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Waldemar A. Solf
Edward R. Cummings

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A Survey of Penal Sanctions
Under Protocol I to the
Geneva Conventions of
August 12, 1949*

by Waldemar A. Solfs**
and
Edward R. Cummings***

I.
INTRODUCTION

The laws of armed conflict are enforceable through several basic remedies and sanctions. The basic sanction of this law is the common conviction of the belligerents that their self-interest is advanced by adhering to the law rather than by violating it, and the recognition that the interests of the belligerents are mutual and reciprocal. The law can be en-

* The views expressed herein are those of the authors and do not necessarily reflect those of the Department of the Army or any other agency of the United States Government.

** Member, Illinois Bar, University of Chicago, B.A., 1935; University of Chicago, J.D., 1937; currently, Chief, International Affairs Division, Office of The Judge Advocate General, Department of the Army.

*** Member, Penn. Bar, Johns Hopkins University, B.A., 1972; George Washington University, J.D., 1975; currently, Captain, United States Army, International Affairs Division, Office of The Judge Advocate General, Department of the Army.

1 M. McDougal & F. Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion 53 (1961); W. Mallison, Studies in the Law of Naval Warfare: Submarines in General and Limited Wars 19 (1968). Those laws of war which are part of customary international law, however, are binding regardless of whether the other belligerent respects them or has entered into a treaty recognizing them as such. See 1 International Military Tribunal, Trial of Major War Criminals Before the International Military Tribunal, Judgment 253-54 (1947). Much of the codified humanitarian law (see note 7 infra) is not dependent on reciprocity. This includes the law respecting the protection of the victims of war, such as P.O.W.'s, the wounded, sick and shipwrecked, and civilians under the control of the adverse power (e.g., protected persons in occupied territory and enemy aliens in the territory of the Parties to a conflict), and the law pertaining to medical and religious personnel. See also Dep't of the Air Force, AFP 110-31, International Law — The Conduct of Armed Conflict and Air Operations 10-1 (1976) [hereinafter cited as AFP 110-31].
forced through the basic sanctions of dissemination, education and proper supervision.\(^2\) If a belligerent does resort to unlawful behavior, several options have traditionally been available to enforce compliance. These options have included diplomatic protest and publication of the facts to influence world opinion,\(^3\) demands for compensation from the offending belligerent,\(^4\) the punishment of individual offenders for war crimes,\(^5\) and if the unlawful action was directly instigated by the belligerent power or performed with its sufferance, a resort to reprisals.\(^6\)

The proposed Protocols to the Geneva Conventions of August 12, 1949,\(^7\) drafted by the International Committee of the Red Cross


\(^3\) DEP'T OF THE ARMY, FM 27-10, THE LAW OF LAND WARFARE \(\S\) 495, at 176 (1956) [hereinafter cited as FM 27-10]. See also M. McDougal & F. Feliciano, supra note 1, at 703.


\(^5\) DEP'T OF THE NAVY, NWIP 10-2, LAW OF NAVAL WARFARE \(\S\) 300, at 3-3 (1955); FM 27-10, supra note 3, \(\S\) 495 (d), at 176; AFP 110-31, supra note 1, at 10-1.


PENAL SANCTIONS

take several of these options into consideration. The proposed articles of the Protocols serve as guides for the conduct of States and individuals by providing the rules of penal responsibility.9

Several of the measures designed to enforce compliance with the two Protocols have been under consideration at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict.10

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9 The functions that norms of law can serve in the laws of armed conflict have been summarized by Professor Baxter as being: (1) guides to the conduct of States; (2) guides to the conduct of individuals; (3) measures of the responsibility of States; (4) rules of penal responsibility to individuals; and (5) standards for employment by the I.C.R.C. in its function of protecting war victims. Baxter, Some Existing Problems of Humanitarian Law, 14 Revue de Droit Pénal Militaire et de Droit de la Guerre 297, 302 (1975); Baxter, Revising the Laws of War: Further Developments, Proc. Am. Soc’y Int’l L. 246, 249 (1975).

Among the subjects being addressed are new categories of grave breaches, the responsibilities of commanders, the failure to
act,\textsuperscript{13} the defense of superior orders,\textsuperscript{14} extradition,\textsuperscript{15} means of enquiry commissions\textsuperscript{16} and reprisals.\textsuperscript{17} Several provisions have been adopted in the main committees of the Conference which have been considering the substantive articles during the past three sessions of the Conference.\textsuperscript{18} These proposals and others will be the subject of negotiation in the committees and the plenary of the Fourth Session, which is to be held in 1977.\textsuperscript{19}

The following survey will address only those provisions in Protocol I that pertain to penal sanctions against individuals who commit violations of the relevant provisions of the laws of armed conflict. The survey will be preceded by a review of the background of these provisions and of the common assumptions underlying penal sanctions in warfare.

II.

GENERAL BACKGROUND

A. The General Approach Toward Penal Sanctions in Treaties

The laws of armed conflict, as stated in United States \textit{v.} List,\textsuperscript{20} are "prohibitive" laws.\textsuperscript{21} They forbid certain forms of violence

\textsuperscript{13} Supra note 8, at art. 76, Failure to Act, CDDH/1/325.
\textsuperscript{14} Supra note 8, at art. 77, Superior orders, CDDH/226, at 141.
\textsuperscript{15} Supra note 8, at art. 78, Extradition, CDDH/226, at 141.
\textsuperscript{16} Supra note 8, at art. 79 \textit{bis}, CDDH/1/241 and Add. I; CDDH/1/267.
\textsuperscript{17} Supra note 8, at art. 74 \textit{bis}, CDDH/1/221 Rev. 1.
\textsuperscript{18} The Conference has been divided into four Committees. Committee I deals with the general provisions of Protocols I and II. Committee II deals with provisions on the Wounded, Sick and Shipwrecked Persons, Civil Defense, and Relief. Committee III deals with the Civilian Population, Methods and Means of Combat, and a New Category of Prisoners of War. An Ad Hoc Committee deals with certain categories of conventional weapons and their use.
\textsuperscript{19} Under the Rules of Procedure, a provision adopted in Committee can only be reconsidered in the Conference if a majority of two-thirds of the representatives present and voting so decides. \textit{RULES OF PROCEDURE} 32, CDDH/2 Rev. 2 (1975).
\textsuperscript{20} United States \textit{v.} List, \textit{TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW \textit{No. 10}}, at 1228 (1948) [herein-after cited as \textit{TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS}].
\textsuperscript{21} Id. at 1247.
rather than authorize others, a concept recognized by Christian Wolff in his *Jus Gentium Methodo Scientifica Pertractatum*. This is due in part to the humanitarian motivations that have led to the creation of this body of rules.

The early treaties on warfare were not designed to be penal codes. The major humanitarian treaties pertaining to hostilities, including the Geneva Conventions of 1864, 1906, 1929 and the Hague Conventions of 1899 and 1907, contain explicit rules on what acts are prohibited during war operations. While some of these multinational agreements do contain provisions describing penal jurisdiction over prisoners of war they do not read like penal codes nor do they always describe with particularity the elements of the criminal offenses. This approach is not uncommon in older multinational agreements pertaining to inter-

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24 One of the motivations was stated by the President of the Hague Conference of 1899: "Our task is much simpler: we wish to save the life and property of the weak, the unarmed, and the inoffensive, but we by no means wish either to prescribe laws for heroes or to curb the impulses of patriots." J. Scott, *The Proceedings of the Hague Peace Conferences: The Conference of 1899*, at 551 (1920).


