

VIII

International Law Aspects of Repatriation of Prisoners of War During Hostilities: A Reply

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I

In the July 1973 issue of the *Journal*,¹ there appeared an article with the above title written by Professor Richard Falk, in which he, in effect, advanced the thesis that the release of prisoners of war for repatriation during the course of hostilities in Vietnam to an *ad hoc* and self-styled “humanitarian organization” (which admittedly consisted solely of individuals who were vocal opponents of the United States participation in those hostilities) either constituted a valid and forward-looking interpretation of the provisions of the Geneva Convention of 1949 relative to the Treatment of Prisoners of War² (hereinafter referred to as “the 1949 Convention”) or indicated the need for revision of that instrument. The subject appears to be one which calls for an analysis in considerably greater depth than the treatment provided in the article by Professor Falk.

In this article, I shall discuss, independently of the facts alleged and the arguments advanced in the article by Professor Falk, the legal aspects involved in (1) the release and repatriation during the course of hostilities of prisoners of war who do not come within the mandatory provisions of Article 109 *et seq.* of the 1949 Convention (in other words, those who are not so “seriously wounded” or so “seriously sick” as to be entitled to release and repatriation as a matter of right); and (2) the use of an “impartial humanitarian organization” to accomplish this purpose. Thereafter, I shall point out some of the areas in which I agree or disagree with the proponent of this procedure.

II

Historically, there have been three major methods employed by Detaining Powers for the release and repatriation during the course of hostilities of able-bodied prisoners of war—ransom, exchange, and parole. The ransom of captured military personnel, which reached its peak in its application to chivalry

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in medieval times, had, for all practical purposes, disappeared by the end of the seventeenth century.³ It was replaced by exchange when continental armies became national and professional and when obtaining the release of captured military personnel became accepted as the responsibility of the sovereign. Exchange was man-for-man and grade-for-grade (with tables of “equivalent values”) so that, at least in theory, it would not result in any change in the relative military strengths of the two sides.⁴ Exchange still existed as late as the American Civil War, but it ceased to be a really effective procedure during that conflict.⁵

Parole is the third method of effectuating the release and repatriation of prisoners of war during the course of hostilities. Under this procedure, the prisoner of war agrees to certain conditions that will govern his conduct upon his release from a confined status. It has proven relatively unimportant as a method of procuring the release and repatriation of prisoners of war during the course of a conflict. Historically, it developed primarily into a method of permitting the prisoner of war more freedom within the territory of the Detaining Power, rather than of procuring his release and repatriation.⁶ Moreover, Article 21(2) of the 1949 Convention, like its predecessors, specifically contemplates that Powers of Origin may prohibit their captured military personnel from giving or accepting parole; a number of countries, including the United States, the United Kingdom, and France, have traditionally restricted the right of their military personnel to give or accept parole.⁷

Article 72 of the Geneva Convention of 1929 Relative to the Treatment of Prisoners of War⁸ (hereinafter referred to as “the 1929 Convention”) suggested the possibility of agreements between belligerents for the repatriation during hostilities of “able-bodied prisoners of war who have undergone a long period of captivity.” A similar but somewhat more extensive provision was included in the 1949 Convention. Article 109(2) provides that the Parties may “conclude agreements with a view to the direct repatriation or internment in a neutral country of able-bodied prisoners of war who have undergone a long period of captivity.”⁹ This provision may be considered as an attempt to encourage the belligerents to adopt one of these procedures (and to give neutral states and others a basis for proposing them), rather than as a legal authorization to do so, inasmuch as no such authorization was needed in order to enable belligerents lawfully to enter into such agreements. Article 6(1) of the 1949 Convention specifically contemplates the conclusion of special agreements by the Parties concerning prisoner-of-war matters, subject only to the limitations that any such agreement may not “adversely affect” the prisoners of war to whom it purports to apply and that it may not “restrict the rights” elsewhere conferred upon them by the Convention. Paragraph 2 of the same article contemplates that a Party may unilaterally give prisoners of war more favorable treatment than is required by the 1949 Convention itself. Certainly, an agreement for the repatriation of

longtime, able-bodied prisoners of war during the course of hostilities would not fall within the ambit of either of the limitations mentioned above;¹⁰ and it would in any event be more favorable treatment than required by the 1949 Convention.¹¹ Moreover, the Detaining Power could justifiably assert that individuals so repatriated would be barred from further participation in the hostilities against it.¹²

Unfortunately, despite the fact that World War II saw many prisoners of war held in captivity for periods in excess of five years, apparently no belligerent sought to implement Article 72 of the 1929 Convention.¹³ And in none of the many armed conflicts which have occurred since the end of World War II (and since the 1949 Convention became effective) has there been an agreement for the repatriation of able-bodied prisoners of war prior to the cessation of hostilities.¹⁴ However, it is not really difficult to understand why neither of the substantially similar provisions of the two Prisoner-of-War Conventions has ever been implemented by belligerents. Any bilateral agreement providing for the repatriation during hostilities of able-bodied prisoners of war would merely be a new name for the old procedure of exchange, a procedure which fell into disuse because, despite its man-for-man and grade-for-grade aspects, it inevitably turned out to be more advantageous for one side than for the other.¹⁵ Indeed, this same factor has even militated against the repatriation during the course of hostilities of seriously wounded or sick prisoners of war.¹⁶

It being accepted that releases and repatriations during the course of hostilities of longtime, able-bodied prisoners of war are within the contemplation of existing international law, despite the failure of any belligerent state to do so as a matter of practice, let us move to the next problem. What are the qualifications required of a body for it to fall within the category of organizations empowered to perform the humanitarian functions which the 1949 Convention authorizes for the benefit of prisoners of war?

Article 8 of the 1949 Convention is the basic article establishing the Protecting Power with its manifold humanitarian and other functions.¹⁷ However, Article 9 of that Convention specifically provides that humanitarian activities for the benefit of prisoners of war may also be performed by the International Committee of the Red Cross (the ICRC) or by "any other impartial humanitarian organization." The organization and operations of the ICRC are widely known and have received well-merited recognition throughout the 1949 Convention.¹⁸ The precise nature of the organizations which fall within the meaning of the term "any other impartial humanitarian organization" is considerably less clear.

