cross made an attempt to procure at least a minimum of safeguards for them, and drew attention to the point at the outset of the work in preparation for the revision of the Convention. The Government Experts, who met in 1947, admitted that the accused should have the benefit of prisoner of war status pending a *prima facie* charge against them, and that an addition to the 1929 Convention should accordingly be made on the point. The XVII Red Cross International Conference in 1948 went further, and urged that prisoners of war charged with offences committed before their capture should continue to have the benefit of the Convention even after conviction.

At the Diplomatic Conference the differences of opinion mainly centered on this last point.

[ Some delegates again brought forward the former argument, and contended that by violating the laws of war one was *ipso facto* "outlawed". The majority however recognised the need for preserving the benefits of the Convention even for prisoners convicted of war crimes. ]

<sup>1</sup> One of the members of the Supreme Court of the United States argued forcibly in a dissentient judgment on the case of Admiral Yamashita that the applicability of the safeguards in question was perfectly plausible and indeed in accordance with the spirit of the Convention. (See the *Law Reports of Trials of War Criminals*, vol. IV, pages 1 ff.)

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There was a practical reason in favour of this solution. In view of the diversity of the laws of the various countries, it was desirable to give these prisoners a minimum standard treatment, namely that accorded in civilised countries to ordinary convicts; and it was precisely such treatment that was indicated in the few Articles of the Convention still applicable to prisoners even after conviction. There was also a theoretical reason which weighed down the balance, and it appears to us to be of particularly cogent force. (It has been said that the benefits of a developed system of law, such as municipal law, remain, even for those who violate it. Why then should not the development of international law, which it is hoped to further, lead to the same conclusion?)

The new Convention accordingly lays down in Article 85 that "prisoners of war prosecuted... for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention". This provision was the subject of reservations on the part of a few States; but it is plain from their declarations that even in their view the Convention continues to apply to all cases—as we think it must and should—until such time as a sentence regularly passed has settled the question of guilt.<sup>1</sup>

Here again the new Convention closes the breach in the 1929 text by its categorical prohibition of transformations of prisoners of war charged with violations of the laws of war.

Though attempts have been made to justify such transformations by the principle indicated above, the real reason for them is to be sought elsewhere. In our opinion the primary purpose of these transformations has been the desire to facilitate the search for, and discovery of, combatants suspected of breaches of the laws of war.

There were undoubtedly great difficulties on occasion in the way of such search, and special measures may have been necessary. But was it really necessary for that reason to go as far as depriving a very large number of prisoners of war

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<sup>1</sup> *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. I, pages 342 ff. and vol. II-B, pages 303 ff.

of the safeguards provided by the Convention? Here again the solution adopted had grave disadvantages, both in principle and in practice, while all the time measures could have been taken within the framework of the 1929 Convention.

85 (There is nothing in the international status of prisoners of war to prevent the internment in special camps under special surveillance, or even the imprisonment, of persons accused of grave offences against the laws of war, provided that such action does not involve any diminution of their rights under the Convention.) There is an explicit provision in the new Convention (Article 92) for special surveillance in the case of prisoners of war who have attempted to escape and been recaptured. A solution on these lines might perfectly well have been adopted in the case of prisoners of war who were merely suspected of war crimes, and also of those against whom a more specific charge had been laid, preventive detention<sup>1</sup> being perfectly compatible with the application of prisoner of war status.

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A brief reference may finally be made to yet another transformation "by authority", which is of much less frequent occurrence, but was considered nevertheless to call for special mention in the new Convention.

Cases have been known where prisoners of war, who have escaped and been recaptured, have not been sent back to their place among their comrades under the military authorities, who were in charge of them, but have been put instead into camps of political detainees, and so been removed completely

<sup>1</sup> The Diplomatic Conference incidentally pronounced on this point in the Report of Committee II, as follows—"In the field of procedure, the regime for preventive detention and the cases to which it applied were defined. It was furthermore limited to three months in all cases. Certain Delegations would have preferred to retain the possibility of extending it in the special case of prisoners indicted with offences against the laws and customs of war, arguing that it was more difficult to try these prisoners equitably in war time than after the end of hostilities. In reply, it was pointed out that by virtue of the principle according to which a prisoner shall be tried without delay and shall be considered innocent until he is proved guilty, he must be released if he has not been brought before a Court within three months. On the other hand, there is nothing in the Conventions to prevent prisoners coming up for trial at a later date; they may even be accommodated in other camps so as to avoid all possibilities of obtaining false witnesses." *Final Record*, vol. II-A, page 572.

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from the operation of the 1929 Convention. Action of this kind was a flagrant breach of the well established principle that prisoners recaptured while trying to escape are only liable to disciplinary penalties.

The authors of the new Convention sought to cover these cases by a provision in Article 92 to the effect that " a prisoner of war who is recaptured " (while trying to escape) " shall be handed over without delay to the competent military authority".