29 Hague Convention (IV), *supra* note 4.

national crimes,\textsuperscript{31} in part because of municipal law difficulties in directly incorporating treaties into domestic law.\textsuperscript{32}

The Oxford Manual developed by the International Law Institute in 1880,\textsuperscript{33} and the provisions on disciplinary and penal sanctions in the Geneva Conventions of 1949,\textsuperscript{34} depart from this approach to a limited extent. In addition to proscribing certain

\begin{itemize}
    \item \textsuperscript{32} Thus there are statements in United States case law to the effect that a treaty does not directly create a violation of criminal law. \textit{E.g.}, The Over the Top, 5 F.2d 838, 845 (D. Conn. 1925). See also 3 \textit{Wharton’s Criminal Law and Procedure}, § 1457, at 865 (R. Anderson ed. 1957). However, when treaties define acts which are violations of international law, such acts may under specified conditions be punishable by United States courts without an express codification of the crimes as violations of domestic law. Thus, the United States Constitution grants to Congress the authority to “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” U.S. Const. art. 1, § 8, cl. 10. It further grants Congress the right “[t]o make Rules for the Government and Regulation of the land and naval Forces.” U.S. Const. art. 1, § 8, cl. 13. In \textit{Ex Parte Quirin}, 317 U.S. 1 (1942), the Court stated that Congress had exercised these grants of power by sanctioning, within Constitutional limitations, the jurisdiction of military commissions to try persons for acts which were offenses under the rules of the laws of nations and the laws of war, and which were cognizable by such tribunals’ jurisdiction. \textit{Id.} at 28. In addition, the Court stated that
    \begin{quote}
    It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns. . . . Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable [sic] the courts. It chose the latter course.”
    \textit{Id.} at 29-30. See also United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820) (piracy). Under contemporary United States law, all violations of the rules of warfare, whether conventional or customary, are war crimes in a broad sense. FM 27-10, \textit{supra} note 3, ¶ 499, at 178. The seriousness of the violation of the law and the kind of sanctions to be applied (penal or administrative) may differ considerably.
    \item \textsuperscript{33} See Manual Published by the Institute of International Law (Oxford Manual), adopted 9 September 1880, \textit{reprinted in} D. Schindler & J. Toman, \textit{The Laws of Armed Conflict: A Collection of Conventions, Resolutions and Other Documents} 35 (1975). Article 84 states explicitly that “offenders against the laws of war are liable to the punishment specified in the penal law.”
    \item \textsuperscript{34} First Geneva Convention, \textit{supra} note 7, at arts. 49, 50; Second Geneva Convention, \textit{supra} note 7, at arts. 50, 51; Third Geneva Convention, \textit{supra} note 7, at arts. 82-108, 129, 130; and Fourth Geneva Convention, \textit{supra} note 7, at arts. 64-78, 117-126, 146-147.
\end{itemize}
activities, these provisions obligate the parties to enact legislation to provide effective penal sanctions for those specified violations of the Conventions that are deemed to be universal crimes. The provision which provides for "grave breaches" was drafted in response to the need to remove any ambiguity regarding the legal right to punish offenders of this branch of law. To a large extent, the "grave breaches" codified by the Geneva Conventions, describe the common elements of the crimes of universal jurisdiction.

B.

Substance of Penal Sanctions in the Law of Armed Conflict

Customary Law

The concept of penal sanctions in the law of war is based on certain fundamental assumptions. One of the most crucial of these is that those who are entitled to the juridical status of "privileged combatant" are immune from criminal prosecution for those war-like acts which do not violate the laws and customs of war but which might otherwise be common crimes under municipal law. This is a concept recognized by the classic publicists, including Belli, Grotius, Pufendorf, and Vattel. It was recognized in


36 See 3 I.C.R.C., Commentary, Geneva Convention Relative to the Treatment of Prisoners of War 617-20 (J. Pictet ed. 1960). The particular acts that are deemed to be grave breaches are discussed in Section I.B.2 of this survey. The distinction between grave breaches and war crimes is discussed in Section V.A.15.

37 See note 101 infra.

38 Augustine wrote that "[t]he soldier who has slain a man in obedience to the authority under which he is lawfully commissioned, is not accused of murder by any law of his state; nay, if he has not slain him, it is then he is accused of treason to the state, and of despising the law. But if he has been acting on his own authority, and at his own impulse, he has in this case incurred the crime of shedding human blood." A. Augustine, The City of God, in 1 The Works of Aurelius Augustine, Book 1, ch. 26, at 37 (M. Dods trans. 1462). See also id., ch. 21, at 32.


40 H. Grotius, Commentary on the Law of Prize and Booty 42, 45, 68, 81 (G. Williams trans. 1604).


Article 57 of the Lieber Instructions of 1863, which states that "[s]o soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses." Under the law of the United States, any killing while on combat operations which is not violative of the laws of war is recognized to be justifiable homicide. Civil law courts recognized this concept in the post-World War II trials when they provided immunity to those defendants charged with violations of domestic criminal law if it was established that their acts were privileged under international law.

43 War Dep't, GO No. 100, Instructions for the Government of Armies of the United States in the Field (24 April 1863), reprinted in D. Schindler & J. Toman, supra note 33, at 3.

44 Id. at 11.

45 One statement of this law is that "[a] homicide committed in the proper performance of a legal duty is justifiable. Thus . . . killing in suppression of a mutiny or riot . . . killing an enemy in battle . . . are cases of justifiable homicide." United States, Manual for Courts-Martial 351 (1951). See also I.C.R.C., Respect of the Geneva Conventions, Measures Taken to Repress Violations: Report Submitted to the International Committee of the Red Cross to the XXth and XXIst International Conferences of the Red Cross 6 (1971). An example of this law is a decision in which a court found that it had no jurisdiction to punish Mexican soldiers for killing United States soldiers in battle. Arce v. Texas, 83 Tex. Crim. 292, 202 S.W. 951 (Crim. App. 1918). See also 1 Wharton's Criminal Law and Procedure § 118, at 258 (R. Anderson ed. 1957). This concept was recognized by a United States Military Tribunal in United States v. List, supra note 20, at 1236. The Tribunal stated "[i]t cannot be questioned that acts done in time of war under the military authority of an enemy cannot involve any criminal liability on the part of officers or soldiers if the acts are not prohibited by the conventional or customary rules of war." Id. But see United States v. Ohlendorf, 4 Trials of War Criminals Before the Nuernberg Military Tribunals 493 (1948). The fundamental policies underlying this concept have been summarized as follows:

What must be emphasized is that acts committed in war by enemy civilians and members of armed forces may be punished as crimes under the belligerent's municipal law only to the extent that such acts are violative of the international law on the conduct of hostilities. Clearly the rules of warfare should be pointless, with dissolution on both policies and sanctions, if every single act of war may by unilateral municipal fiat be made a common crime and every prisoner of war executed as a murderer. International law delineates the outer limits of the liability of supposed war criminals; and conformity with that law affords a complete defense for the violent acts charged.

46 See Lord Wright, Netherlands Law Concerning Trials of War Criminals, 11 Law Reports of Trials of War Criminals 86, 87 (U.N. War Crimes Comm'n 1949)
Another fundamental assumption underlying the concept of penal sanctions in the laws of war is that there are various types of crimes that might be committed during wartime, the commission of which produces different consequences. The concept of war crimes, as understood under existing laws and contemporary literature, has a technical meaning.\textsuperscript{47} War crime prosecutions after World War II generally used the phrase "war crime" to mean those acts which are violative of the laws and customs of war for which there is no immunity under the laws of war even if committed by privileged belligerents. The United States Supreme Court indicated in 1942 that acts such as espionage, sabotage, and guerrilla warfare committed by individual combatants not fulfilling the criteria of Article 1 of the Hague Regulations\textsuperscript{48} were war crimes in a broad sense.\textsuperscript{49} The common understanding after the


\textsuperscript{47} The term "war crime" generally refers only to violations of the laws and customs of war. See FM 27-10, supra note 3, ¶ 499, at 178; 3 I.C.R.C., Commentary, supra note 36, at 421-22. Other international crimes which are often discussed in connection with war crimes are crimes against peace and crimes against humanity. See FM 27-10, supra note 3, ¶ 498, at 178. Crimes against humanity and crimes against peace were defined in Article 6 of the Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280.

\textsuperscript{48} Hague Regulations, supra note 4, at art. 1, states that the laws, rights, and duties of war apply not only to armies but also to the militia and volunteer groups which fulfill the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

These requirements are similar to those found in Article 4 (A)(2) of the Third Geneva Convention, supra note 7. A controversial collateral requirement is that those seeking prisoner of war status must prove that they belong to a party to the conflict. See Third Geneva Convention, supra note 7, at art. 4(A)(2). But see Nurick & Barrett, Legality of Guerrilla Forces under the Laws of War, 40 Am. J. Int'l L. 563, 567-70 (1946); Military Prosecutor v. Omar Mahmud Kassem and Others, 42 Israel L. Rep. 470, 476-78 (Israeli Mil. Ct., Ramallah, Jordan, 1969); Dinstein, supra note 10, at 282-83; Schwartzzenberger, Human Rights and Guerrilla Warfare, 1 Israel Y.B. Human Rights 246, 248-52 (1971).