Article 88 of the 1929 Convention, which was the direct progenitor of Article 9 of the 1949 Convention, did not include the possibility of the intervention of any "humanitarian organization" other than the ICRC for the purpose of

furnishing assistance to prisoners of war. That possibility received recognition for the first time in a proposal made by the Italian representative during a meeting of a committee of the Diplomatic Conference which drafted the 1949 Convention.¹⁹ The Italian proposal to add the words “or any other impartial humanitarian body” after the reference to the ICRC in the original draft of the article received the strong support of the Director-General of the International Refugee Organization (IRO) who pointed out that, in view of the existing collaboration between governments and the IRO, “it would seem opportune to extend the provisions of Article 8 [now Article 9 of the 1949 Prisoner-of-War Convention], to enable governments to avail themselves of its services in case of necessity.”²⁰ The proposal was adopted by the Joint Committee of the Diplomatic Conference after a debate in which the representative of the United States had supported the use for humanitarian purposes of “welfare organizations of a non-international character” and the Committee had rejected a Burmese proposal to narrow the Italian proposal to “any other *internationally recognized* impartial humanitarian body.”²¹ It was approved at a Plenary Meeting of the Diplomatic Conference without debate.²²

The foregoing is the substance of the *travaux préparatoires* concerning the addition of the words “or any other impartial humanitarian organization” to Article 9 of the 1949 Convention.²³ In attempting to elucidate the precise meaning of these words, it is therefore necessary to look elsewhere for help. The ICRC’s discussion of the matter in a 1960 publication is extremely helpful.

The humanitarian activities authorized must be undertaken by the International Committee of the Red Cross or by any other *impartial humanitarian* organization. The International Committee is mentioned in two capacities—firstly on its own account . . . ; and secondly, as an example of what is meant by “impartial humanitarian organization. . . .”

The organization must be *humanitarian*; in other words it must be concerned with the condition of man, considered solely as a human being, regardless of his value as a military, political, professional or other unit. It must also be *impartial*. Article 9 does not require it to be international.... Furthermore, the Convention does not require the organization to be neutral, but it is obvious that impartiality benefits greatly from neutrality.

In order to be authorized, the organization’s activities must be purely humanitarian in character; that is to say they must be concerned with human beings as such, and must not be affected by any political or military consideration. Within those limits, any subsidiary activity which helps to implement the principles of the Convention is not only authorized but desirable under Article 9. . . .²⁴

There are, then, three basic requirements for an organization's qualifying as "any other impartial humanitarian organization" within the meaning of Article 9 of the 1949 Convention: first, it must be *impartial* in its operations; second, it must be *humanitarian* in concept and function; and third, it must have some institutional, operational, and functional *resemblance to the ICRC*.²⁵ Negatively, it need not be international in creation and it need not be neutral in origin.

What is meant by "impartial"? An "impartial" organization is one which, as an institution, is unbiased and unprejudiced, fair and equitable to both sides in its operations, one which neither by act nor by statement gives any indication that it prefers one side over the other.²⁶ The mere fact of being established and based in a neutral country does not of itself make an organization "impartial."²⁷ Conversely, the mere fact of being established and based in a belligerent country does not necessarily indicate a lack of "impartiality." While, as a practical matter, it will undoubtedly be most difficult to identify an organization which is not "neutral" in location but which is accepted as "impartial," this is neither a paradox nor an impossibility. Such an organization will usually be one which operates exclusively in the territory of its own nation, preparing material assistance for dispatch through neutral relief channels, such as the ICRC, to the prisoners of war of its own nationality held by the enemy; and, more relevantly, it will be one which is permitted to and does provide material assistance to enemy prisoners of war held in the territory of its own nation.²⁸ It is, however, almost inconceivable that an organization which is established and based in the territory of one belligerent will be permitted to function in the territory of an opposing belligerent, no matter how impartial and humanitarian its reputation and its operations.²⁹ Wartime public opinion alone would be a sufficiently powerful force to prevent an "enemy" organization from functioning freely in the territory of the other side—except under the most unusual circumstances.³⁰

The meaning of the term "humanitarian" is considerably less controversial and its application presents far fewer problems. As stated by the ICRC in the excerpts quoted above, "humanitarian" denotes "concerned with the condition of man, considered solely as a human being." In the context of the prisoner of war, a "humanitarian organization" is one which has the objective of protecting and improving the welfare of the prisoner of war and the conditions under which he exists. Certainly, this is, and has long been, a major objective of the ICRC, and, as we have seen, the ICRC serves as a model for identifying the organizations which come within the meaning of Article 9 of the 1949 Convention.

Finally, the entity seeking to bring itself within that provision—or which one of the belligerents seeks to bring within that provision—must be an "organization" and as such it must have some institutional, operational, and functional resemblance to the ICRC. An individual does not qualify.³¹ A small,

ad hoc loose-knit group consisting of individuals who have joined together for a specific and limited purpose and which is obviously destined to have a limited life span does not qualify. There must be some institutional basis, some operational experience and tradition, which clearly establishes it as an organization that is both impartial and humanitarian.³² An established religious organization could probably qualify institutionally even though it had not been previously engaged in prisoner-of-war welfare activities. A national Red Cross Society could probably qualify institutionally as could an organization which has operated in the field of relief from natural disasters. An international organization, such as the United Nations or the Organization of American States,³³ or an agency thereof, such as the UN High Commissioner for Refugees or the OAS Council, could probably qualify institutionally. The possibilities are almost limitless.

One additional facet of the designation of "impartial humanitarian organizations" requires mention. Article 9 of the 1949 Convention makes the activities of the ICRC or of any other impartial humanitarian organization "subject to the consent of the Parties to the conflict concerned."³⁴ In the debate on the proposed amendment to the draft article which contemplated the activities of impartial humanitarian organizations other than the ICRC,³⁵ the representative of France pointed out that "the activities of humanitarian bodies were always subordinated to approval by Parties to the conflict."³⁶ The provision of the 1949 Convention has been interpreted, and properly so, as requiring the consent of all the Parties "upon which the possibility of carrying out the action contemplated depends."³⁷ This is why it is inconceivable that even a universally recognized humanitarian organization, if established and based in the territory of one belligerent, would be able to function in the territory of the other.³⁸

An organization obviously *cannot* function if it does not have the permission and approval of the sovereign of the territory in which it proposes to operate (normally, this would be the Detaining Power); it legally cannot, and certainly *should not*, function if it does not also have the permission and approval of the other sovereign concerned (normally, this would be the Power of Origin).³⁹

To summarize:

(1.) An adequate legal basis exists in international law for the release and repatriation of longtime, able-bodied prisoners of war during the course of hostilities (Article 109(2)).

