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Enforcing The Third Geneva Convention On The Humanitarian Treatment Of Prisoners Of War

7 United States Air Force Academy Journal of Legal Studies 37 (1997)

During the period of early history, through the Biblical days, the Egyptian, Greek, and Roman empires, and the Crusades, and well into the Middle Ages, there was no protection for individuals taken prisoner in conflict and they were either killed or enslaved. It was not until well into the seventeenth and eighteenth centuries that it began to be accepted that prisoners of war were merely unfortunate human beings who were being held in custody solely to prevent them from once again engaging in the hostilities.¹ While this resulted in some bilateral agreements touching on the subject, the first multilateral attempt to legislate in this area was Chapter II of the Regulations Attached to the 1899 Hague Convention No. II on the Laws and Customs of War on Land,² a document containing 17 articles with respect to prisoners of war. The 17 articles of Chapter II of the Regulations Attached to the 1907 Hague Convention No. IV on the Laws and Customs of War on Land³ were, for all practical purposes, identical to those of 1899. The provision of these two instruments most relevant to our discussion is Article 4(2) which provides that: "They [i.e., prisoners of war] must be humanely treated." Although these Conventions had no penal provisions as such, after both World War I and World War II individuals were tried and convicted for what amounted to violations of their provisions.⁴

During the course of World War I the provisions of the 1907 Hague IV Convention relating to the protection of prisoners of war were found to be so inadequate that a great number of bilateral and multilateral agreements on the subject were drafted and entered into by the opposing belligerents.⁵ Then in 1929, as an aftermath of World War I, the International Committee of the Red Cross (the ICRC), which had previously been concerned solely with the sick and wounded of armed forces in the field and at sea, entered the prisoner-of-war arena by sponsoring the 1929 Geneva Convention Relative to the Treatment of Prisoners of War⁶; and World War II was followed by four new ICRC-sponsored conventions, the third of which was the 1949 Geneva

Convention Relative to the Treatment of Prisoners of War.⁷ It is with this 1949 Third Geneva Convention that we will be primarily concerned.⁸ In view of the breadth of the subject-matters covered by the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, this discussion will be limited to the provisions relevant to “detering humanitarian law violations” and to those “strengthening enforcement” of those provisions.⁹

First, some statistics: as of 31 December 1995 there were 185 members of the United Nations. At that same time, there were 186 States Parties to the 1949 Geneva Conventions. The only members of the United Nations, or Parties to the Statute of the International Court of Justice, who were not Parties to these Conventions were Eritrea, Lithuania, Marshall Islands, and Nauru.¹⁰ The near universality of these conventions is obvious and it is probably not an exaggeration to say that they are now part of the customary law of war, binding on all nations, whether or not they are Parties thereto.

There are a number of articles of the 1949 Third Geneva Convention which are worthy of mention in the context of our study as they establish either the coverage of the Convention or the substantive humanitarian rule which is to be followed. Thus, Article 1 is short and to the point: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” Note that not only does a Party itself undertake to respect the provisions of the Convention, it is responsible for ensuring respect thereof by its people, civilian and military, and by other Parties, including the belligerents when it is a neutral and its allies when it is a co-belligerent. This latter is not always an easy task, as the United States learned in Vietnam.

Article 2 specifies when the Convention is applicable. First, it is applicable

in all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties even if the state of war is not recognized by one of them.¹¹

The latter part of this provision has increased in importance because of the fact that although there have been more than a hundred international armed conflicts since the end of World War II, there have been no declarations of war since that of the Soviet Union against Japan in August 1945 and there have, therefore, been no formal acts recognizing the existence of a state of war.