The criteria specified in Article 1 of the Hague Regulations, supra note 4, and Article 4 of the Third Geneva Convention, supra note 7, are conditions which are implicitly applicable to regular armed forces also. See also Ex Parte Quirin, 317 U.S. 1, 36 n.12 (1942); In Re Yamashita, 327 U.S. 1, 15-16 (1945); Osman Bin Haji Mohamed Ali v. Public Prosecutor, [1969] A.C. 430, 453-54 (P.C. Malaysia 1968); The War Office, The Law of War on Land Being Part III of the Manual of Military Law, ¶ 96, at 34 (1958).

\textsuperscript{49} Ex Parte Quirin, 317 U.S. 1, 31, 34, 36 (1942).}
war, however, has reflected a contrary view expressed by Professor Baxter in a seminal article published in 1951,50 which was later adopted by the Judicial Committee of the Privy Council.51 A "privileged combatant" was distinguished from the "unprivileged combatant."52 The privileged combatant is the individual who, while meeting the characteristics stated in Article 1 of the Hague Regulation,53 is entitled, upon capture by the adverse party, to prisoner of war status and immunity from prosecution for legitimate acts of war.54 Those individuals not meeting these particular criteria, such as spies, saboteurs, and civilians who do not distinguish themselves as required, are classified as unprivileged belligerents. Their acts, which might be acts of patriotism, are not prohibited under international law, nor are they treated as war crimes.55 Rather, the injured belligerent is entitled, for rea-

52 Baxter, supra note 50, at 343.
53 See note 48 supra.
54 As stated in United States v. List, "[i]t is only this group that is entitled to treatment as prisoners of war and incurs no liability after capture or surrender." Supra note 20, at 1246. See also Baxter, The Municipal and International Law Basis of Jurisdiction Over War Crimes, 23 Brit. Y.B. Int'l L. 382, 385 (1951) and note 45, supra. Those who are properly entitled to prisoner of war status receive this immunity. It is an immunity recognized in Article 87 of the Third Geneva Convention, supra note 7, which states that "[p]risoners of war may not be sentenced . . . to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts." (Italics Added). This provision, which is based on Article 46 of the 1929 Prisoners of War Convention, supra note 27, has been interpreted to mean that prisoners of war can only be charged with crimes that are violations of the laws of war and those other offenses which a Detaining Power would punish its own forces for committing." In Re Rauter, 16 Ann. Dig. 526, 528-29 (Special Court of Cassation, Holland, 1949); Booyzen, Terrorist, Prisoners of War, and South Africa, S. Afr. Y.B. Int'l L. 14, 38 (1975); see also 3 I.C.R.C., Commentary, supra note 36, at 418-22; but see Military Prosecutor v. Omar Mahmud Kassen and Others, 42 Israel L. Rep. 470, 472 (Israeli Mil. Ct., Ramallah, Jordan, 1969); Abi-Saab, Wars of National Liberation and the Laws of War, 3 Annales D'Etudes Internationales 93, 114 (1972); and 3 I.C.R.C., Commentary, supra note 36, at 40. Those who are not legally entitled to the status of prisoner of war may be denied the international law immunity from prosecution for legitimate acts of war. G. Draper, The Red Cross Conventions 55 (1958); Baxter, supra note 50, at 344.
55 J. Scott, supra note 24, at 547, 552; Baxter, supra note 50, at 335; Mallison & Jabri, The Juridical Characteristics of Belligerent Occupation and the Resort to Resistance by the Civilian Population: Doctrinal Development and Continuity, 42 Geo.
sons of deterrence, to punish those individuals who fall into his custody. They are not accorded immunity under international law for any hostile act they may have committed. As a result, acts of unprivileged belligerency are not considered to be war crimes in a strict sense unless they violate one of the specific rules of warfare.

Legislation and Treaties

Many of the proscribed acts that may constitute war crimes are defined in various declarations issued as a result of World War II, including the Charter of the International Military Tribunal, Control Council Law Number 10, and various municipal statements of law that were developed for the purpose of indicting alleged war criminals. The 1949 Geneva Convention’s grave breaches, which are recognized under United States law to be war crimes, relate to certain acts committed against persons or property protected by the Conventions. These acts include wilful killing, torture or inhuman treatment, including biological


56 United States v. List, supra note 20, at 1247; H. TAYLOR, A TREATISE ON INTERNATIONAL PUBLIC LAW 535 (1901).

57 Article 6 of the Charter of the International Military Tribunal, supra note 49, states that the following acts are within the jurisdiction of the Tribunal: War Crimes: Namely, the violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.


59 See, e.g., the Netherlands list of war crimes in 11 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93-94 (1949) and the Australian list in 5 id. at 94-96 (1948). For a summary of the substantive offenses, see Digest of Laws and Cases, in 15 id. at 99-134 (1949).

60 Common Articles 50/51/130 of the First, Second and Third Conventions, supra note 7; Fourth Convention, supra note 7, at art. 147.

61 FM 27-10, supra note 3, ¶ 502, at 179, and ¶ 504, at 180.
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 a fair and regular trial as prescribed in the Conventions. 62 Many acts which were serious crimes during World War II were not included in this listing. 63 These acts may be breaches of the Conventions which are not subject to universal jurisdiction 64 for purposes of the extradition provisions of the 1949 Geneva Conventions. 65 Nevertheless, these acts remain serious crimes under customary law. 66

For purposes of this study, a war crime or "grave breach" consists of those acts prohibited by the laws of war which even a privileged belligerent could not perform without incurring liability under municipal law, and for which there is no immunity under international law.

62 See note 60 supra.

63 See, e.g., (1) the use of prisoners of war for prohibited classes of work, such as the construction of fortifications on the front lines, In Re Lewinski, 16 Ann. Dig. 509, 516-18 (Brit. Mil. Ct., Hamburg, W. Ger., 1949); (2) the compulsory use of prisoners of war for unloading arms and ammunition from military aircraft, In Re Student, 4 Law Reports of Trials of War Criminals 118, 119 (Brit. Mil. Ct., Luneberg, W. Ger., 1946); (3) the compulsory employment of prisoners of war in the production of armaments, United States v. Krupp, 9 Trials of War Criminals Before the Nuremberg Military Tribunals 1197, 1395 (1948); (4) the utilization of unsanitary or inadequate housing facilities for prisoners of war, In Re Sueo, 14 Ann. Dig. 208, 209 (Temp. Ct. Martial, Makassar, Netherlands East Indies, 1947); In Re Killinger, 3 Law Reports of Trials of War Criminals 67 (Brit. Mil. Ct., Wuppertal, W. Ger., 1945); (5) the giving of false information to the Protecting Power concerning the condition of prisoners of war, United States v. Weiszsaeccker, 14 Trials of War Criminals Before the Nuremberg Military Tribunals 436-67 (1949); (6) exposing prisoners to public humiliation, In Re Hirota, 15 Ann. Dig. 356, 371-72 (Int′l Mil. Trib., Tokyo, Japan, 1948); (7) abandoning the responsibility for protecting prisoners of war by transferring them to unauthorized civilian organizations, In Re Von Falkenhorst, 11 Law Reports of Trials of War Criminals 18, 19 (Brit. Mil. Ct., Brunswick, W. Ger., 1946); United States v. Leeb, 11 Trials of War Criminals Before the Nuremberg Military Tribunals 492 (1948); (8) the infringement of the religious rights of prisoners, Trial of Tanake Chuichi, 11 Law Reports of Trials of War Criminals 62 (Austl. Mil. Ct., Rabaul, New Guinea, 1946).

64 See note 35 supra. Breaches of the Conventions are distinguishable from grave breaches primarily by not being made subject to extradition. These acts, however, may be punished both through judicial and non-judicial procedures.

65 For the extradition provision, see note 89 infra.

III.