(2.) While the legal basis for such action contemplates a consensual arrangement, the 1949 Convention not only permits but encourages unilateral action which is more favorable to the prisoners of war than is required by the Convention itself (Article 6(2)).

(3.) Bilateral release and repatriation of longtime, able-bodied prisoners of war during the course of hostilities, as provided in the 1949 Convention (Article

109(2)), is actually a return to the historic procedure of exchange with the added limitation against the further use of the repatriated prisoners of war "on active military service" (Article 117).

(4.) Either the International Committee of the Red Cross or "any other impartial humanitarian organization" may perform humanitarian activities for the welfare of prisoners of war provided that the appropriate Parties to the conflict give their consent (Article 9).

(5.) An "impartial humanitarian organization" within the meaning of Article 9 of the 1949 Convention is one which is unbiased and unprejudiced, fair and equitable to both Parties concerned, one which neither by act nor by statement gives any indication that it prefers one side over the other; one which has the humanitarian objective of protecting and improving the welfare of the prisoners of war and the conditions under which they exist in their status as captives; and one which is truly an "organization," a status measured, in the final analysis, by its institutional, operational, and functional resemblance to the ICRC.

III

From the foregoing general discussion of the legal aspects of the release and repatriation during hostilities of longtime, able-bodied prisoners of war through the intervention of humanitarian organizations, it is obvious that Professor Falk and I are in substantial agreement on the merit of such releases and repatriations from a humanitarian point of view. He suggests the need for "flexible" interpretation, or, alternatively, revision of the 1949 Convention in order to accomplish his basic purpose.⁴⁰ This is unnecessary because the provisions of Article 109(2) of the 1949 Convention specifically cover exactly the contingency with which he is concerned,⁴¹ thereby making "flexible" interpretation or revision unnecessary.

We part company completely when he attempts to enlarge the scope of the term "impartial humanitarian organization" so as to bring within its ambit a group such as the self-styled "Committee of Liaison with Families of Servicemen Detained in North Vietnam"⁴² (hereinafter referred to as the "Committee of Liaison") the members of which were far more concerned with anti-war propaganda than with the welfare of prisoners of war.⁴³ The Committee of Liaison was anything but "impartial"; it was more strongly motivated by political than by humanitarian considerations; and its existence as an "organization" within the meaning of the 1949 Convention was, at the very least, debatable.

To put the matter in proper perspective, it will be helpful to summarize briefly the events which are the basis for the legal thesis with which we are dealing. The process really began in October-November 1967⁴⁴ when the Viet Cong released three captured American soldiers in Phnom Penh, Cambodia, to Thomas E. Hayden, an American identified by the press as being the

representative of “anti-war groups” in the United States.⁴⁵ Then in February 1968 the Democratic Republic of Vietnam (DRV) released three American pilots in Hanoi to the Rev. Daniel Berrigan and Howard Zinn, also identified by the press as representatives of “anti-war groups.”⁴⁶ Some months later, in July–August 1968, the DRV released three more American pilots in Hanoi, this time to Mrs. Robert Scheer, Vernon Grizzard, and Stuart Meacham, once again identified by the press as representatives of “anti-war” groups.⁴⁷ In August 1969 the DRV released three American servicemen in Hanoi, this time to Rennard C. Davis and David Dellinger, who were identified as representing the “National Mobilization Committee to End the War in Vietnam.”⁴⁸ Finally, in September 1972, there occurred the release of three American pilots in Hanoi to Mrs. Cora Weiss, David Dellinger, Professor Falk *et al.*⁴⁹ Thus, the DRV made the first release of three captured American servicemen in February 1968; the second in August 1968; the third in August 1969; and the fourth and last in October 1972. The first two of these releases were made to well-known anti-war individuals; the latter two were made to two different anti-war groups. Each was attended with great publicity over an extended period of time. Each involved the release of only a token number of prisoners of war. Each involved prisoners of war who could only have been selected for release for reasons other than their physical condition or length of confinement, the grounds mentioned in the 1949 Convention for releases and repatriations during the course of hostilities.⁵⁰

The cablegram sent by the “escort group” to the President of the United States from Hanoi⁵¹ (which was, perhaps not unexpectedly, immediately broadcast by Hanoi radio) displayed either remarkable presumption, remarkable ignorance, or remarkable naiveté.⁵² The four “guidelines” laid down for the benefit of the U. S. Government by the Committee of Liaison warrant individual comment, particularly in the light of the claim being advanced that the Committee of Liaison was an “impartial humanitarian organization.”

The first paragraph of the cablegram demanded that the three prisoners of war released by the DRV to the Committee of Liaison for repatriation to the United States “shall proceed home with us and representatives of their families in civilian aircraft.” The DRV could have made a case for insisting upon the use of civilian aircraft up to the territorial limits of the United States; but that it would omit such a major requirement from its public statement, and then privately so advise the members of the escort groups seems, to say the least, rather odd.⁵³ On the other hand, if the use of civil aircraft and the designation of authorized fellow passengers was a condition asserted on the initiative of the escort group, the group demonstrated that it, and the Committee of Liaison which it represented, were anything but “impartial.” Moreover, despite the obvious mental reservations displayed by members of the escort group,⁵⁴ it is a universal rule of military law that upon his departure from the territory and

control of the enemy (whether by release, escape, or any other method), a prisoner of war has the duty to report at once to the first available authorities of his country. Members of anti-war groups frequently display a singular inability to recognize that the relationship between a member of the military service and the military authorities has evolved over the centuries as a result of the dictates of necessity and differs considerably from the relationship between a civilian and the civilian authorities.