## B. " VOLUNTARY TRANSFORMATIONS "

This concerns prisoners of war who, during their captivity, abandoned all or part of their rights under the Conventions, not as a result of a decision of the Detaining Power, but at their own request and of their own free will. Whether this request was made without restraint is another question to which we will revert later. However that may be, prominence was in general given to the voluntary nature of this type of transformation which distinguishes it from those we have already examined.

### I. *Transformations resulting from inter-governmental agreement.*

In voluntary transformations the first place must be given to those which resulted in placing prisoners of war, either entirely or partially, in the position of civilian workers in the country of their internment. The best known cases are those of the French prisoners in Germany, who were transformed into civilian workers, the Italian prisoners in Allied hands who became " collaborators " after the formation of the Badoglio Government, and the German prisoners in France.

Of these three cases, one which mainly engaged the attention of the authors of the new Geneva Convention was the case of the French prisoners in Germany. In 1943 these prisoners were offered certain material advantages by the German Government, provided they accepted employment even for work in connection with military operations. Although they continued

to be prisoners of war in name, they ceased to be subject to military discipline, and were assimilated as regards working conditions, jurisdiction and freedom of movement to the French workers in Germany. This offer was made to them by the detaining authorities as being in complete agreement with the French (Vichy) Government.<sup>1/</sup>

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The prisoners who accepted this "leave from captivity" at first effectively enjoyed certain advantages; but this semi-freedom nevertheless became more and more disadvantageous for them as the situation in Germany became worse. Being no longer under military jurisdiction, they lost the benefit of protection under the Conventions in the event of legal proceedings against them; and in the case of disputes with their employers they came under the power of the civilian police, by whom they could be sent to punishment camps, which were not open to visits by the International Committee of the Red Cross. They were no longer eligible for repatriation; and above all they no longer received like prisoners of war the food parcels they cruelly lacked when the food situation became very difficult and contact with France impossible.

An even more serious point was that, whereas this change of status was to have been of an optional nature, unwilling prisoners (i.e. the great majority) were subjected to vexatious treatment and the strongest possible pressure, until the number of "transformed prisoners" agreed upon by the Governments had been reached.

The situation, at least as regards the consequences, was somewhat different for the Italian prisoners of war in British and American hands who were transformed into "collaborators" following the appeal of the Badoglio Government in 1943, soliciting an armistice from its former adversaries. Here also these prisoners were asked by the Detaining Powers to join in the Allies' war effort by accepting any work, regardless of the restrictions imposed by Articles 31 and 32 of the 1929

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<sup>1</sup> For more detailed information on the subject see M. Bretonnière, *L'application de la Convention de Genève aux prisonniers de guerre français en Allemagne durant la seconde guerre mondiale*, Thèse, Paris 1949, pages 491-495.

Convention. In return they received much greater freedom, facilities of all descriptions and a different internal organisation (under the control of their own officers). The Detaining Powers said that this new status was offered to them following diplomatic negotiations between the United Nations and the provisional Italian Government.

Those who accepted this transformation were never exposed to the great disadvantages suffered by the French transformed prisoners. When it took place however, it had very unfortunate moral effects. A great many prisoners were faced with a distressing case of conscience, being divided on the one hand by their wish to remain faithful to their military allegiance and the status by which they had been protected until then, and on the other hand by their inclination to rally round the new Italian Government. In addition these measures caused great disturbance in the life of the prisoners of war, who had until then been united, by making apparent and even intensifying divergences of political opinion which had remained in abeyance during their common captivity.

This type of transformation raised two legal points. Were prisoners of war entitled to give up their status under the Conventions, and were the Detaining Powers authorised to suggest it? Were moreover the Detaining Power and the Home Power entitled to enter into an agreement, as in this instance, for offering prisoners another status than that afforded by the Conventions?

We will first reply to the latter question, with the intention of reverting to the first question when we come to consider the case of voluntary transformation not based on such agreements.

In order to justify their mutual agreements for granting a new status to prisoners of war, the States concerned put forward, more or less explicitly, Article 83 of the 1929 Conventions, under which the Contracting Parties "reserve to themselves the right to conclude special conventions on all questions relating to prisoners of war concerning which they may consider it desirable to make special provisions". In the *letter* and at first sight this Article apparently justifies their claim. But, as we have endeavoured to show in another survey on the

subject,<sup>1</sup> the logical interpretation of this clause in conformity with the *spirit* of the Geneva agreements makes such a conclusion impossible. The authors of the 1929 and 1949 Conventions were desirous of affirming in law a standard system of captivity as it emerges from the practice of States, which should respond to the demands of civilised peoples' conscience. They had been wise enough to leave to the Contracting Parties the necessary executive measures, such as the conclusion of agreements for certain special applications in specific cases; but it could not have been their intention to give them the possibility by means of agreements of abolishing rules which all their efforts had tended to make of a universal and permanent nature. Such a rule was the provision of the Geneva Convention which prohibits the employment of prisoners for work in connection with the operations of war, a rule which may be considered as part of international customary law.