ATTEMPTS TO ADDRESS THE CONCEPT OF PENAL SANCTIONS IN INTERNATIONAL AGREEMENTS

A. General

Apart from the inclusion of provisions on breaches and grave breaches in the Geneva Conventions of 1949, there have been several efforts to define, codify, and implement the concept of penal sanctions with respect to armed conflicts. Several agreements pertaining to proscribing certain acts that might be committed in war have come into force, such as the Genocide Convention and the Convention for the Protection of Cultural Property in the Event of Armed Conflict. Two conventions dealing with statutory limits on the prosecution of war crimes, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and the European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, have also come into force.

Further attempts to strengthen the law have occurred in public and private international organizations, including various organs of the United Nations and the I.C.R.C.

71 In 1946, the General Assembly of the United Nations adopted a Resolution on the Extradition and Punishment of War Criminals, G.A. Res. 3(1), U.N. Doc. A/64 at 9 (1946), and a Resolution on the Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95(1), 1 GAOR Pt. II (1946). In the latter resolution, it directed the Committee on the Codification of International Law to treat the codification inter alia, of the principles recognized in the Charter of the Nuremberg Tribunal and in that Tribunal’s judgment as a matter of primary importance. In response to these resolutions, the International Law Commission formulated the principles in 1950 in a document entitled Formulation of the Nuremberg Principles, U.N. Doc. A/CN.4/22, [1950], 2 Y.B. INT’L L. COMM’N 181 (1957), and Collateral Principles were
B.

I.C.R.C. INITIATIVES

The I.C.R.C. has maintained a constant interest in the implementation of the penal sanctions provisions of the 1949 Geneva Conventions. It has traditionally been the leading organization in the development and enforcement of those laws of armed conflict devoted to the protection of victims of war that are codified in the Geneva Conventions. Several resolutions of I.C.R.C. affiliated organs and of the United Nations have encouraged these efforts. The I.C.R.C. has studied the possibility of establishing a model penal code and has prepared studies on the “Respect for the Geneva Conventions — Measures Taken to Repress Violations.”

These efforts contributed to the I.C.R.C.’s effort to convene two sessions of a Government Experts Conference to study the possibility of new Protocols to the 1949 Conventions. The Swiss Government subsequently convened a Diplomatic Conference to study the draft Protocols that were developed to supplement the 1949 Geneva Conventions.


I.C.R.C., Respect of the Geneva Conventions, Measures Taken to Repress Violations, (XXVth International Conference of the Red Cross 1965); and I.C.R.C., Respect of the Geneva Conventions, Measures Taken to Repress Violations, (XXIst International Conference of the Red Cross 1969).

The subject of penal sanctions was discussed at the Red Cross Experts Conference at the Hague in 1971 and several changes were proposed for revising the law. I.C.R.C., Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (The Hague, Mar. 6, 1971): Report of the Work of the Conference 31-32 (1971). These issues were discussed at the First Session of the Governments Experts Conference. I.C.R.C., Conference of Government
IV.
THE DIPLOMATIC CONFERENCE NEGOTIATIONS

General

The draft Protocols submitted by the I.C.R.C. to the First Session of the Diplomatic Conference contained a section entitled "Repression of Breaches of the Conventions and of the Present Protocol." Protocol II on non-international conflicts also contained a provision that pertained to penal prosecutions. The I.C.R.C. draft articles and the proposed amendments to them formed the basis of discussion in the Conference Committees during the first three sessions of the Conference.


1. To reaffirm and develop the principles of personal responsibility for war crimes;
2. To set up an international criminal tribunal or, pending its establishment, to make at least arrangements for some kind of international presence at proceedings concerning war crimes brought before a national tribunal;
3. To elaborate model laws which would permit the standardization of penalties for breaches of humanitarian law;
4. To set up an international penal code;
5. To draft a provision relative to the question of superior orders;
6. To supplement those articles in the Conventions concerning breaches by setting up a provision relative to breaches by omission.


76 I.C.R.C. Draft Protocol I, supra note 8, at pt. V, § II.

77 Amendments proposed prior to the Third Session are collected in I.C.R.C., Table of Amendments, CDDH/225 (1975).
Provisions on penal sanctions were adopted by Committees of the Diplomatic Conference during the second and third sessions. At the Second Session, Committee II adopted Article II\textsuperscript{78} on the protection of persons against unjustified acts or omissions endangering physical or mental health and integrity. At the Third Session, Article 74 on the repression of breaches\textsuperscript{79} and Article 76 on the failure to act\textsuperscript{80} were adopted by Committee I.\textsuperscript{81}

V.

ADOPTED ARTICLES

A.

Article 74

Article 74 on repression of breaches deals primarily with new categories of grave breaches. It is the primary provision on penal sanctions in Protocol I and was the focus of negotiations for Committee I during the Third Session.

The negotiations on Article 74 in the plenary were marked by continuous references to the goal of ensuring that the specific acts that would be made grave breaches should be clearly defined and that the requisite mental element needed for an act to be a crime should be made clear.\textsuperscript{82} In essence many of the delegations were of the common conviction that the grave breaches provision should reflect the common elements required in municipal law for an act to be considered a crime. Among these were the nature of the criminal act, the requisite mental state, the causation that was necessary, and the result that had to follow.\textsuperscript{83}

As was the case in 1949, the catalogue of grave breaches was intended to be one of clearly identifiable and reprehensible acts that involved a high degree of guilt and which were committed against clearly specified and defenseless persons who were at the mercy of the enemy.\textsuperscript{84} Article 74 adopted the approach of mak-

\textsuperscript{78} Supra note 8, at art. 11, CDDH/I/II/276.

\textsuperscript{79} Supra note 8, at art. 74, CDDH/I/326.

\textsuperscript{80} Supra note 8, at art. 76, CDDH/I/325.

\textsuperscript{81} Article 10 of Protocol II on penal prosecutions (CDDH/I/331) was also adopted by Committee I.

\textsuperscript{82} See generally CDDH/I/SR. 43, CDDH/I/SR. 44, CDDH/I/SR. 45 passim (1976); CDDH/I/SR. 64, at 8 (1976); CDDH/I/SR. 65, at 18 (1976).

\textsuperscript{83} See note 101 infra.

\textsuperscript{84} CDDH/I/SR. 44, at 15 (1976). The Conference decided in favor of this approach rather than that of codifying all of the violations of the laws of war.
ing prohibited acts grave breaches when committed against individuals who were not a party's own nationals. The negotiations were also marked by statements to the effect that the chief purpose of making a prohibited act a grave breach was to make such an offense a universal crime and thus an extraditable one that was subject to penal sanctions as opposed to administrative ones.\(^8\)

The majority of delegates decided to adopt the recommendation of the I.C.R.C. that the general approach of the 1949 Conventions should be adopted in the Protocol. In part, this was due to caution. As pointed out by one delegate, the 1949 provisions had not been successfully implemented by many nations because of various difficulties.\(^8\) To make the new treaty more complicated would not be propitious.\(^8\) It was also deemed necessary to provide adequate guidelines for the national legislators who were to assume the task of implementing the new provisions into municipal legislation.\(^8\)

1. Article 74, paragraph 1.

Paragraph 1 of Article 74 provides that the provisions of the 1949 Conventions relating to the repression of breaches and grave breaches will apply to the repression of breaches of the Protocol. In essence, this incorporates the substantive and procedural provisions found in the common articles on penal sanctions in each of the four Geneva Conventions. These provisions provide for extradition and the enactment of the national legislation necessary to provide effective penal sanctions for persons committing or ordering the commission of grave breaches.\(^8\)

A proposed codification consisting of 54 articles was sponsored by one delegation. CDDH/56/Add. 1. Corr. 1.

\(^8\) See, e.g., CDDH/I/SR. 65, at 18 (1976); CDDH/I/SR. 45, at 6 (1976).

\(^8\) CDDH/I/SR. 45, at 20 (1976). With the exception of the major war crimes trials after World War II, the enforcement of the laws of war through penal sanctions has been left to national courts. In part, this is due to the requirements of the Geneva Conventions. See note 102 infra. Trials of captured enemies for war crimes have not taken place after recent conflicts. In part, this is because of the fact that parties have generally found that a major war crimes program stands in the way of achieving other high priority aims. These aims include the attaining and holding of a cease fire, settling the issues which led to the conflict, and repatriating prisoners of war and other detained persons.