The second paragraph of the cablegram called for the granting of a 30-day "furlough" to the three prisoners of war being released and repatriated.⁵⁵ How such a completely internal, administrative matter could possibly have been deemed to be within the purview of either the DRV or of an "impartial humanitarian organization" is exceedingly difficult to perceive.⁵⁶ It was just about as much the business of either the DRV or the Committee of Liaison as it would have been to lay down a condition that the men were to receive automatic promotions or to be entitled to additional pay for the period during which they had been prisoners of war. The members of the escort group seem to have labored under the impression that their first contact (except for Dellinger) with the problem of returned prisoners of war offered a subtle occasion to educate the military services about the process of repatriation. They were apparently unmindful of the fact that thousands of prisoners of war had been repatriated by the armed forces after World War II and the Korean War.⁵⁷

The third paragraph of the cablegram demanded a "complete medical checkup at the hospital of their choice, civilian or military." Once again the Committee of Liaison pronounced itself on an internal, administrative matter in an area in which the military services have had far more experience than the members of the escort group. The members of the Committee again demonstrated an unwillingness to accept the fact that the three prisoners of war continued to be members of the military service, subject to military control and discipline, and were not just civilian members of the general public and "protégés" of the Committee of Liaison. Moreover, despite the demand for a medical checkup in a hospital made in the cablegram, the escort group later apparently realized that this would completely remove their "protégés" from their control and, as they approached the United States, their medical judgment changed. "[I]t was clear to the escort group . . . that there was no immediate need for medical surveillance."⁵⁸ However, once they were back in the United States they had to concede that "the pilots preferred, or at least were unwilling to contest, the Government's insistence on a medical checkup under military auspices."⁵⁹

The fourth paragraph of the cablegram prescribed that the three men being repatriated "shall do nothing further to promote the American war effort in Indochina." As we have seen, Article 117 of the 1949 Convention contains an

ambiguous prohibition against a repatriated prisoner of war's being "employed on active military service."⁶⁰ Like the United States, the ICRC interprets this to prohibit taking part "in armed operations against the former Detaining Power or its allies."⁶¹ Certainly, any reasonable interpretation of Article 117 is far from the broad ban which the "impartial," anti-war Committee of Liaison sought to impose.⁶²

The fact that the Committee of Liaison opposed U. S. participation in the hostilities in Vietnam is apparently considered one of the more decisive arguments in establishing both its "impartiality" and its "humanitarianism."⁶³ Conversely, it is at least implied that support of U. S. participation in the hostilities in Vietnam establishes a lack of "impartiality" and "humanitarianism." Thus, the "National League of Families of American Prisoners and Missing in Southeast Asia," an organization all of whose members were relatives of servicemen either known to be prisoners of war or missing in action and whose goal was "to achieve better treatment for Americans held captive and to learn the status of those missing in action,"⁶⁴ is dismissed as being one of the "groups that also proclaim their humanitarian purposes, despite their commitment to Mr. Nixon's war policies."⁶⁵ While there is merit to the conclusion that the "National League" did not qualify as an "impartial humanitarian organization" within the meaning of Article 9 of the 1949 Convention, this is not because of its failure to oppose U.S. participation in the Vietnamese conflict, but because, as in the case of the Committee of Liaison, there is no basis for concluding that it was the type of organization envisaged by the draftsmen of the 1949 Convention.

The failure of the U.S. Government to oppose Dellinger's application for leave to travel with the escort group when he was free on bail pending an appeal is construed as evidence of an implied consent by the United States to the activities of the Committee of Liaison.⁶⁶ The fact that the U.S. Government did not "interfere with its activities,"⁶⁷ or "make an objection" to the Committee,⁶⁸ and that "the North Vietnamese initiative was not repudiated,"⁶⁹ are also cited as evidence that the United States agreed to and concurred in the activities of the Committee of Liaison and that "it was a consensual process."⁷⁰ In other words, it is contended that the failure of the U.S. Government to interfere with and to prevent the repatriation in 1972, just as it had taken no action to interfere with or prevent the earlier repatriations, constituted a legal acceptance of the Committee of Liaison as an "impartial humanitarian organization."⁷¹ That contention does not even appear to warrant discussion.

The argument advanced with respect to the proper interpretation of Articles 9 and 10 of the 1949 Convention is also without validity. Despite the fact that Article 9 is so specific in requiring the consent of both Parties to an armed conflict before the ICRC or an impartial humanitarian organization may undertake

activities for the protection or relief of prisoners of war,⁷² the argument is made that the language of both Articles 9 and 10 is “ambiguous with regard to whether the belligerent [belligerents?] must agree to the designation of a humanitarian organization”;⁷³ and the conclusion is reached that it is “most reasonable” to interpret Article 10(2) “as giving the Detaining Power, North Vietnam, the capacity to deal with an organization like the Committee of Liaison.”⁷⁴

The DRV is at least a de facto state and its “capacity to deal” with the Committee of Liaison, or any other group, cannot be doubted; but to use this circumstance to establish that the Committee of Liaison is, therefore, an “impartial humanitarian organization” which may be unilaterally designated by the DRV as a substitute for the Protecting Power is quite another matter. The attempt to attain this result is, in effect, based upon the following reasoning: Article 10(2) of the 1949 Convention provides that if there is no Protecting Power and if no organization offering all guarantees of impartiality and efficacy to perform the duties of the Protecting Power has been designated to perform those duties under Article 10(1), “the Detaining Power shall request a neutral State, or such an organization, to undertake the functions” of the Protecting Power. In acceding to the 1949 Convention, the DRV made a reservation to Article 10 stating that it would not “recognize as legal” such a request by the Detaining Power “unless the request has been approved by the State upon which the prisoners of war depend.”⁷⁵ A substantially similar reservation to Article 10 had been made by the USSR and the Soviet bloc countries upon signing the Convention in 1949 and in their subsequent ratifications.⁷⁶ The reason given by the USSR for the reservation was the belief that “the Government of the country to which the protected persons belong [cannot be prevented] from taking part in the choice of the substitute for the Protecting Power.”⁷⁷ In recommending that the Senate give its advice and consent to the ratification of the 1949 Convention by the United States, the Department of State advised the Senate of its opposition to the USSR and similar reservations.⁷⁸ This opposition, according to Falk,

seems to confirm the United States view that the Detaining Power had the capacity, even the duty, to designate an impartial humanitarian organization and that such designation would be determinative at least in the absence of objection from the country whose men are detained that the organization is not “impartial” or not “humanitarian.”⁷⁹

Thus, based upon the DRV reservation to Article 10 of the 1949 Convention and the earlier stated objection of the Department of State to the DRV-type reservation to that article, the conclusion is reached that a Detaining Power may unilaterally designate an “impartial humanitarian organization” to perform functions with respect to prisoners of war.