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The Conference of Government Experts, and the Diplomatic Conference, were naturally concerned with this important question, and answered it without ambiguity. They fully confirmed the imperative and inalienable nature of the provisions of the Geneva Convention by prohibiting, in Article 6 common to all the new Conventions, special agreements which might adversely affect the situation of prisoners as defined by the Convention or restrict the rights which it confers upon them.

By thus definitely prohibiting agreements between Contracting Parties, of which the effect would be to deprive prisoners of war of the protection afforded by their status, the authors of the new Conventions had principally in mind the situation of the "transformed prisoners" in Germany and, in general, the possible effects for prisoners of war of certain belligerents' vital need of man-power. Does this mean that they wished to ignore agreements (such as the transformation of Italian prisoners of war) of which the consequences would by no means be of such a disadvantageous nature? We do not think this is the case. But they no doubt felt—and

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<sup>1</sup> R. J. WILHELM, *Le caractère des droits accordés à l'individu dans les Conventions de Genève*, "Revue internationale de la Croix-Rouge", August 1950.

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rightly—that the possibility of agreements modifying the situation under the Conventions was a source of positive danger for the great majority of prisoners of war, even if a small number might find it to their advantage, and that it was preferable to prohibit them entirely./

The case of the Italian “collaborators” is worthy of a few supplementary comments: for here again the question arises as to whether the results of this transformation fully justified the serious measure of principle which the renunciation of prisoner of war status represented, and whether certain aspirations it was intended to fulfil could not have been dealt with within the actual framework of this status.

Did the Detaining Powers gain much greater profit for their war effort from these prisoners (whose transformation only took place in 1944, and of whom many continued to work on the land) than they would have obtained from the work of non-transformed prisoners while respecting Article 31? Even without available statistics on the subject there is a doubt.

On the other hand, was it their intention to give Italian prisoners of war greater liberty in view of the new political situation? The international prisoner of war regulations themselves made this possible by the provision for liberty on parole, as specified by the Hague Regulations and expressly repeated in the 1949 Convention. These provisions allow for freedom of movement, sometimes on a large scale, to be granted to prisoners of war, who are prepared and authorised to give their parole. (It is of course fully understood that a prisoner on parole does not lose prisoners of war status, and cannot in consequence renounce or be forced to renounce the protection conferred upon him by this status.)

Was it a question of giving prisoners greater autonomy in their organisation? In that case use could be made of the practice followed by certain Detaining Powers, subsequently affirmed by Article 79 of the new Convention, under which officer prisoners of war were to be placed in labour camps for other ranks for administrative duties, and might further, if elected for the purpose by the prisoners of war, act as the prisoners' representatives.

The circumstances in which the transformation took place make it necessary to review and to discuss these questions. But all this would be irrelevant and even futile without raising the other question, whether it would not have been in the spirit of the Geneva Convention to have liberated these prisoners or at least to have provided in the Armistice Agreement clauses relative to their liberation and repatriation, and whether the answer was not in fact unfortunately in the negative. }

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2. Transformations of a purely voluntary nature. ~

We will now deal with a type of transformation, where the change of status does not result indirectly from an agreement between the prisoner's Home Power and the Detaining Power, but is always the result, in appearance at least, of the prisoner of war's own action. In dealing with these cases we can thus reply to the question previously raised as to whether prisoners of war can renounce, or be brought to renounce, their protection under the Conventions.

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The best known case of voluntary transformation in history is that of prisoners of war, who accepted to serve in the armed forces of the Power detaining them. In this case the transformation is total. There is no longer any prisoner of war status under the Conventions, whereas in the transformations previously examined there were certain elements or safeguards under such status, which were still applicable to those concerned.

The question of enrolment during hostilities did not arise very often during the Second World War, except perhaps in the case of prisoners of war who were not subject to the regime of the 1929 Convention, such as the prisoners in the German-Soviet conflict. It had on the other hand been a fairly common practice during the 1914-1918 war, and in previous conflicts; and it is quite possible that it may gain new importance in view of the ideological and totalitarian nature of present struggles.

Certain

The letter of the 1929 text contains no definite answer to the question whether a prisoner of war can give up his status and enrol in the forces of the Detaining Power, or whether

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the latter can accept this renunciation if he does. / A belligerent is prohibited by international customary law from forcing nationals of the adverse party to take part in war operations directed against their own country. This principle, expressly laid down by the Hague Regulations, therefore prohibits all compulsion on the part of the Detaining Power in order to obtain the enrolment of prisoners of war.

But how does the matter stand when prisoners spontaneously offer their services, as it is most often alleged they do? Strictly speaking, it might be deduced from the rule prohibiting the employment of prisoners for work connected with military operations that the presence of a former prisoner of war in the armies of the Detaining Power is unlawful *a fortiori*. It would however appear that, until the last war, international law had not definitely drawn any such conclusion, or specified the attitude to be observed by the Detaining Power in regard to such offers. The question was nevertheless raised at the Conference which Red Cross representatives attended in Copenhagen in 1917, when the Austrian representatives urged that Russia should cease accepting the voluntary enrolment of prisoners of war.