\(^8\) CDDH/I/SR. 45, at 20 (1976).

\(^8\) CDDH/I/SR. 43, at 11 (1976).

\(^8\) The common provisions on extradition, articles 49/50/129/146, supra note 7, provide that:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be com-
are obligated to employ all necessary means to suppress, by penal, administrative, or disciplinary measures, all other acts contrary to the provisions of the Conventions or the Protocol.\textsuperscript{90}

Paragraph 1 also incorporates the safeguards of proper trial and defense for all accused persons which are no less favorable than those provided for by Article 105 and subsequent provisions in the Third Convention.\textsuperscript{91}

2. Article 74, paragraph 2.

Paragraph 2 provides that acts described as grave breaches in the 1949 Conventions are also grave breaches of the Protocol if they are committed against certain classes of individuals protected by the Protocol. It stipulates that these acts will be grave breaches if committed against persons entitled to prisoner of war status under the Protocols;\textsuperscript{92} refugees,\textsuperscript{93} stateless persons,\textsuperscript{94} or sick, wounded, shipwrecked, medical or religious persons, or medical units or transports of the adverse party that are protected by the Protocol.\textsuperscript{95} It does not create new offenses as such, but rather, expands the category of persons to whom protection is granted.

3. Article 74, paragraph 3.

Paragraph 3 enumerates new categories of grave breaches. This provision lists the acts which are to be made crimes under domestic legislation. These acts are ones that may be classified as combat offenses.
The extension of the concept of grave breaches to cover combat offenses that may occur in violation of the Protocol was deemed desirable by some delegates only if the humanitarian, juridical, and military interests of the belligerents were taken into account.\(^9\) One delegate pointed out that the provision had to be applied by armies in the field, and that to be effective, it had to be fair and credible.\(^7\) Other delegations indicated that it was necessary to minimize the exposure of combatants to penal risks for their legitimate acts of war.\(^8\)

Paragraph 3 defines as grave breaches certain methods and means of warfare which are prohibited by other provisions of the Protocol.\(^9\) The preambular paragraph incorporates by reference the penal provisions of Article 11 relating to the protection against unjustifiable endangerment of health of persons in the hands of an adverse party or those who are otherwise deprived of liberty as a result of the armed conflict. The preambular portion of the paragraph also creates requirements which apply to all of the succeeding subparagraphs. These requirements are extremely important in that they substantially restrict the negative impact from a criminal law standpoint of each of the subparagraphs if they were to be taken in isolation. If any of the given requirements of the preambular sentence are missing, none of the offenses in the following subparagraphs can be considered a grave breach.

The preambular language states that the subsequent acts are to be made grave breaches if they are: (1) committed wilfully; (2) in violation of the relevant provisions of the Protocol; and (3) cause death or serious injury to body or health.\(^10\) These require-

\(^9\) CDDH/I/SR. 45, at 18 (1976).

\(^7\) CDDH/I/SR. 46, at 6 (1976).

\(^8\) CDDH/I/SR. 47, at 4 (1976).

\(^9\) The other provisions referred to were adopted by Committee III of the Conference.

\(^10\) The fact that the Protocol included certain offenses that could be committed in combat led one delegation to argue against the requirement that death or injury must result in order for an act to constitute a grave breach. The reason was that the Hague Regulations of 1907, \textit{supra} note 4, do not require this result. CDDH/I/SR. 65, at 14 (1976). The assumption made was that the Hague Regulations were being incorporated into the Protocol, and that the rules codified in the Hague Regulations were intended to serve as penal norms. Neither of these assumptions is justified with respect to the Protocol. While the Protocol does encompass some of the situations heretofore regulated only in the Hague Regulations, the Protocol is not intended to replace the 1907 agreement, nor is it intended to be an exclusive codification of the laws of war. To the extent that the 1907 Hague Regulations were not designed to function directly as penal codes, they did not detail the elements of each of the prohibited acts. Nor did they identify the aggravating circumstances which
ments are quite compatible with the common law concept of a crime. The preambular language defines the specified acts that are prohibited, indicates what the requisite mens rea is, and contains a statement of the specific results that must follow before the prohibited act may be deemed to be a crime. To the extent that this clause was inserted into the Protocol, it eliminates the chances that spurious war crime allegations can be successfully prosecuted.

4. Article 74(3), subparagraph (a).

Subparagraph (a) states that making the civilian population or individual civilians the object of attack is a grave breach when the preambular requirements are met. This paragraph is based on Article 46(2) of Protocol I which prohibits making the civilian population or individual civilians the object of an attack. The provision applies only where attacks are directed at civilians and does not apply in cases where the attacks are directed against military objectives, but do cause incidental civilian casualties. Hence, the grave breach denounced by Article 74(3)(a) occurs only when would distinguish ordinary breaches from those considered so serious as to justify their designation as universal crimes subject to extradition and to the jurisdiction of all Parties.

101 See J. Hall, General Principles of Criminal Law 18 (2d. 1960); 4 W. Blackstone, Commentaries on the Laws of England 7, 8; W. LaFave & A. Scott, Handbook on Criminal Law 5, 7 (1972). See also 1 Russel on Crimes 17-60 (12 ed. J. Turner 1964); 1 J. Bishop, A Treatise on Criminal Law 133-35 (9th ed. J. Zane & C. Zollman eds. 1892). Greenspan notes, Crime in International Law, as in Municipal Law, consists of two elements, the performance of an act forbidden by law, which may be a lawful act performed in an unlawful manner, and the presence in the person executing the act of a guilty or culpable condition of mind, which is known in law as mens rea. Both must be present at the same time to secure conviction.

M. Greenspan, The Modern Law of Land Warfare 477 (1959) (footnotes omitted). This view is reflected in United States v. List: In determining the guilt or innocence of these defendants, we shall require proof of a causative, overt act or omission from which a guilty intent can be inferred before a verdict of guilty will be pronounced. Unless this be true, a crime could not be said to have been committed unlawfully, willfully, and knowingly as charged in the indictment. Supra note 20, at 1261. These elements are reflected in the 1949 Geneva Conventions' provisions on grave breaches, supra note 60. These provisions indicate that grave breaches consist of clearly specified, prohibited acts against persons or property protected by the Convention. The acts must be committed willfully or wantonly (the mens rea aspect). A similar approach is adopted with respect to piracy under the High Seas Convention, April 29, 1958, arts. 15 & 16, [1962] 2 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

102 Art. 46, Protection of the civilian population, CDDH/III/272.
an individual knowingly attacks a civilian with the specific knowledge that he is a civilian and death or serious injury results. It is noted that under Article 46(2), civilians who assume a direct role in the hostilities lose their protection from attack; thus, attacks against such civilians would not constitute either a grave breach as designated in subparagraph (a) of Article 74(3) or any breach of the Protocol.

While this provision makes the proscribed act a grave breach of the Protocol, it does not change existing customary law. It is a time-honored concept that civilian noncombatants are immune from direct attack. The incidental effects of a battle in which civilians are injured would not make the act a crime. In part, this is a concomitant of the concept that what is prohibited is the singling out of civilians as the object of an attack. Thus, while attacking military targets in a city and causing incidental death or injury to civilians would not be the offense denounced, singling such individuals out for injury would be.

103 The traditional concept has been that "[t]he noncombatant personnel, to the extent that they refrain from participation in actual fighting, are not liable to direct assault as distinguished from the incidental consequences of military operations." M. McDOUGAL & F. FELICIANO, supra note 1, at 573-74. Change No. 1 to FM 27-10 states:

A. Attacks Against the Civilian Population as Such Prohibited. Customary international law prohibits the launching of attacks (including bombardment) against either the civilian population as such or individual civilians as such.


104 This distinction was made by the United States Military Tribunal in United States v. Ohlendorf:

A city is bombed for tactical purposes; communications are to be destroyed, railroads wrecked, ammunition plants demolished, factories razed, all for the purpose of impeding the military. In these operations it inevitably happens that nonmilitary persons are killed. This is an incident, a grave incident to be sure, but an unavoidable corollary of battle action. The civilians are not individualized. The bomb falls, it is aimed at the railroad yards, houses along the tracks are hit and many of their occupants killed. But that is entirely different, both in fact and in law, from an armed force marching up to the same railroad tracks, entering those houses abutting thereon, dragging out the men, women, and children and shooting them.