In the first place, it must be borne in mind that Article 10 deals, not with the activities of the “impartial humanitarian organization” referred to in Article 9, but with the activities of Protecting Powers and of “substitutes” for Protecting Powers. It seems incredible that the contention would be made that the Committee of Liaison, a small group of completely inexperienced individuals, whose only common thread was opposition to U.S. participation in the hostilities in Vietnam, could possibly qualify as an organization “offering guarantees of impartiality and efficacy to perform the duties of the Protecting Power,”—which are the requirements set forth in Article 10(1) for an organization that may be designated under Article 10(2).

In the second place, the DRV, like the USSR and the Soviet bloc countries at the 1949 Diplomatic Conference, made its reservation to Article 10 because it considered that the article improperly reduced the right of the Power of Origin to participate in the selection of a substitute for the Protecting Power. Inasmuch as the DRV became a Party to the 1949 Convention only on the condition that no neutral state or humanitarian organization could be designated by a Detaining Power to act as a substitute for the Protecting Power without the consent of the Power of Origin, it is certainly inverse reasoning to claim that this established the right of the DRV acting as a Detaining Power, unilaterally so to designate the Committee of Liaison,⁸⁰ without the consent of the United States, the Power of Origin.

In the third place, instead of referring to the suggestion made in a letter written by Secretary Dulles to the Senate Foreign Relations Committee concerning the attitude which the United States should take with respect to the Soviet bloc reservations,⁸¹ it would have been more appropriate to refer to the position actually and officially taken by the United States in connection with ratification of the 1949 Convention:

Rejecting the reservations which States have made with respect to the Geneva Convention relative to the treatment of prisoners of war, the United States accepts treaty relations with all parties to that Convention, except as to the changes proposed by such reservations.⁸²

In other words, while the United States has treaty relations with any state which has ratified or acceded to the 1949 Convention with a reservation to Article 10, those treaty relations are subject to the changes made by the reservation, which means that *neither the United States nor the reserving state*, when acting as a Detaining Power, may designate a neutral Power or a humanitarian organization as a substitute for the Protecting Power without the approval of the Power of Origin.⁸³

One basic question remains. Why did they do it? Why did the North Vietnamese unilaterally release these randomly-selected, token-size groups of

prisoners of war for repatriation? Were the North Vietnamese more humanitarian-minded than the belligerents of World War I? Of World War II? Of Korea? Were they inspired to do what they did because of empathy for the men released and repatriated? All of these questions carry their own negative responses.⁸⁴

The Vietnam War was unlike past conflicts. Previous wars had not seen the establishment and proliferation of anti-war groups which functioned openly, seeking publicity that was not always easy for them to obtain.⁸⁵ The release of token numbers of prisoners of war to these groups for repatriation at rather lengthy intervals served, on each occasion, as a major propaganda device, one which for a number of days gave the North Vietnamese and the particular anti-war group large-scale newspaper, television, and radio coverage.⁸⁶ Had the releases been purely humanitarian in nature, the prisoners of war selected for release would have been those who were the most seriously wounded or sick, or those who had been the longest in prisoner-of-war status; but neither of these valid criteria was used in the selection process.⁸⁷

The significance for the future of what transpired in the concluding months of American participation in the war in Vietnam is not great. In an all-out armed conflict, one which is a "war" both under international law and in an American constitutional sense, private repatriations by civilians will probably not be practical, because the members of the antiwar group in any belligerent country participating in such an event would undoubtedly find themselves spending at least the balance of the period of hostilities in close confinement after having been tried and convicted of treason or of communicating with the enemy. Second, as a practical matter, with the limitations which would exist on wartime travel, particularly across international borders, it would probably be all but impossible for an "escort group" to accomplish its function. Third, and most important, with the close censorship of the news media which is maintained during wartime, there would be little or no propaganda value in releasing token-sized groups of prisoners of war for repatriation as the Power of Origin could completely control the amount of publicity, if any, which the event would be allowed within its territory, the place where the impact of the propaganda is actually desired. Without the publicity which releases and repatriations are designed to generate, the motive for such action by a belligerent withers on the vine.

In conclusion, while there are both legal and humanitarian bases for the release and repatriation, or internment in neutral countries, during the course of hostilities of longtime, able-bodied prisoners of war, this highly laudable purpose can best be accomplished through resort to the established and recognized facilities of the Protecting Power and the International Committee of the Red

Cross, rather than through the use of partisan, *ad hoc* groups which have extremely limited public acceptance and recognition.

Notes

1. 67 AJIL 465 (1973) (hereinafter cited as Falk).
2. 6 UST 3316; 75 UNTS 135; 47 AJIL SUPP. 119 (1953).
3. One author asserts that "[f]aint though unmistakable traces of it [ransom] survive even into Napoleon's war, . . ." LEWIS, *NAPOLEON AND HIS BRITISH CAPTIVES* 43 (1962). See also, Levie, *The Nature and Scope of the Armistice Agreement*, 50 AJIL 880, 897 (1956). Perhaps it may be said to have reappeared momentarily as a result of the sequel to the Bay of Pigs episode.
4. When, for some reason, a formal exchange could not be made, a prisoner of war might be released and repatriated in a temporary parole status until his counterpart had been repatriated and the formal exchange had thus been completed. Lewis, *supra* note 3, at 45.
5. The occasional procedure mentioned in the previous note was substantially the system adopted as a general procedure in the rather ineffectual Dix-Hill Cartel during the American Civil War. LEWIS & MEWHA, *THE HISTORY OF PRISONER OF WAR UTILIZATION BY THE UNITED STATES ARMY, 1776-1945*, at 29-30 (1955); MURPHY, *PRISONERS OF WAR: REPATRIATION OR INTERNMENT IN WARTIME 2-3* (1971).
6. The release and repatriation on temporary parole mentioned in note 4, *supra*, was the exception rather than the rule; and the Dix-Hill Cartel, in attempting to make it the rule, failed to accomplish the intended result to the satisfaction of either side.
7. See, for example, U.S. Army Field Manual 27-10, *THE LAW OF LAND WARFARE*, para. 187a (1956); Article III, *Code of Conduct for Members of the Armed Forces*, Exec. Order No. 10631, Aug. 18, 1955, 3 CFR, 1954-1958 Comp., at 266; United Kingdom, *THE LAW OF WAR ON LAND, BEING PART III OF THE MANUAL OF MILITARY LAW*, para. 246, n. 1 (1958); CODE DE JUSTICE MILITAIRE, *ARMÉE DE TERRE*, Art. 235 (Daloz, 1963).
8. 47 Stat. 2021; 2 Bevans 932; 27 AJIL SUPP. 59 (1933).
9. On Dec. 9, 1970, the UN General Assembly adopted a Resolution in which it:

Urges compliance with Article 109 of the Geneva Convention of 1949 . . . which provides for agreements with a view to the direct repatriation . . . of able-bodied prisoners of war who have undergone a long period of captivity. (A/RES/1676 (XXV) (1970)).