Second, the Convention is applicable in the case of a military occupation, even if that occupation is not resisted; and, third, the general participation (*si omnes*) clause of the 1899 and 1907 Hague Conventions is specifically rejected and the Convention is applicable as between States Parties thereto even if one of the belligerents is not a Party to the Convention. In view of the wide acceptance of this Convention, this provision, which was of major importance

when adopted, has lost that status. Its importance when drafted is evidenced by the fact that in his 1948 dissent in the trial of the major Japanese war criminals by the International Military Tribunal for the Far East, Justice Pal of India found that during World War II in the Pacific Japan was not bound by the rules set forth in the 1907 Hague Convention No. IV and its annexed Regulations because Bulgaria and Italy were not Parties to that Convention.¹²

Article 4 of the 1949 Third Geneva Convention is an extremely lengthy article which specifies the numerous classes of individuals who are entitled to prisoner-of-war status when they fall into the power of the enemy. For the purposes of the present study it may be assumed that at the time of the alleged violation of the humanitarian provisions of the Convention the victims were prisoners of war and that at the time of the prosecution for that alleged violation of the humanitarian provisions of the Convention, the accused were entitled to the status of prisoners of war.¹³

Article 5 has two very important provisions. Its first paragraph provides that the Convention is applicable "from the time they [i.e., persons entitled to prisoner-of-war status] fall into the power of the enemy until their final release and repatriation." The North Koreans and the Chinese Communists in Korea contended that a prisoner of war was not entitled to the benefits of the Convention until he had "repented"—which meant that he had accepted Communist indoctrination¹⁴; and the North Vietnamese contended that, although no American prisoners of war had been tried, they were all war criminals captured in *flagrante delicto* and, therefore, were not entitled to the protection of the Convention.¹⁵ Neither of these contentions was legally valid. Moreover, the second paragraph of that article specifically provides that if there is a dispute as to the entitlement to prisoner-of-war status, the individual is entitled to the protection of the provisions of the Convention until his status has been determined by a competent tribunal. No such determinations were made in either North Korea or North Vietnam, but prisoners of war held by those entities were denied the protection of the provisions of the Convention.¹⁶

Article 8 is concerned with the operations of the Protecting Power, the neutral Power which represents a belligerent in the territory of its enemy and which has the very important responsibility of ensuring that prisoners of war receive the humane treatment and other protections to which they are entitled under the provisions of the 1949 Third Geneva Convention. A Protecting Power is selected by the belligerent which it is to represent and it must be acceptable to the belligerent in whose territory it is to operate. While most belligerents had Protecting Powers during World War II, the 1982 Falklands War is the only real instance of the designation, acceptance, and functioning of Protecting Powers during hostilities since 1949 despite the great number of international wars which have occurred since that time.¹⁷ This is, indeed, a

tragedy, as the mere existence of a Protecting Power is frequently sufficient to ensure more humane treatment for prisoners of war.

Article 9 provides that nothing in the Convention is to be considered as adversely affecting the humanitarian activities of the ICRC, or of any other impartial humanitarian organization, which activities are, however, subject to the consent of the belligerent concerned. In Korea the ICRC was allowed to perform its normal functions of inspecting prisoner-of-war camps, consulting individual prisoners of war, providing relief supplies, etc., by the United Nations Command in South Korea, but it was not permitted to function in North Korea. In Vietnam the ICRC was allowed to perform its normal functions in South Vietnam, but it was not permitted to function in North Vietnam. During the hostilities in Vietnam one well-known academic took the position that an anti-war group of which he was a member was such an "impartial humanitarian organization."¹⁸ The present author strongly challenged that conclusion.¹⁹ During the Iran-Iraq War there were not only no Protecting Powers, but both countries frequently denied the International Committee of the Red Cross access to its prisoner-of-war camps. Eventually, the Secretary-General of the United Nations sent a special mission to inspect the prisoner-of-war camps in both countries and numerous violations of the provisions of the 1949 Third Geneva Convention were found to have been committed by both sides.²⁰

The 1949 Third Geneva Convention contains a number of substantive provisions which define certain inhumane conduct towards prisoners of war as punishable. Thus, Article 13 provides:

Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited and will be regarded as a serious breach of the present Convention.²¹ In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.²²

Likewise, prisoners of war must at all times be protected, particularly against acts of violence and against insults and public curiosity.²³