5. Article 74(3), subparagraphs (b) and (c).

Subparagraph (b) makes it a grave breach to launch an indiscriminate attack affecting the civilian population or civilian objects with the knowledge that such attacks will cause excessive loss of life, injury to civilians or damage to civilian objects as defined in Article 50(2)(a)(iii). Subparagraph (c) prohibits launching an attack against works or installations containing dangerous forces with the knowledge that such attacks will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in the same cited article.

The phraseology employed in these paragraphs is based on that used in Article 46(3)(b), 49 and 50(2)(a)(iii). Article 46(3)(a) prohibits indiscriminate attacks, which are defined as those acts of violence not directed at a specific military objective or which employ a method or means of combat which cannot be directed at a specific military objective, or the effects of which cannot be limited as required by other provisions of the Protocol. This portion of Article 46 encompasses within the concept of indiscriminate attacks those attacks prohibited by Article 50(2)(a)(iii), which deals with any act of violence which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage

(1947). But see United States v. List, supra note 20, at 1253. The same concept was recognized by Victoria, who discussed the matter in reference to the concept of proportionality. F. VICTORIA, DE INDIS ET DE IVRE BELLI REFLECTIONES 179 (J. Bate trans. 1696).


106 Art. 50, Precautions in attack, CDDH/III/268. Article 50(2), subparagraph (a) provides that those who plan or decide upon an attack shall do everything feasible to verify that the objectives to be attacked are indeed legitimate military targets and are not immune under the Protocol; that they shall refrain from deciding to launch any attack which may be expected to cause incidental injury or loss of civilian life or property which would be excessive in relation to the concrete and direct military advantage anticipated; and that they are to take all feasible precautions in the choice of means and methods of attack with a view to avoiding and minimizing the incidental loss of civilian life, injury to civilians, and damage to civilian objects.

107 Art. 49, Works and installations containing dangerous forces, CDDH/III/267.
expected. In essence, this is a codification of the concept of proportionality.\textsuperscript{108}

Subparagraph (c) is also based on Article 49, which provides special protection for dams, dikes, and nuclear electrical power stations, as well as other military objectives in the vicinity of such objects. Article 49 provides that even when these objects are military objectives, they may not be attacked when the attack may be expected to cause the release of what is termed as "dangerous forces" and a consequent severe loss in the civilian population unless these items are used in a regular and significant way, and in direct support of military operations. An attack must be the only feasible way to terminate such support. In addition, even when these attacks are justified under the applicable rules, all practical precautions must be taken to avoid releasing the dangerous forces. A collateral obligation is that the parties are to avoid locating military objectives in the vicinity of dams, dikes or nuclear electrical generating stations.\textsuperscript{109}

It should be noted that the substance of subparagraph (c) is in fact covered by subparagraph (b). Subparagraph (c), however, was included to satisfy those States that desired to have an explicit reference in Article 74 to the works and installations containing dangerous forces protected by Article 49.

These paragraphs limit culpability to attacks which are launched with the knowledge that they will cause disproportionate injury to civilians or damage to civilian objects. The requirement that the attack be launched "with the knowledge" that it will cause disproportionate incidental injury ensures that commanders who, in the context of a combat situation, mistakenly initiate attacks that do cause disproportionate civilian losses, will not have committed a grave breach. In such cases, the requirement of beforehand knowledge of the attack's disproportionality

\textsuperscript{108} This concept is reflected in FM 27-10:

\ldots loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained. Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places within the meaning of the preceding paragraph but also that these objectives may be attacked without probable losses in lives and damage to property, disproportionate to the military advantage anticipated.

FM 27-10, supra note 3, Change No. 1, ¶ 41, at 5 (1976). There were several objections to the inclusion of the concept of proportionality into the list of grave breaches, e.g., Report to Committee I on the Work of Working Group A, CDDH/I/324, at 4; CDDH/I/SR. 64, at 5, 19 (1976).

\textsuperscript{109} Art. 49, ¶ 5, CDDH/III/267.
would not be met. The standard as to what is disproportionate would be based on the commander's perception at the time that the decision had to be made, and would not be a hindsight judgment as to whether the damage was, in fact, disproportionate.110

6. Article 74(3), subparagraph (d).

Subparagraph (d) provides that making non-defended localities and demilitarized zones the object of attack will be a grave breach. This subparagraph is based on Articles 52111 and 53,112 which were adopted by Committee III at the Second Session. Protection under these Articles ceases if the adverse party fails to meet the requirements established by those Articles for such localities and zones. Mistakenly attacking such protected areas would not constitute a grave breach because this would not be a wilful violation as required by the preambular language of paragraph 3.

Article 52 provides that non-defended localities must meet certain conditions. They are to be inhabited places near or in a zone in which armed forces are in contact and which is open for occupation by an adverse party.113 Among the conditions that

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110 See, e.g., United States v. Rendulic, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1296 (1947) in which the court stated that:

There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect [sic] can well sustain this conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal. After given [sic] careful consideration to all the evidence on the subject, we are convinced that the defendant cannot be held criminally responsible although when viewed in retrospect, the danger did not actually exist.

111 Art. 52, Non-defended localities, CDDH/III/269.


113 Under Article 25 of the 1907 Hague Regulations, supra note 4, "[t]he attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited." The United States Army FM 27-10, supra note 3, has interpreted this provision as follows:

An undefended place, within the meaning of Article 25, HR, is any inhabited place near or in a zone where opposing armed forces are in contact which is open for occupation by an adverse party without resistance. In order to be considered as undefended, the following conditions should be fulfilled:

(1) Armed Forces and all other combatants, as well as mobile weapons and mobile military equipment, must have been evacuated, or otherwise neutralized;

(2) no hostile use shall be made of fixed military installations or establishments;
they must fulfill are: (a) that armed forces and other combatants as well as mobile weapons and other military equipment have been evacuated; (b) that no hostile use is made of fixed military installations or establishments; (c) that no acts of warfare are committed by the authorities or by the population; and (d) that no activity in support of military operations is undertaken in the area. Certain requirements are also established for notifying the adverse belligerent about such areas. The conditions which demilitarized zones must fulfill are similar to those for non-defended areas.\footnote{114}{See, e.g., art. 53, ¶ 3, Demilitarized zones, CDDH/III/274.}

7. Article 74(3), subparagraph (e).

This subparagraph, which is based on Article 38\,\(\text{bis}\), provides that it is a grave breach to make a person the object of an attack knowing that he is hors de combat. A person under Article 38\,\(\text{bis}\) is hors de combat if he is: (1) in the power of an adverse party; or (2) has clearly expressed an intention to surrender; or (3) has been rendered unconscious or is otherwise incapacitated by wounds or sickness and is therefore incapable of defending himself. In any case, it is necessary that he abstain from any hostile act and not attempt to escape. When read in conjunction with the requirements of the preamble of paragraph 3, the prohibited acts defined in Articles 38\,\(\text{bis}\) and 74(3)(e) must be directed against an individual who is hors de combat and must be carried out with a specific knowledge that he is such a person. Thus, attacks against military objectives which result in incidental injury to persons hors de combat do not fall within the purview of this provision; nor do attacks carried out against persons hors de combat in the honest belief that they are active combatants. Such safeguards prevent the prosecution of soldiers for grave breaches if their action was legitimate or resulted from honest mistakes in a combat situation.

\(\text{(3) no acts of warfare shall be committed by the authorities or by the population; and,}\)

\(\text{(4) no activities in support of military operations shall be undertaken.}\)

The presence, in the place, of medical units, wounded and sick, and police forces retained for the sole purpose of maintaining law and order does not change the character of such an undefended place.


\footnote{115}{Art. 38\,\(\text{bis}\), Safeguard of an enemy hors de combat, CDDH/III/340.}
8. Article 74(3), subparagraph (f).