In Havens, *Release and Repatriation of Vietnam Prisoners*, 57 ABAJ 41, 44 (1971), the author argues that after 18 months as a prisoner of war an individual should be entitled to release and repatriation. However, he cites no authority for this interpretation of the provisions of the 1949 Convention.
10. Article 109(3) prohibits the involuntary repatriation of sick and injured prisoners of war during the course of hostilities. Normal rules of treaty interpretation would seem to make this provision inapplicable to the repatriation during hostilities of able-bodied prisoners of war unless it can be said that as a result of the settlement reached in Korea in 1953, supported by a number of resolutions of the UN General Assembly, a norm of international law has evolved which prohibits the involuntary repatriation of prisoners of war under any circumstances.
11. Although both the 1929 and the 1949 Conventions contemplate that such repatriations will be accomplished under agreements between the Parties, there is certainly no reason why one Party cannot elect to take such action unilaterally if it so desires. Article 6(2) of the 1949 Convention specifically mentions this possibility and Article 118(2) of that Convention, dealing with post-hostilities release and repatriation, specifically provides for, and even requires, unilateral action if no agreement covering the subject is reached by the belligerents. Pakistan initiated this unilateral action in November 1972 with respect to the Indian prisoners of war it then held. *NY Times*, Nov. 28, 1972, at 1, c. 2.
12. Article 117 of the 1949 Convention provides that "[n]o repatriated person may be employed on active military service." This provision is, of course, quite ambiguous. PICTET (ed.), *COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR* 538-39 (1960) (hereinafter cited as PICTET, *COMMENTARY*). U.S. military authorities have construed Article 117 as only prohibiting the repatriated serviceman from participating in combat against the former Detaining Power and not as requiring his complete separation from the military service. *American Prisoners of War in Southeast Asia, 1971, Hearings before the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 92d Cong., 1st Sess., 350 (1971) (hereinafter cited as 1971 *Hearings*).
13. Although the REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS ON ITS ACTIVITIES DURING THE SECOND WORLD WAR (September 1, 1939—June 30, 1947) (1948) includes a 21-page discussion of the numerous repatriations of seriously wounded and seriously sick prisoners of war in Europe (Vol. I, at

373-93), it does not even mention any proposal by a belligerent or neutral state or a humanitarian organization to implement Article 72 of the 1929 Convention.

14. Probably no armed conflict which has occurred since 1945 (except for those involving the French in Vietnam, Korea, and the later Vietnamese conflict) has really continued for a long enough time for any prisoner of war to be considered as having "undergone a long period of captivity."

15. The Dix-Hill Cartel, *supra* notes 5 and 6, failed because in the early years of the American Civil War the equal exchange of able-bodied prisoners of war favored the Union, while later in the conflict it favored the Confederacy, LEWIS & MEWHA, *supra* note 5, at 30. Of course, this criticism is not true of internment in a neutral country, the alternative provided for in Article 109(2).

16. See LINDSAY (ed.), SWISS INTERNMENT OF PRISONERS OF WAR 3 (1917):

The fear expressed by France [in February 1915] that under the system of exchange wounded soldiers would be returned to Germany who could still be of military service [an amputee could work in a depot, thus relieving an able-bodied soldier], was common to other belligerents. . . .

17. Levic, *Prisoners of War and the Protecting Power*, 55 AJIL 374 (1961).

18. *Ibid.*, at 394-96. See also ICRC REPORT, *supra* note 13, at 11-29.

19. Fourth Meeting of the Joint Committee, FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, Vol. IIB, at 18, 21 (hereinafter cited as FINAL RECORD).

20. Annex 24, FINAL RECORD, Vol. III, at 32.

21. FINAL RECORD, Vol. IIB, at 60 (emphasis added).

22. Article 7/8/8/8, *ibid.*, at 346.

23. At some point in the deliberations the word "body" was changed to "organization" but this author was unable to pinpoint the event in the FINAL RECORD, a result not unique to this particular matter.

24. PICTET, COMMENTARY, 107-08.

25. Both the phrasing of the provision of the 1949 Convention and the doctrine of *ejusdem generis* indicate the validity of the conclusion reached by the ICRC that it was to be considered "as an example of what is meant by 'impartial humanitarian organization'."

26. No matter how politically remote its policymakers and other members may be from the cause of the war and from the belligerents, they will, of course, inevitably have individual prejudices with respect to any armed conflict that may be in progress. However, if the organization is to be able to maintain its aura of "impartiality," even these individual preferences must be both suppressed and concealed because of the human difficulty of ascribing "impartiality" to an organization whose policymakers and other members have publicly expressed individual preferences and prejudices.

27. During the hostilities in Korea the Chinese charged, with the support of the USSR, and totally without justification and solely for political reasons, that the ICRC was a "capitalist spy organization." United Kingdom, Ministry of Defence, TREATMENT OF BRITISH PRISONERS OF WAR IN KOREA 33-34 (1955). The actions of the North Vietnamese during the hostilities in Vietnam would seem to indicate a similar attitude. Falk, *The American POWs; Pawns in Power Politics*, THE PROGRESSIVE, March 1971, at 13, 16. Under the circumstances, it is unexpected, indeed, to find the USSR communicating to the Secretary-General of the United Nations its belief in the need for the ICRC to undertake additional tasks relating to the protection of human rights in armed conflict and omitting any suggestion for the use of "other impartial humanitarian organizations" for this purpose. Report of the Secretary-General, *Respect for Human Rights in Armed Conflict*, UN Doc. A/8052, Sept. 18, 1970, at 119, 120.