Measures of reprisal against prisoners of war are prohibited.²⁴

And Article 130 states:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully

depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.²⁵

These two articles refer specifically to serious or grave breaches of the provisions of the 1949 Third Geneva Convention.²⁶ Article 129(1) of that Convention requires States Party “to enact legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches” defined in Article 130. Based upon the precedents of post-World War II, this provision was unnecessary. A violation of a prohibitive provision of a law-of-war convention is a war crime; a war crime is punishable as a violation of international law; the punishment to be assessed for the commission of a war crime is within the discretion of the trial court.²⁷ Article 129(3) requires each State Party to take measures for the punishment of all violations of the 1949 Third Geneva Convention other than the grave breaches. Thus, violations of other provisions of the Convention such as, for example, those contained in Articles 14, 16, 17, 23, 26, 34, 52, etc., are likewise punishable offenses, although the international community considers them to be on a lesser level of importance than violations of the provisions of Articles 13 and 130.²⁸

There will be little difficulty in identifying the acts which constitute violations of the substantive provisions of the 1949 Third Geneva Convention. Unfortunately, the procedural provisions of that Convention, while easily identified, may present some problems of application.

Articles 82-88 and 99-107 set forth rules which are intended to ensure that any prisoner of war who is subjected to a judicial proceeding by the Detaining Power, whether for a pre-capture or a post-capture offense, will receive a fair trial. Most of those provisions should cause no difficulty of implementation.²⁹ However, there are two which will.

Article 63 of the 1929 Geneva Prisoner-of-War Convention provided:

A sentence shall only be pronounced on a prisoner of war by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power.

In the Yamashita Case³⁰ the United States Supreme Court held that this provision was directed at post-capture offenses only and did not apply to trials for pre-capture offenses (war crimes). This ruling was followed by all of the courts before which the issue was raised in the war crimes cases tried after World War II with the result that those cases were not tried by courts-martial, but by military tribunals, military commissions, and other specially established courts, each with its own rules concerning procedure and, particularly, the admission of evidence.³¹

Apparently the participants in the Diplomatic Conference which drafted the 1949 Third Geneva Convention desired to make its provisions applicable to pre-capture, as well as post-capture, offenses. To accomplish this end they included in that Convention Article 102 which, for all practical purposes, is identical with Article 63 of the 1929 Geneva Prisoner-of-War Convention; then they drafted a new provision to be found in Article 85 of the 1949 Third Geneva Convention, which states:

Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.³²

It would appear that the draftsmen were attempting to provide that when prisoners of war are tried for pre-capture offenses, that is, for war crimes, they would, in accordance with the provisions of Article 102, be entitled to be tried “by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power”—which means that the draftsmen of the Convention were adopting a rule contrary to that laid down in the Yamashita Case.³³ Of course, such trials could still be conducted by military commissions or other specially created tribunals—but only if members of the armed forces of the Detaining Power could be tried by such commissions or tribunals.³⁴

There is one possible view of Article 85 of the 1949 Third Geneva Convention which might result in its being interpreted differently. As we have seen, that article refers to prisoners of war “prosecuted under the laws of the Detaining Power.” When a prosecution is for a violation of a provision of the 1949 Third Geneva Convention, is it based on “the laws of the Detaining Power” or is it based on international law? The International Committee of the Red Cross urges very strongly that such a prosecution is based on national law, particularly for a country like the United States where treaties are part of the supreme law of the land.³⁵ On the other hand, it is often argued: (1) that the post-World War II war crimes trials established the precedent that war crimes were and are violations of international law; (2) that it would be difficult to find a national statute which, for example, prohibited compelling a prisoner of war to serve in the forces of the Capturing Power, or the denial of quarter, or the use of prisoner-of-war labor in a munitions factory; and (3) that the fact that Article 99 of the 1949 Third Geneva Convention prohibits the trial of a prisoner of war for an act not “forbidden by the law of the Detaining Power or by International Law,”³⁶ while Article 85 of that Convention refers only to “the laws of the Detaining Power,” indicates that the draftsmen did not intend prosecutions under international law to be covered by the provisions of Article

85 and that, therefore, the decision in the Yamashita Case, and like cases, continues to apply. This appears to be a problem of interpretation which will only be resolved when courts are actually presented with the problem.³⁷

It is apparent that in any future war crimes trials there will be little opportunity to advance the contention that the offense charged is subject to the claim of being *ex post facto*; and that, under the post-war situation which normally prevails, prosecutions in common law countries will be much more difficult to conduct if there must be compliance with the strict common law rules of evidence. However, all in all, it may certainly be said that while some of the provisions of the 1949 Third Geneva Convention are intended to protect the helpless prisoner of war from unfair prosecutions, the specific aim of many of those provisions is to “deter humanitarian law violations” and to “strengthen enforcement” of the substantive provisions thereof.