Another grave breach defined by Article 74 states that the perfidious use of the Red Cross, Red Crescent, or Red Lion and Sun emblems and other protective signs recognized by the Conventions or the Protocol will be grave breaches if done in violation of Article 35. The I.C.R.C. indicated that the non-inclusion of the provision as a grave breach in the 1949 Conventions resulted from an oversight. Similar acts were war crimes prior to 1949, and resulted in war crime prosecutions.

To be properly understood, this subparagraph must be read in conjunction with Article 35 on the prohibition of perfidy. Article 35 forbids the killing, injuring, or capturing of an adversary by resort to perfidy, which is defined as acts inviting the confidence of an adversary that he is entitled to or is obliged to accord protection to under international law applicable in armed conflict with an intent to betray that confidence. In order to constitute a grave breach under Article 74, the misuse of the Red Cross or other protective signs must be accompanied by the perfidious intent described in Article 35. The result must include death or serious injury to body or health.

Article 36 of the Protocol prohibits the improper use of the protective signs recognized by the Conventions and the Protocol. In addition to the Red Cross, the Red Crescent, and the Red Lion and Sun, it refers to "emblems, signs, or signals provided for by the Conventions or the present Protocol." It also prohibits

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117 See I.C.R.C., Draft Additional Protocol to the Geneva Conventions of August 12, 1949: Commentary 95 (1973). This provision was originally Draft Article 75 to Protocol I, CDDH/226, at 140.
118 Article 23 of the Hague Regulations, supra note 4, makes it especially forbidden "[t]o make improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Conventions. . . ."
119 See, e.g., Trial of Hagendorf, 13 Law Reports of Trials of War Criminals 146 (Mil. Govt. Ct., Dachau, W. Ger., 1946).
119 Art. 36, Recognized emblems, CDDH/III/298.
120 Israel has made a proposal to formally recognize the Red Shield of David as a protected emblem under the Conventions and the Protocol. New article 2 bis, CDDH/1/286. On the status of the Red Shield, see Rosenne, The Red Cross, Red Crescent, Red Lion and Sun and the Red Shield of David, 5 Israel Y.B. Human Rights 1 (1975).
120 Article 38 of the First Geneva Convention, supra note 7, and Article 41 of the Second Geneva Convention, supra note 7, describe the distinctive emblem. Article 23 of the Third Geneva Convention, supra note 7, and Article 6, Annex I to the Fourth Geneva Convention, supra note 7, refer to the marking of prisoner
the misuse of other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property. It also prohibits the unauthorized use of the emblems of the United Nations.


Paragraph 4 contains a second list of offenses which will be considered to be grave breaches. The introductory paragraph contains two important requirements which specify that in order to constitute a grave breach, each of the offenses listed in the subparagraphs must be committed wilfully and must involve a violation of the Conventions or the Protocol. The grave breaches defined in the subparagraphs, with the exception of subparagraph (d), do not relate to the conduct of hostilities and would, in general, involve responsibility only on the part of high level State officials.

Paragraph 4 of Article 74 was the most controversial provision of the article. It was deemed by many delegates to be a political provision, with many emotional overtones, and one which did not belong in a humanitarian treaty. Several nations indicated in the plenary that they would not have joined in the adoption by consensus of Article 74 had a vote been taken paragraph by paragraph on the article. Paragraph 4, in their opinion, was also too difficult to implement by national legislation.

10. Article 74(4), subparagraph (a).

Subparagraph (a) deals with the transfer by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or part of the population of war camps and hospital safety zones, respectively. Article 83 of the Fourth Geneva Convention refers to the marking of internment camps. See also art. 18, Identification, CDDH/II/283/Rev. 1 and Corr. 1. Committee II of the Diplomatic Conference has adopted an Annex on marking and identification: Regulations concerning the identification, recognition and marking of medical personnel, units or transports and civil defense personnel, equipment or transports, CDDH/II/389. The annex contains separate provisions for light and radio signals and electronic identification: art. 6, Light Signals, CDDH/II/389; art. 7, Radio signals, CDDH/II/389; art. 8, Electronic identification, CDDH/II/389. I.C.R.C. Draft Article 59 deals with the distinctive emblem for civil defense units. Art. 59, Identification, CDDH/226, at 117-18.

121 CDDH/I/SR. 64, at 9, 22 (1976); CDDH/I/SR. 65, at 7, 15, 17, 18, 20 (1976).

122 See, e.g., CDDH/I/SR. 60, at 14 (1976); CDDH/I/SR. 64, at 9 (1976).

But see CDDH/I/SR. 65, at 3 (1976).
tion of the occupied territory within or outside of this territory, in violation of Article 49 of the Fourth Convention. It was introduced with a statement condemning the occupation of territories and the colonizing of occupied land. References were made to Article 49 of the Civilians Convention, which mentions that the occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies. Some delegates indicated that it was not sufficiently clear that such acts were already grave breaches in the existing law, although some violations of Article 49 are. Some States saw that the obvious intent of this provision was to include Israeli attempts to establish settlements in occupied territories.

The primary effect of this subparagraph is to make it a grave breach for an occupying power to transfer parts of its civilian population into the territory it occupies. The remainder of this provision, which deals with the deportation or transfer of the population of occupied territory, is already a grave breach of the Conventions, and hence does not mark new ground.

11. Article 74(4), subparagraph (b).

This paragraph provides that the unjustifiable delay in the repatriation of prisoners of war and civilians is a grave breach of the Protocol. It was firmly advocated by Pakistan and attracted wide support from some delegations of all regional groups at the Conference. It was introduced with a statement to the effect that the exaction of political or other advantages in exchange for the release and repatriation of prisoners of war and civilians should be eliminated.

125 CDDH/I/SR. 64, at 8 (1976).
126 For discussions of the Israeli settlements as violations of the Geneva Conventions, see Problems of Protecting Civilians Under International Law in the Middle East Conflict: Hearings Before the Subcomm. on International Organizations and Movements of the Comm. on Foreign Affairs of the House of Representatives, 93d Cong., 2d Sess. at 3 (statement of W. T. Mallison); see also Note, Oil Resources in Occupied Arab Territories Under the Law of Belligerent Occupation, 9 J. INT’L L. & Econ. 533, 550-51 n.70 (1974).
127 It has been noted that Article 49 was intended to prevent a practice, adopted during World War II, of transferring portions of a belligerent’s population into occupied territory for political and racial reasons or in order to colonize the territories. 4 I.C.R.C., COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 283 (J. Pictet ed. 1958). The use of civilians for administrating the occupied territory would not violate Article 49.
The key term in this paragraph is "unjustifiable." This term can be understood by reference to those delays which, under the Third Convention, would be permissible. There are several recognized sources of permissible delay. The first is delay stemming from practical difficulties in repatriation. Article 119 of the Third Convention, with its reference to Articles 46 to 48, refers to such considerations. Immediately after an armed conflict it may, for example, not be possible to return large numbers of prisoners of war or civilians to their homeland because of disrupted transportation systems or shortages of food and drinking water in their own country. Delay in the repatriation of prisoners of war and civilians is also justified under Article 119 in the Third Convention and Article 133 of the Fourth Convention for individuals against whom criminal proceedings for indictable offenses are pending or those who have been convicted of a crime and are serving a sentence as punishment for the crime. In such a case, repatriation may be delayed until after the completion of proceedings, including service of any sentence that may have been adjudged. Finally, international practice indicates that prisoners of war may be permitted to delay or to block entirely their own repatriation in circumstances such as those which existed at the end of the Korean War. In such a case, however, this must clearly be at the voluntary request of the particular individuals involved. Under the provisions of subparagraph (b), delay in the repatriation of prisoners of war or civilians not justified by any of the permissible reasons would constitute a grave breach of the Protocol.

As was pointed out during the Conference, this is the kind of breach that is committed by heads of States and high level Government officials rather than by individuals in the field.

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130 CDDH/I/SR. 65, at 17 (1976).
12. Article 74(4), subparagraph (c).