28. During World War II, the Young Men's Christian Association, the National Catholic Welfare Conference, and other similar organizations, were permitted, in varying degrees, to supplement the humanitarian work of the ICRC on behalf of enemy prisoners of war held in the United States. Rich (ed.), *A Brief History of the Office of the Provost Marshal General, World War II*, at 489-91 (mimeo., 1946). Some of these organizations might, upon investigation, qualify under Article 9. While their orientation was, for the most part, primarily religious, they normally offered humanitarian assistance to all enemy prisoners of war, without regard to their origin, nationality, or religion. Of course, religious supplies furnished by them were limited to those of their own denomination.

29. When the representative of the United States at the 1949 Diplomatic Conference supported the proposed change in the draft of Article 9 and referred to "welfare organizations of a non-international character," he unquestionably had in mind the operation of such organizations in their own country, based upon the experience in the United States during World War II mentioned in the previous note.

30. There could certainly be little dispute that, during World War II, it would have been impossible for the American Red Cross, or the YMCA, or the National Catholic Welfare Conference, all American-established and based humanitarian organizations, to have obtained permission to function in Germany or Japan, or for the German or Japanese Red Cross to have obtained permission to function in the

United States. The same was indubitably true of the American Red Cross, the Red Cross of the Republic of Vietnam, and the Red Cross of the Democratic Republic of Vietnam (DRV) during the hostilities in Vietnam.

31. No matter how humanitarian may have been H. Ross Perot's motives, his misguided activities on behalf of the American prisoners of war then held in North Vietnam could not have been considered as falling within any provision of the 1949 Convention.

32. The "institutional basis" and the "operational experience and tradition" need not necessarily have been prisoner-of-war oriented, or even war-oriented.

33. Some official action previously taken by the international organization might have called in question its impartiality but it would not affect its "institutional" qualifications.

34. It can be assumed that the People's Republic of Korea and the Democratic Republic of Vietnam would rely on this provision in justification of their right to refuse to allow the ICRC to perform its customary humanitarian functions within their territories. Whether they did indeed act on the basis of law is another question.

35. See text in connection with notes 19-23, *supra*.

36. FINAL RECORD, Vol. IIB, at 60.

37. PICTET, COMMENTARY, 109.

38. *Supra* note 30. If Switzerland were a belligerent, the ICRC would undoubtedly find itself refused permission to function in the territory of that country's enemy, despite the century-old tradition of impartial humanitarianism which the ICRC enjoys. It could, of course, continue to perform those humanitarian functions which might be performed in Switzerland.

39. This is why the reservation made to Article 10 of the 1949 Convention by the USSR and the other Communist countries (including, subsequently, the DRV) and objected to by the Western countries, appears to have a valid basis. *Levie, supra* note 17, at 385, n. 32. That article provides that if there is no Protecting Power, and for some reason, a new Protecting Power cannot be designated, the Detaining Power may request the services of a neutral state or of a humanitarian organization such as the ICRC to perform the functions of the Protecting Power. The Communist reservation properly makes the consent of the Power of Origin necessary for the designation of such a substitute. (For a more detailed discussion of the reservation to Article 10, see text at pp. 182-84.)

40. "Observations" Nos. (1) and (4), Falk, at 477.

41. See text at pp. 174-75 and note 9, *supra*.

42. Mrs. Cora Weiss, co-chairman with David Dellinger of this Committee, testified as follows with respect to this group:

The Committee of Liaison was established on January 15, 1970, after three women including myself, of Women Strike for Peace, returned from a trip to North Vietnam. In our announcement of formation and purpose, we stated that the purposes of the committee were (1) to facilitate communication between prisoners and their families; and (2) to inquire on behalf of families regarding the status of their missing relatives.

1971 *Hearings* 230. An "Information Sheet" issued by the Committee of Liaison during the month of its inception stated that it had been established "at the request of the North Vietnamese." The Information Sheet goes on to give assurances that the Committee of Liaison "is not in any sense representing the government of North Vietnam." *Ibid.*, 532.

43. Falk, 473-74.

44. The significance of mentioning a time period instead of an exact date is discussed in note 86, *infra*.

45. The men released were Sgt. Edward R. Johnson, Sgt. Daniel L. Pitzer, and Sgt. James E. Jackson. N.Y. Times, Nov. 13, 1967, at 2, c. 6. On three subsequent occasions the Viet Cong released a total of six additional American servicemen in the field, allowing them to return to U.S. military control without the benefit of an escort.

46. The men released were Maj. Norris M. Overly, USAF, captured in Sept. 1967; and Capt. Jon D. Black, USAF, and Lt. (j.g.) David P. Matheny, USN, both captured in Oct. 1967. N.Y. Times, Feb. 17, 1968, at 1, c. 8.

47. The men released were Maj. James F. Low, USAF, captured in Dec. 1967; Capt. Joe V. Carpenter, USAF, captured in Feb. 1968; and Maj. Fred N. Thompson, USAF, captured in March 1968. N.Y. Times, Aug. 5, 1968, at 15, c. 1.

48. The men released were Lt. Robert F. Frishman, USN, captured in Oct. 1967; Seaman Douglas B. Hegdahl, captured in April 1967; and Capt. Wesley L. Rumble USAF, captured in April 1968. N.Y. Times, Aug. 5, 1969, at 1, c. 2.

49. Lt. (j.g.) Markham L. Gartley, USN, had been captured in Aug. 1968; Lt. (j.g.) Morris A. Charles, USN, had been captured in Dec. 1971; and Maj. Edward K. Elias USAF, had been captured in April 1972. David Dellinger was once again one of the emissaries selected by the DRV to receive the release of the three

prisoners of war, but this time it was not in his capacity as a member of the "National Mobilization Committee," but in his parallel capacity as a member of the Committee of Liaison. N.Y. Times, Sept. 17, 1972, at 3, c.4.

50. Only Frishman could be said to have had a physical condition which might have warranted his release and repatriation on medical grounds. Gartley, who had been a prisoner of war for more than four years, certainly qualified as a "longtime" prisoner of war. Hegdahl had been a prisoner of war for 28 months, Frishman for 22 months, and Rumble for 16 months. All of the other men released and repatriated by the DRV had been prisoners of war for less than one year (actually, for periods of between 4 and 9 months).