The new Geneva Convention relative to Prisoners of War henceforth settles the question by affirming in Article 7 the inalienable nature of the rights conferred upon them. "Prisoners of war" it says "may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention".

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It is true that in making this provision, <sup>(Art 7)</sup> the authors of the Convention seem rather to have had in mind the transformation of prisoners into civilian workers as cited above. This Article is thus closely linked with that prohibiting agreements to modify the prisoners' conditions; and they complete each other in covering the various aspects of these transformations, namely, the agreement of the Governments on the one hand, and the renunciation by the prisoners themselves.

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It is nevertheless still true that in its present form Article 7 can entirely apply to purely voluntary transformations, and in particular to enrolment in the armed forces of the Detaining Power. /

In its original version Article 7 provided that prisoners may "in no circumstances be induced by constraint, or by any other means of coercion, to abandon partially or wholly the rights conferred on them...<sup>1</sup>" Strictly speaking it might have been deduced from this wording that the provision authorised prisoners to abandon their rights under the Convention, on condition that the renunciation took place without any coercion and with their free consent. But the Diplomatic Conference did not want any such interpretation : it accordingly modified the wording, and adopted Article 7 in the absolute form we have cited above. |

A regulation of so strict a nature naturally led to reservations. Some wondered if it would have the effect of "suppressing" the freedom of those whom the Convention endeavoured to protect. Others recalled the case of the Alsatians and Lorrainers who enrolled in the French armed forces during the 1914-1918 War. The great majority however approved of this regulation, probably for the reasons forcibly expressed by the representative of Norway, a State which has never followed the policy of power or of prestige : "I wish", said the Norwegian Delegate, M. Castberg, "to draw the attention of this meeting to the great danger which would ensue from granting protected persons the faculty of renouncing (definitely or for a certain period only) the rights conferred upon them by the Conventions. In all countries where social legislation exists, the principle is, I believe, generally admitted that persons who benefit from this legislation cannot, at least legally, renounce the rights deriving from it. No doubt the application of this principle may have harsh and sometimes unfortunate consequences in practice ; but in this case it is more important to make the protection of persons under the Convention effective than to provide them with the faculty of renunciation.

It has been contemplated that prisoners of war or civilian persons held by a Power could, by means of an agreement concluded with the latter, definitely renounce their rights under the Con-

<sup>1</sup> See *Draft Revised or New Conventions for the Protection of War Victims*, Geneva 1948, page 55, Article 6.

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vention for the duration of the war. It is not enough, in our opinion, to say that such agreements are not valid if obtained by coercion ;/we all know that it is extremely difficult to prove the existence of coercion or pressure. Generally speaking, Powers who have obtained such a renunciation do not hesitate to assert that those concerned gave their free consent, and the latter may be brought to confirm that this was their actual wish. I think that the one and only way to reach our aim of ensuring effective protection will be to set up a general ruling as to the absolute invalidity of the renunciation of all rights conferred by the Conventions".<sup>1</sup>

Article 7 which henceforth prohibits enrolment, whether voluntary or not, may no doubt sometimes have the "unfortunate consequences" to which the Norwegian Delegate referred—that is to say, it may run counter to the wishes of certain prisoners of war who, as a result of political developments, are nationals of States of which they do not feel they are the subjects. (We are not referring here to persons forcibly enrolled in the armed forces of the Occupying Power, as for instance the Alsatians and Lorrainers in the last World War, which we will examine at a later stage.) Nevertheless in the light of the history of "voluntary" enrolments, the Norwegian Delegate's comments appear to be most sagacious.

With regard to the measures practised by the French during the first World War, in the case of German prisoners of war of Lorraine, Schleswig-Holstein, Czech or Polish origin, M. Cahen-Salvador's work on prisoners of war gives valuable information on the subject.<sup>2</sup> The chapter on the point is aptly entitled "Les régimes de faveur". The title alone, better than any explanation, illustrates the danger of all discrimination of this nature, for experience always proves that a favour granted to one person is prejudicial to another. In another passage, speaking of Polish prisoners of war, the author describes the

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<sup>1</sup> Translation of a verbatim report, of which a summary will be found in the *Final Record of the Diplomatic Conference*, vol. II-B, pages 17-18.

<sup>2</sup> G. CAHEN-SALVADOR: *Les prisonniers de guerre (1914-1918)*, Paris 1929.

scrupulous sorting methods practised—a general screening depot, { a centre for “reliable” Poles who were given more favourable treatment and another for acknowledged “pro-German” Poles who were isolated from German prisoners. There were in fact, the author said, a whole series of stages to enable the French Government to carry out its pro-Polish policy, and to promote the designs which were eventually affirmed by the Peace Treaty.