Notes

1. For a more elaborate discussion of the historical aspects of this subject, see HOWARD LEVIE, *PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT* 2-11 (1979) (hereinafter cited as LEVIE, *PRISONERS*).

2. 32 Stat. 1803; T.S. 403; 1 BEVANS, *TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949*, at 247 (1968) (hereinafter cited as BEVANS).

3. 36 Stat. 2277; T.S. 539; 1 BEVANS, *supra* note 2, at 631.

4. They were tried for and convicted of violations of the law of war. Thereafter the International Committee of the Red Cross (ICRC) decided that “war” was a nasty term and started the practice of using the term “armed conflict” in its place. Apparently “armed conflict” is now likewise a nasty term so they have substituted the term “humanitarian law.” (This is to distinguish it from “human rights law,” applicable for the protection of the individual in time of peace.) The present author does not believe that the ugly face of war can be changed by semantics and continues to use the term “law of war.” [Fortunately, there was no attempt made to change the term “prisoners of war” (POWs) into “prisoners of armed conflict” (PACs)!]

5. The agreement on the treatment of prisoners of war entered into between Germany and the United States was not signed until 11 November 1918, the day of the German surrender! It was quite comprehensive and unquestionably served as a model for the 1929 Geneva Prisoner-of-War Convention hereinafter referred to.

6. 47 Stat. 2021; T.S. 846, 2 BEVANS, *supra* note 2, at 932.

7. 6 U.S.T. 3316; T.I.A.S. No. 3364; 75 U.N.T.S. 135. This Convention is known, and will hereinafter be referred to, as the “1949 Third Geneva Convention.”

8. If no references to the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I, 72 A.J.I.L. 457 (1978), 16 I.L.M. 1391 (1977)), are to be found in the text, that is because the United States is not a Party to that instrument, a situation which, hopefully, will change in the not too distant future.

9. For a somewhat different approach to this problem, see U. Palwankar, *Measures Available to States for Fulfilling their Obligation to Ensure Respect for International Humanitarian Law*, *INTERNATIONAL REVIEW OF THE RED CROSS*, January-February 1994, No. 298, at 9.

10. *Ibid.*, March-April 1996, No. 311, at 251. It would appear that Lithuania should be bound by succession from the State of which it was previously a part—the U.S.S.R. (Lithuania is a Party to the 1929 Geneva Prisoner-of-War Convention.)

11. The latter part of this provision was bad drafting. Does the Convention apply if a state of war is not recognized by two or more of the belligerents? That this error was recognized is demonstrated by the fact that when the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict [249 U.N.T.S. 240; *THE LAWS OF ARMED CONFLICTS* 745 (D. Schindler & J. Toman, eds., 3rd ed., 1988)] was drafted five years later, in 1954, the comparable provision in Article 18(1) of that Convention reads “is not recognized by one or more of them.”

12. 2 *The Tokyo Judgment* 1001 (B. Roling & C. Ruter, eds., 1977). He overlooked (or disregarded) the fact that Bulgaria, Italy, and Japan were all Parties to the 1899 Hague Convention No. II and that Japan

therefore continued to be bound by the almost identical rules annexed to that Convention. [Article 4(2) of the 1907 Hague Convention IV points out that "The Convention of 1899 remains in force as between the Powers which signed it, and which do not also ratify the present Convention."]

13. The scope of Article 4 of the 1949 Third Geneva Convention has been considerably extended by Articles 1, 43, 44, and 45 of the 1977 Protocol I, *supra* note 8.

14. LEVIE, PRISONERS, *supra* note 1, at 351 n.36 (1979). While the 1949 Conventions had not yet been ratified by either the United States or North Korea (and, in any event, was not yet in force), the former had stated that it "would be guided by humanitarian principles of [the 1949] Conventions" [1 LE COMITE INTERNATIONAL DE LA CROIX-ROUGE ET LE CONFLIT DE COREE: RECUEIL DE DOCUMENTS 13 (1952)] and the latter had stated that it was "strictly abiding by principles of Geneva Conventions in respect to Prisoners of War." *Ibid.* at 15. See also TREATMENT OF BRITISH PRISONERS OF WAR IN KOREA 31-32 (Ministry of Defence, 1955).