51. Falk, 467, 471-72. Falk seems to have been surprised that no answer was received from the U.S. Government by the Committee of Liaison to this and other messages sent from Hanoi. *Ibid.*, 467. It is difficult to believe that he really expected answers.

52. While the cablegram does state that the conditions it contained were "[i]n accordance with the expressed expectations of the North Vietnamese Government," Falk indicates clearly that its contents were developed by the "escort group" as an outgrowth of internal discussions which took place in Hanoi with respect to the group's "responsibilities" (*ibid.*, 466-67) and that the releases by the DRV were, in fact, unconditional. *Ibid.*, 471.

53. It is, of course, possible that the desire of the Committee of Liaison to retain "custody" of the three men and to travel by civilian, rather than military, aircraft, could have been motivated by the publicity anticipated from a press conference and reception planned for their arrival at Kennedy Airport. *Ibid.*, 468.

54. *Ibid.*, 471.

55. The use of the term "furlough" shows a practical ignorance of contemporary military vocabulary. It was never applicable to officers and disappeared from the military lexicon shortly after World War II. Only a certain antiquarian interest would have prompted the three officers to request a "furlough."

56. Was the granting of 30-day "furloughs" one of the "expressed expectations of the North Vietnamese Government"? See note 52, *supra*.

57. For example, after Korea some 4,400 prisoners of war were released and repatriated. Each was put through a processing which had been well organized beforehand and which included preliminary hospitalization and medical examination in Japan, return to the United States when medically approved, further hospitalization either in Hawaii or in the military hospital nearest to his home, complete medical examination and treatment, and extended leave as soon as medical clearance was granted.

58. Falk, 471-72. Elsewhere reference is made to "reported *abuses* in relation to prior treatment" and the suggestion is advanced that there should be "a preliminary medical examination, perhaps *under neutral auspices*" (*ibid.*, 472, emphasis added). Incredible as it may seem, these two quotations refer to the treatment of repatriated prisoners of war in military hospitals in the United States!

59. *Ibid.*, 472. Here and elsewhere throughout the article statements appear implying that anything done for the benefit of repatriated prisoners of war in the United States occurred solely because of public pressure by the escort group and in spite of strong governmental (or military service) predilections to the contrary. This, of course, disregards the fact that everything done for these men, as well as those who preceded and followed them, evolved from a refinement of the procedures for repatriated prisoners of war applied after World War II and Korea.

60. *Supra* note 12.

61. PICTET, COMMENTARY, 539.

62. If one of these men had resigned from the military service and had then gone on a speaking tour in support of U.S. participation in the hostilities in Vietnam, he clearly would not have violated Article 117 of the 1949 Convention; but he would have violated the broader prohibition of the fourth "guideline."

63. Falk, 473-74.

64. 1971 *Hearings* 25.

65. Falk, 474 and n. 13. (In the cited note, the activities of the "National League of Families" are equated to the activities of H. Ross Perot.)

66. *Ibid.*, 474.

67. *Ibid.*

68. *Ibid.*, 475.

69. *Ibid.*, 477.

70. *Ibid.*

71. *Ibid.*

72. See text *supra* at pp. 700-01.

73. Falk, 474.

74. *Ibid.*

75. 274 UNTS 339.

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76. See note 39 *supra*. The USSR reservation provides for "the consent of the Government of the country of which the prisoners of war are nationals." 191 UNTS 367. Either wording refers, of course, to the Power of Origin.

77. FINAL RECORD, Vol. IIB, at 347.

78. *Geneva Conventions for the Protection of War Victims, Hearing before the Senate Comm. on Foreign Relations*, 84th Cong., 1st Sess., on Executives D, E, F, and G, 82d Cong., 1st Sess., at 62 (1955).

79. Falk, 475.

80. *Ibid.*

81. *Ibid.*, n. 17.

82. 6 UST 3316, 3514; 213 UNTS 383.

83. PILLOUD, RESERVATIONS TO THE 1949 GENEVA CONVENTIONS 5 (1958).

84. A number of questions, basically along this same line, appear in the Falk article, at 477 and 478. They are not answered except by the statement that "North Vietnamese motivations are of no account." *Ibid.*, 478.

85. When the Viet Cong made the first prisoner-of-war release, in Nov. 1967, Nguyen Van Hieu, the VC representative in Phnom Penh, Cambodia, where it took place was quoted as follows:

Mr. Hieu said that the soldiers were being released in cooperation with American opponents of the United States involvement in the Vietnam war in the expectation that they would be able to contribute usefully to the United States peace movement.

N.Y. Times, Nov. 13, 1967, at 2, c. 6. This revealing statement was not repeated on the occasion of the subsequent releases.

86. Some evidence of this can be found in the fact that with each release of prisoners of war there would be a great fanfare when the announcement of the proposed release was made, or when the escort group set off for Hanoi, or when it arrived in Hanoi—and then there would be an unexplained delay of a number of days while the publicity, of course, continued. For example, in the second 1968 release the delay was "pretty close to three weeks" (1971 *Hearings* 222) and in the 1972 release of which Falk gives us a blow-by-blow description the unexplained delay was from Sept. 17 to 24 (Falk, 466). While it is true that a Gallup poll conducted in Feb. 1970 revealed that a majority of Americans did not believe the glowing statements made by the members of the escort groups upon their return to the United States, a surprising number of Americans apparently did believe them—and even if the number had been much smaller, the propaganda value to the DRV far outweighed the cost, which was negligible.

87. Actually, it is probable that no criteria were used. See note 50 *supra*. In the July-Aug. 1968 release the three pilots released had been prisoners of war for only four to seven months. Note 47 *supra*. Concerning the selection of these three individuals, one witness before the House Subcommittee testified:

When Thompson, Low and Carpenter were brought together at the time of their release, they tried to figure out why they had been selected. They determined, as many others have since determined, that the obvious conclusion was that none of them had been held very long, all were in apparent good health, they were not debilitated or injured, nor had they been subjected to extremes of brutality. And, too, each had been penned up separately, in a solitary cell, barred from learning all they might otherwise have learned about the general condition of the prison camps or the general condition or treatment of other prisoners.

As Major Thompson says, "We were safe bets to release. People would see and say, 'Maybe they do take good care of their prisoners'."

1971 *Hearings* 387.