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The last point is particularly significant. It was to promote the policy of a particular belligerent. What became of the freedom of the individual in all this? What does the freedom of choice represent for a prisoner of war, i.e. when a captive person is put to the test by an offer of advantages or of liberation? Consider the other side of the medal! When these prisoners (many of whom had perhaps no liking for Germany) were being urged to break away from their home country, French prisoners in Germany, natives of provinces known for their irrendentism, were being subjected to heavy pressure, in spite of their deep patriotic sentiments, to induce them to renounce their fatherland. The German author Scheidl<sup>1</sup> states that during the 1914-1918 War all States were more or less engaged in constant, frenzied and unscrupulous efforts to induce prisoners in their hands to turn against the Government of their Home Power. So much so that the International Committee of the Red Cross, in its well-known Appeal of January 1918, made a strong protest against propaganda in this form, and refused to admit the right of any country to have recourse to coercion, even if based on religious belief or national sentiment, to induce prisoners to give up their flag, or break their oath of allegiance—that is to say, to commit an act which, in the case of its own nationals, it would consider as treason, for which it would inflict the most severe punishment.<sup>2</sup>/

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In the light of this Appeal, and in view of the situations which might arise in a world where the mobilising of men for

<sup>1</sup> *Die Kriegsgefangenschaft*, Berlin, 1943, page 283.

<sup>2</sup> *Appel en faveur de la suppression des camps dits de propagande*, 21 janvier 1918. See “Bulletin international des Sociétés de la Croix-Rouge”, 1918, page 183.

ideological aims is steadily gaining ground, we can but approve the authors of the new Conventions for having, in Article 7, definitely condemned any practice which entails the transformation of prisoners of war by voluntary enrolment, whether fallacious or genuine.

A purely voluntary transformation was that of the German prisoners of war in France who, while awaiting their long-deferred repatriation, chose to become "free workers".

The French Government informed the German prisoners in 1947 that in the first place, in order to give effect in advance to Article 75 of the 1929 Convention, it would liberate them progressively over a period of about three years. Secondly, it offered to those who were not included in the first repatriated contingents, their liberation on the spot if they would become workers under conditions which were on many points equivalent to those of the French workers. Prisoners who accepted received a certificate of liberation which marked the end of their prisoner of war status. Of the rights peculiar to prisoners of war they only retained that of being repatriated.

First of all, let it be said that a situation of this description would no longer be possible under the new Convention. In Article 118 the latter requires that repatriation of prisoners should take place "without delay" on the cessation of active hostilities, whereas in the 1929 text repatriation was only required after the conclusion of peace, a wording which allowed of prisoners being held in captivity for years for the more or less openly avowed purpose of Reparations.

But even a repatriation of prisoners of war under the new Convention, that is to say without delay, may in practice necessitate a considerable lapse of time.

541/542 After such devastating conflicts as those we have known the Detaining Power may lack the necessary means of transport : the point was made by the French Government. / In these conditions it would appear only natural that, while awaiting the means of returning to their own country, prisoners should be granted more favourable conditions in view of the cessation of hostilities.

That would be fully consistent with the terms employed

in the new Convention in Articles 5 and 115, where it speaks of "release and repatriation" of prisoners of war, terms which are not found in the 1929 text.

Should it be understood however, in the sense of the French practice referred to above, that release puts an end to protection under the Convention and to the rights and safeguards which accompany prisoner of war status? By no means! Article 5 of the new Convention is formal on this point: the Convention must apply until definite repatriation. It can therefore only concern more favourable conditions and greater freedom of movement on release, and does not in any way imply a diminution of the prisoner's rights under the Convention which, as we have already seen, cannot be renounced. The solution is eminently logical. In principle a prisoner of war, in his military capacity, is dependent upon his army; and it is in general by his army authorities that he is definitively released from his military duties.

But it is above all in the prisoners' interest. {Supposing they were released on the spot without the means of returning immediately to their country, they would have no definite status and their position would be uncertain. A state of war, if not of active hostilities, would still exist. They would have no diplomatic representation for their protection. As enemies the laws of their country of residence would not be applicable to them, and the population would perhaps be unfriendly. They would thus be placed, from a legal standpoint, in a no man's land, which would be detrimental to their interests.

It is true that the transformation of German prisoners of war in France did not suffer these consequences. It took place when general feeling had already abated and, in particular, the International Committee of the Red Cross (while expressing no opinion as to the principle of this transformation, which to it was an act of authority,) continued its services on behalf of the transformed prisoners; and its activities in this connection enabled the Committee to realise the effectiveness of the dangerous issues above-mentioned, which in less favourable circumstances than those prevailing in the case of the transformation in France would most certainly be incurred.

One also wonders whether in the case of the Italian "collaborators" the aims pursued by the transformation could not have been realised within the actual framework of the Convention, especially as there was no longer any question of employing the transformed prisoners on work prohibited under the Convention.

If the transformation had been intended to obtain a maximum output from the manpower constituted by the prisoners of war, we should not hesitate to give an affirmative reply to the proposal. Higher salaries, greater freedom of movement, more favourable working conditions, all these advantages were possible, even within the framework of prisoner of war status. But other aims would seem to have been envisaged—namely the implantation of foreign labour among the French population for a long period. In that case prisoner of war status would of course no longer serve.