15. Howard Levie, "Maltreatment of Prisoners of War in Vietnam", 48 B.U.L. REV. 323, 346-347 (1968); reprinted in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 361 (R. Falk, ed., 1969). The penal offense in the course of which they were captured in *flagrante delicto* was apparently that of engaging in war with the North Vietnamese!

16. The interpretation of the clause "released and repatriated" lengthened the Korean war by over a year as the United Nations Command insisted that repatriation was a voluntary act and that a prisoner of war had the right to elect not to return to his homeland while the Communists insisted on "forcible repatriation," repatriation even against the wishes of the prisoner of war. "Voluntary repatriation" is now an accepted rule of the international law of war.

17. The ICRC takes the view that there were several other instances of the designation of Protecting Powers but these are questionable. Article 5 of the 1977 Protocol I, *supra* note 8, was a much watered-down attempt by its draftsmen to increase the likelihood of the designation of Protecting Powers. It has not accomplished that purpose in the past and it is doubtful that it will do so in the future.

18. Richard Falk, *International Law Aspects of Repatriation of Prisoners of War During Hostilities*, 67 A.J.I.L. 465, 473-475 (1973); reprinted in 4 THE VIETNAM WAR AND INTERNATIONAL LAW 326 (R. Falk, ed., 1976).

19. Howard Levie, *International Law Aspects of Repatriation of Prisoners of War During Hostilities: A Reply*, 67 A.J.I.L. 693, 696-701 (1973); reprinted in 4 THE VIETNAM WAR AND INTERNATIONAL LAW 340 (R. Falk, ed., 1976).

20. *Prisoners of War in Iran and Iraq: The Report of a Mission Dispatched by the Secretary-General*, January 1985, S/16962, 22 February 1985. In the covering Note, the Secretary-General expressed "his deep dismay and concern that the unanimous findings of the mission indicate that the fundamental purposes that the international community set itself in adopting in 1949 the Third Geneva Convention relative to the Treatment of Prisoners of War are not being fulfilled."

21. As we shall see, while the English version of Article 13 of the 1949 Third Geneva Convention uses the term "serious breach," Articles 129 and 130 thereof use the term "grave breaches." In the French version of the Convention, which is equally authentic, the term "*infractions graves*" is used in all three articles. It would appear that the variation in the English version is the result of bad translation and that it was the intention of the Diplomatic Conference which drafted this Convention to put violations of the provisions of Article 13 on a par with violations of the provisions of Article 130. See, for example, J. DE PREUX, COMMENTARY III: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 140 (1960) (hereinafter cited as DE PREUX).

22. For trials for this offense after World War II, see HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES 54 (1993) (hereinafter cited as LEVIE, WAR CRIMES); The Medical Case, *ibid.*, 76 and 322; The Kyushu University Case, *ibid.*, 325; etc. Article 11 of the 1977 Protocol I, *supra* note 8, considerably amplifies this provision.

23. For trials for this offense after World War II, see the Opinion of the Tribunal (IMTFE), Levie, War Crimes, *supra* note 22, at 151-152; Trial of Karl Maelzer, *ibid.*, 342; Trial of Masataka Kaburagi, *ibid.*, 343; The Borkum Island Case, *ibid.*, 315; etc.

24. The classic case of a reprisal against prisoners of war was the handcuffing of British and Commonwealth officer prisoners of war by the Germans during World War II when they learned that a British order called for the handcuffing of German soldiers captured during the Dieppe Raid in order to prevent them from destroying documents of intelligence value. 1 REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS ON ITS ACTIVITIES DURING THE SECOND WORLD WAR 368-370 (1948).

25. The majority of the war crimes trials conducted after World War II involving prisoners of war as victims will be found to include a charge of a violation of at least one of the offenses now listed in Articles 13 and 130 of the 1949 Third Geneva Convention.