Were these aims successful? Apparently not; so that the question again, arises as to the eventual utility of transformations, which are contrary to the spirit of the 1929 text and to the letter of the 1949 Convention. /

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### C. "LICIT" OR PSEUDO-TRANSFORMATIONS

It is now proposed to consider cases where combatants after having been treated and considered as prisoners of war, were given another status, or were released entirely, without this transformation being contrary to the laws of war, or in particular to the new Geneva Convention relative to prisoners of war.

#### I. *Transformation of deserters.*

A brief study should first be made of prisoner of war status as applied to deserters. By deserters we mean individuals who elude the military duties to which they are subjected in their own countries and who, if they join the enemy, clearly state their intention of abandoning their own armies.

The attitude which should be observed by belligerents towards deserters who seek refuge in their territory has not so far been the object of precise regulations in international law. According to the majority of jurists, States apparently enjoy great freedom of action as to the liberty they intend granting to these persons, if they are willing to receive them. If the deserter is interned however, the majority of writers on the subject are of the opinion that he should, as far as possible, enjoy the treatment to which prisoners of war are entitled. There is moreover a principle, generally affirmed, that deserters should not be handed over to the adversary when prisoners are exchanged or repatriated.<sup>1</sup>

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What is the position of the new Geneva Convention in this connection? It may be said that, without making any special reference to this point, it confirms the latitude afforded to States. It may even be said simply that it does not concern deserters.

We have seen from Article 4 A that the Convention applies to members of the armed forces who have fallen into the power of the enemy. The term "fallen" clearly shows that it concerns combatants who pass into enemy hands, not of their own free will, but by a force beyond their control because they are under its constraint. This conclusion is equally valid for military personnel captured in action, and for those who surrender or give themselves up when absolutely unable to continue the combat.

This reasoning, founded on the actual letter of the Convention, is similar to the reasoning which flows from its general sense or spirit. Its essential purpose is to protect combatants, who even when falling into enemy hands have at heart to remain faithful to the army in which they served, and not to those, such as deserters, who wish to give up the struggle and their country, regardless of the consequences which such action involves. A number of Articles of the Convention, such as the

<sup>1</sup> G. JACCARD (*Capture et Captivité des Prisonniers*, page 169) says that it had been contemplated to defer the question of the repatriation of deserters, which arose between Greece and Bulgaria in 1913, to the arbitration of the President of the French Republic.

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provisions concerning the communication of names, repatriation, financial resources, the Protecting Power, plainly indicate a certain bond of allegiance between the prisoner and his country of origin. How can such provisions apply to those who wish to sever this bond?

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Such is the principle; but it does not in practice prevent deserters from benefiting for a time from the provisions of the Convention. (It often occurs that a deserter is not immediately recognised as such. Supposing that on giving himself up he immediately states his intention of deserting, the front line troops to whom he applies are not in general competent to decide as to his status. He will then find himself being treated as a prisoner of war under the new Article 5 referred to above, which requires that in case of doubt as to his category a combatant fallen into enemy hands is to be treated in conformity with the Convention, until his status has been determined by a competent tribunal.)

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(In practice we are therefore concerned with a category of military personnel having passed into enemy hands, who are treated as prisoners until the time when a definite decision as to their character of deserters authorises the Detaining Power to give them another regime. This is therefore a transformation but, according to the terms of the Convention, it is a legal transformation; and it also responds to the proper character of the conception of a deserter.)

Is there not a risk of abuse in this solution? May not the delay in determining whether prisoner of war status should be applied to the deserter be sometimes indefinitely prolonged? May not the prisoners be suddenly qualified as deserters after having been in captivity for months, if not for years?

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(In our opinion the term "deserter" should be reserved for the combatant, who voluntarily places himself in the enemy's power, and who *from the beginning* has clearly shown his intention of breaking his bond of allegiance to the country he served. A part from the period during which (for the practical reasons stated above) he will possibly be treated as a prisoner of war, his true status should be determined within a fairly early delay, i.e. the time required for him to be sent from the

front lines to a screening camp in the rear for the usual questioning. He will never in short have been an actual prisoner of war, but merely a pseudo-prisoner.)

On the other hand, prisoners of war who at the outset of their captivity, on being questioned have never claimed to be deserters, but after months or years have suddenly asked to be so considered, are clearly prisoners wishing to change their/status. This case falls within the category of "voluntary" transformation; and our previous remarks, on the subject of enrolment in particular, will no doubt apply to deferred desertions of this description. Such transformations will in most cases be the outcome of special treatment or coercion of a more or less open nature. [Desertion, although not dealt with by the Convention, definitely exists, and cannot be ignored; but it should not occur in the course of captivity.] It seems all the more advisable therefore to protect against transformations of any kind prisoners who have fallen into the enemy's power while faithful to their country who should not be induced, on account of the diminution of their freedom, to depart from this most admirable attitude.

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## 2. Transformation of "nationals".

The last type of transformation which we have to examine is that of prisoners of war, who are nationals of the Power holding them.

Should a belligerent State apply the laws of war, and in particular the status of prisoners of war, to members of enemy forces, who have fallen into its power and are its own nationals? Up to the present many jurists have held, in the light of practical experience, that States had the right to refuse to treat these captives as prisoners of war.<sup>1</sup> The national tie would in such case be an obstacle to international legislation, and the captives' prisoner of war status would be overruled by their capacity as nationals.

<sup>1</sup> For instance W.E.S. FLORY: *Prisoners of War*, Washington 1942, states "... individuals who owe allegiance to the capturing State may be deprived of treatment as prisoners of war", page 29.

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In reality the actual state of combatants who are nationals of the Detaining Power will not be discovered immediately. In most cases therefore they will be considered and treated as prisoners. It is not until they have been identified by the Detaining Power (if it is successful in so doing) that the latter can deprive them of the international status, punish them or again enrol them in its own armed forces. A transformation of prisoners of war therefore results in this case, but which (at least in the view of the jurists above-mentioned) is considered to be legal.

But how is this transformation to be viewed in the light of the Geneva Convention?

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It will be remembered that according to Article 4 the combatant belonging to the armed forces of one of the belligerents, who falls into the power of the "enemy", is placed under the protection of the Convention. By giving the term "enemy" the sense sometimes allotted to it in international law, some might be tempted to claim that a Detaining Power who captures one of its own nationals is not the captive's enemy in the sense of Article 4, that the Convention does not therefore apply to such a national, and that the opinion cited above is thus confirmed.

This conclusion seems to be premature and open to criticism. In order to give a satisfactory reply to the question, careful distinction must be made between two somewhat different cases.

In the first instance the Detaining Power is dealing with one of its nationals, who was forcibly enrolled by the adversary, whether the enrolment was due to physical pressure or to legal measures. We have seen above that the fact of forcing an individual to take up arms against his own country is contrary to the laws of war. Consequently if the Detaining Power, after having investigated its national's case, ascertains that the latter was forcibly enrolled, it will not even need to seek an interpretation of the term "enemy", as above-stated, to decide whether it is dealing with a true prisoner of war. It will suffice for it to adopt the general principle in law that consent given under coercion is not valid and cannot incur authorised juridical consequences }

The new Geneva Convention in Article 4 confers the status of prisoners on combatants "belonging" to the various categories of the adverse Power's armed forces. The Detaining Power is entitled to consider that its nationals had never strictly speaking "belonged" to the armed forces in question, and that any such assignment was contrary to law, and could not entail the attribution of prisoner of war status to the victim concerned. On this theory the Detaining Power is entitled to liberate its national immediately; and a transformation of this nature, far from being illegal, merely reaffirms the law. 4

The second case is that of a national of the Detaining Power, who was not forcibly enrolled by the adverse Power. In this event should the prisoner not be allowed to remain under the protection of the Convention? 685/686

In several cases the new Convention now gives the benefit of protection under international law to prisoners of war who have committed offences which under the previous regulations would have caused them to forfeit this protection. We have already alluded to the fate of "war criminal" prisoners. We may also refer to prisoners liberated on parole, who are recaptured after escape bearing arms against the Government to which they had given their pledge. They will again be entitled to prisoner of war status by virtue of Article 85 of the Convention which, unlike the former rule, on the subject,<sup>1</sup> prescribes that prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture retain the benefits of the Convention.

We presume that this provision should also apply henceforth to nationals captured by their own State—with the exception of course of the case previously examined of forcible enrolment. Further, this application does not in any way prevent the detaining State from punishing its nationals. Its effect is merely to confer upon the latter the guarantees for sentencing and imprisonment provided by the Convention as the minimum admitted by civilised nations. Such guarantees will perhaps

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<sup>1</sup> Article 12 of the Hague Regulations prescribes that they forfeit their right to be treated as prisoners of war.

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enable the person concerned (better than would be the case with a hasty trial) to justify his presence in the armed forces of the enemy or to plead extenuating circumstances./

From the case before us it appears that in opposition to the opinion which has so far been held, the status of prisoner of war prevails over that of the Detaining Power's subject, that is to say, international law has precedence over municipal law, which is in conformity with the evolution of the former. The new Convention for the protection of Civilian Persons, although adhering for its application to the traditional principle of nationality, also makes an important exception to this principle. It prescribes that an Occupying Power cannot punish its nationals who previously sought refuge in the territory which it is occupying.<sup>1</sup> This is a good example of the evolution of law in this connection.

In making this conclusion we will consequently no longer give the term "enemy" (Article 4) the sense it was formerly given; we will merely take it to signify "adversary", on the grounds that any combatant falling into the hands of the "adversary", whatever the bond of nationality between them may be, should be considered and treated as a prisoner of war.]

We are induced to adopt this point of view for two reasons.