26. Article 75(2) of the 1977 Protocol I, *supra* note 8, reiterates and enlarges on the cited provisions of the 1949 Third Geneva Convention. Article 85 of the 1977 Protocol I not only reiterates and enlarges on the grave breaches listed in the Third Convention, but paragraph 5 thereof specifically denominates their violations as war crimes.

27. The United States Army Field Manual 27-10, THE LAW OF LAND WARFARE (1956), states:

499. War Crimes. The term "war crimes" is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.

505. Trials.

(e) Law Applied. As the international law of war is part of the law of the land in the United States, enemy personnel charged with war crimes are tried directly under international law without recourse to the statutes of the United States. . . .

506. Suppression of War Crimes.

(c) Grave Breaches. "Grave breaches" of the Geneva Conventions of 1949 and other war crimes which are committed by enemy personnel or persons associated with the enemy are tried and punished by United States tribunals as violations of international law. If committed by persons subject to United States military law, these "grave breaches" constitute acts punishable under the Uniform Code of Military Justice. Moreover, most of the acts designated as "grave breaches" are, if committed within the United States, violations of domestic law over which the civilian courts can exercise jurisdiction.

508. Penal Sanctions. The punishment imposed for a violation of the law of war must be proportionate to the gravity of the offense. The death penalty may be imposed for grave breaches of the law. . . .

28. Article 20(c) of the Draft Statute for an International Criminal Court prepared by the International Law Commission (ILC) at its 1994 meeting would give that Court jurisdiction over "serious violations of the laws and customs applicable in armed conflict." Report of the International Law Commission on the Work of its Forty-sixth Session, U.N. GAOR, 49th Sess., Supp. No. 10, at 70, UN Doc. A/49/10 (1994). The ILC's Commentary on that provision contains quite a detailed discussion of the problem, citing the relevant provisions of the Statute of the International Tribunal for the Former Yugoslavia and of its own Draft Code of Crimes against the Peace and Security of Mankind. *Ibid.*, at 73-75.

29. Article 75 of the 1977 Protocol I, *supra* note 8, enlarges somewhat upon the provisions of the cited articles of the 1949 Third Geneva Convention.

30. 327 U.S. 1 (1946). See LEVIE, WAR CRIMES, *supra* note 22, at 156-163; 261.

31. See DE PREUX, *supra* note 21, at 413-414. In 1950, when the World War II war crimes trials program was winding down, the French Supreme Court of Appeal reversed the rule previously established by French courts, which had until then followed the rule of the Yamashita Case, *supra* note 30.

32. For the historical background of this article, see DE PREUX, *supra* note 21, at 413-416. The Soviet Union, followed by all of the other Communist countries of that period, made a reservation to this article, but this reservation related to post-conviction treatment only. *Ibid.*, 423-425.

33. In Everett & Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509, 516-517 (1994) (hereinafter cited as Everett & Silliman), the authors state that "this provision [Article 102] applies only to crimes committed while a prisoner of war, and not for a violation of the law of war committed while a combatant," relying on the decisions in the Yamashita Case, *supra* note 30, and in *Johnson v. Eisentrager*, 339 U.S. 763 (1950). This completely ignores the problem created by the presence of Article 85 of the 1949 Third Geneva Convention.

34. The article by Everett & Silliman, *supra* note 33, at 519, takes the position that "the rationale of *Madsen v. Kinsella* [343 U.S. 341 (1952)] might suggest that a military commission could try a [United States] servicemember for any violation of the law of war." While this is marginally possible, it is highly improbable.

35. DE PREUX, *supra* note 21, at 416-417. But see paragraph 505(e), FM 27-10, *supra* note 27.

36. Emphasis added.

37. Surprisingly, this is one of the very few issues which has not been raised as a defense in the trials before the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (better known as the International Criminal Court for the Former Yugoslavia), a Tribunal established by S/Res/827 (1993), 25 May 1993, of the Security Council of the United Nations. [The Charter of the Tribunal is reproduced at 32 I.L.M. 1203 (1993).] A number of the decisions of the Trial and Appeals Chambers of that Tribunal, including several on the question of jurisdiction, will be found in 10 TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 59-276 (H. Levie, ed., 1996).