Firstly, the reasons which may cause a person to be in the armed forces of a belligerent in conflict with his own State may be extremely varied, and even without forcible enrolment due to circumstances beyond his control. These reasons may for instance be connected with conflicts of nationality, or even with alterations which in the course of the war may have occurred in the political structure of his country.

One author cites the very revealing case, which occurred during the last war, of Czechs fighting with the British forces who fell into the custody of the IIIrd Reich. The latter, having annexed Czechoslovakia, wished to consider them as subjects under German sovereignty and to punish them, whereas the prisoners in question claimed to have acquired British na-

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<sup>1</sup> Article 70, 2nd paragraph.

tionality.<sup>1</sup> This example shows that a doctrine allowing for the automatic transformation of a prisoner, who is a national of the Detaining Power, might be fraught with great dangers.

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In the special case cited as an example, the intervention of the Protecting Power (and the fact that similar situations of the opposite kind occurred in England) finally resulted in these Czech prisoners being left under the protection of the Convention. The Protecting Power cannot in fact be left uninformed of the transformation of prisoners of war and, unless it is a definite question of forcible enrolment, its intervention will make it more difficult for the Detaining Power to deprive such prisoners of war of their status.

Another reason which inclines us towards this more magnanimous point of view proceeds from the general nature of the Geneva Conventions themselves. They have, we may say, a growing tendency to break with the classic conceptions of the laws of war in regard to allegiance to a belligerent, and to make rather for the protection of whoever may be on either side of the barricade during a conflict. They tend to protect all who have fallen into the enemy's power, whoever they may be, belonging to the participants in the struggle (to one of the "Parties to the conflict" according to the Convention's own terms), whether belonging in law or in fact. Is not this tendency more consistent with a world where war not only opposes States but also parties, political opinions and ideological groups?

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We should like in conclusion to refer to a personal recollection.

In April 1945, while engaged with the receipt and distribution of Red Cross parcels in the big prisoner of war camp in Moosburg, South Germany, we succeeded one day in obtaining the use of a very convenient store-room for these parcels in a

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<sup>1</sup> Hans K. FREY: *Die disziplinarische und gerichtliche Bestrafung von Kriegsgefangenen*, Vienna 1948, page 24.

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factory which had been previously used for war work ; and we had entrusted the supervision and handling of the parcels to a small body of war prisoners, natives of a country occupied by Germany, who had been formerly employed in the factory, and who carried out their duties in a most satisfactory manner.

When informing of this convenient arrangement (suitable warehouses were rare) the camp leader for the prisoners of one of the Great Western Powers, the former remarked with severity and some slight contempt " Those are not prisoners of war ". In this case they were not even " transformed " prisoners but merely prisoners who have at one time been obliged to work in violation of the provisions of the 1929 Convention.

These were harsh words in regard to comrades in adversity. They were nevertheless characteristic on the part of a prisoner whose home State had fulfilled and continued to fulfil its duty for the protection of its nationals, a prisoner for whom the application of the 1929 Convention was ensured both by the existence of a strong and still independent State, and by the latter's interventions, its sending of supplies and even also by its possibility of retortion or reprisals, in short by its constant solicitude for its subjects held in captivity.

But the words were unjust on account of the speaker's profound lack of understanding as to the exact position of thousands, nay millions, of prisoners, whom the circumstances of modern warfare, i.e. of that total warfare which destroys sovereignties, had deprived, sometimes entirely, of a home State and its solicitude, and whose security had as its sole basis some hundred or so articles of the 1929 Convention.

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The last great war definitely revealed that the law for the protection of prisoners of war was not, or was mainly no longer, a matter of reciprocity, an advantage granted by one belligerent to obtain the counterpart from the adversary, a law primarily in the interest of the States, the prisoners being merely the indirect beneficiaries. It revealed the fact that for many prisoners the law was everything, that prisoners were directly concerned with international law for their protection, and that the true intent of the law was thus of vital importance for them.

In the light of this consideration it will be more easily understood that the new law of captivity, as it has been laid down by the Geneva Convention of 1949, shows more precision and greater scope, and in particular is more strict in regard to any change in the status of prisoners of war, experience having shown the dangers which in most cases ensue for the prisoners, as our study is intended to show.

The new law thus not only prohibits by several essential provisions changes due to the Detaining Power, or the transformations which we have called "by authority", whatever the reasons given: unconditional surrender, doubt as to the capacity of regular combatants, violations of the laws of war etc. In the general interest of those it protects it also prohibits "voluntary" transformations, i.e. changes of status requested by the prisoners themselves, spontaneously or at the request of their Government; and this prohibition is couched in terms which—by chance or deliberately—concern directly the persons in question. "Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention...".

In conclusion, if the new law still leaves the treatment of deserters to the discretion of the Detaining Power, and rightly allows the transformation of individuals forcibly enrolled in the enemy forces, it most strictly implies the maintenance of prisoner of war status under the Convention, even for those fighting with armies opposed to those of their own State, who are taken prisoner by the latter, not in order to protect them from punishment, but to grant them the minimum safeguards of defence to which every individual is entitled, especially when he is under the menace of summary execution.

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