Subparagraph (c) deals with "... practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination." This provision was strongly and emotionally advocated by African States. The proposal was sponsored by Tanzania and Uganda.\(^{131}\)

The majority of nations attending the Conference supported this particular provision, although others found it inappropriate for the Protocol. Some complained that such an offense was not mentioned either in the Conventions or the Protocol and could not be deduced from existing provisions. One delegate pointed out that his country condemned apartheid and continued to do so.\(^{132}\) However, in his view, the introduction of a political ideology into the Convention, as repulsive as those condemned practices might be, would not develop humanitarian law but rather tend to destroy it.\(^{133}\) Others complained that the standard employed was too vague and did not meet the general standards of clarity in penal legislation applied to other grave breaches.\(^{134}\)

The language of subparagraph (c) is not entirely novel. It is similar to that contained in the Convention on the Suppression and Punishment of the Crime of Apartheid\(^{135}\) which declares that apartheid is a crime against humanity\(^{136}\) and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination are crimes violating the principles of international law.\(^{137}\) A similar phrase is also contained in one of the conventions on statutory limits on the prosecution of war crimes.\(^{138}\)

\(^{131}\) CDDH/I/313.

\(^{132}\) CDDH/I/SR. 64, at 8 (1976).

\(^{133}\) Id.

\(^{134}\) See, e.g., CDDH/I/SR. 64, at 4, 8 (1976).


\(^{136}\) Those supporting subparagraph (c) insisted that apartheid is now a crime against humanity, but that it lacks appropriate penal provisions in existing treaties. CDDH/I/SR. 44 at 21 (1976). See also CDDH/I/SR. 47, at 2-5; CDDH/I/SR. 64, at 4 (1976). It was implied that the adoption of a provision in the Protocol would help to rectify this situation. A provision was desired by some delegates that would restrict those belligerents who were deemed responsible for such wars. CDDH/I/SR. 47, at 5 (1976).

\(^{137}\) See art. 1, supra note 135.

\(^{138}\) Supra note 69.
As adopted, the Protocol provision states that in order to constitute a grave breach, there must first be a violation of the Conventions or the Protocol. This requirement substantially narrows the scope of the provision. The violation is in turn to involve practices of *apartheid* or other inhuman or degrading practices on personal dignity which are based on racial discrimination. The use of the word "practices" is designed to clearly indicate that the provision refers to a widespread system implemented as a matter of policy rather than to isolated or sporadic instances. Several provisions of the 1949 Geneva Conventions and of the Protocol may be pertinent in that they prohibit adverse distinctions based on race or other enumerated criteria.\(^1\) These acts, however, are already breaches, and the Protocol provision's direct effect may be limited to making the act a grave breach if committed by a government that practices *apartheid* as a matter of official government policy. Given the tenor of these existing provisions, and the requirement of "practices," subparagraph (c), like other articles in the Protocol, is directed to high State policymakers rather than to members of the armed forces in the field.

13. Article 74(4), subparagraph (d).

This paragraph states that it is a grave breach to make clearly recognized historic monuments, places of worship or works of art which constitute the cultural heritage of peoples and to which special protection has been given by special arrangements the object of attack. The specified result that must ensue to make the act a criminal one is causing the extensive destruction of the objects.

Subparagraph (d) is based on Article 47 bis on the Protection of Cultural Objects and of Places of Worship.\(^2\) It states that without prejudice to the provisions of the Hague Convention on the Protection of Cultural Property and other relevant instruments,\(^3\) it is forbidden: (1) to commit any acts of hostility directed against historic monuments, places of worship, or works of art which constitute the cultural heritage of peoples; (2) to use such historic

\(^1\) *Supra* note 7, e.g., arts. 3, 12, First and Second Geneva Convention; arts. 3, 16, Third Geneva Convention; arts. 3, 13, 27, Fourth Geneva Convention.

\(^2\) Art. 47, General protection of civilian objects, CDDH/III/263.

monuments or places of worship in support of the military effort; and (3) to make these protected items the object of reprisals.

These provisions were included in the Protocol at the behest of nations which possess large numbers of priceless historical monuments. They attracted the support of other States in their endeavor to obtain specific protection for these objects.

The provision defines a grave breach only on the basis of property damage. As finally adopted, the provision is, however, quite restricted. Subparagraph (d) requires that the cultural object involved must be clearly recognized and that such objects be subject to special protection given by special arrangement. In addition, there must be no evidence that the adverse party is using the object for military purposes in violation of Article 47 bis (b), nor may any of these objects be located in the immediate proximity of military objectives. The provisions apply only if the attacks were directed specifically at the cultural objects themselves and not when damage was strictly an incidental result of an attack on a proper military objective.

14. Article 74(4), subparagraph (e).

The deprivation of the right to a fair and regular trial of a person protected by the Conventions or by Article 74, paragraph 2 is,

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142 Cultural property receives a limited protection under the laws of belligerent occupation. Article 56 of the Hague Regulations, supra note 4, states that

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure or destruction of, or wilful damage to, institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

Article 27 of the Hague Regulations, supra note 4, provides that in sieges and bombardments, all necessary measures must be taken to spare such objects, as far as possible, provided that they are not being used for military purposes. The purpose of such buildings or places is to be indicated by distinctive and visible signs notified to the enemy beforehand. On the protection of such property, see Meranghini, La Difesa Dei Beni Culturali Dall' Offesa Bellica, 7 REVUE DE DROIT PENAL MILITAIRE ET DE DROIT DE LA GUERRE 133 (1968); Nahlik, International Law and the Protection of Cultural Property in Armed Conflict, 27 HASTINGS L.J. 1069 (1976); Nahlik, La Protection Internationale Des Biens Culturels En Cas De Conflit Armé, 120 HAGUE RECUEIL DES COURS 59 (1967). Property rights have generally received significant protection under the laws of war. See Dietze, The Disregard For Property in International Law, 56 NW. U.L. REV. 87 (1961); Oil Resources in Occupied Arab Territories, supra note 126, at 552-55.
under subparagraph (e), a grave breach.\footnote{143} Paragraph 2 of Article 74 accomplishes by implication what subparagraph (e) does expressly. The right referred to in subparagraph (e) is one recognized as a grave breach in Article 130 of the Third Convention and Article 147 of the Fourth Convention. These provisions are incorporated by reference in paragraph 2 of Article 74.

This provision implicitly incorporates the procedural safeguards that are found in the 1949 Geneva Conventions. The 1949 Conventions contain numerous procedural rights in addition to limiting the type of tribunal before which prisoners of war and others may be tried.\footnote{144} With respect to pre-capture offenses, Articles 85 and 102 of the Third Convention depart significantly from World War II practice. In essence, there is an implicit rejection of the post-World War II practice of trying suspected enemy war criminals by \textit{ad hoc} tribunals.\footnote{145} It is now necessary to try these individuals before the same courts and according to the same procedures as are used for members of the armed forces of the detaining power.\footnote{146} The procedural rights of due process that prisoners of war are entitled to include such rights as the prohibition against double jeopardy for the same act;\footnote{147} the prohibition against being charged with \textit{ex post facto} crimes;\footnote{148} the prohibition against compulsory self-incrimination;\footnote{149} the right to qualified counsel;\footnote{150} the right of appeal;\footnote{151} the right to a speedy trial;\footnote{152} the right to an ample opportunity to prepare one’s defense;\footnote{153} the right to have compulsory attendance of witnesses;\footnote{154}

\footnote{143} For a summary of these rights, see Lolis, \textit{The Protection of the Right of Defence Under the Geneva Conventions of 1949}, \textit{20 Revue Hellenique de Droit Internationale} 160 (1967).

\footnote{144} See, e.g., art. 102, Third Geneva Convention, \textit{supra} note 7; art. 66, Fourth Geneva Convention, \textit{supra} note 7.


\footnote{146} Article 102 of the Third Geneva Convention, \textit{supra} note 7, states that “[a] prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.”

\footnote{147} Art. 86, Third Geneva Convention, \textit{supra} note 7.

\footnote{148} \textit{Id.} at art. 99.

\footnote{149} \textit{Id.}

\footnote{150} \textit{Id.} at arts. 99, 105.

\footnote{151} \textit{Id.} at art. 106.

\footnote{152} \textit{Id.} at art. 103.

\footnote{153} \textit{Id.}

\footnote{154} \textit{Id.} at art. 105.
and the right to have certain instructions given by the court prior to adjudging a sentence. Certain comparable procedural rights are extended to civilians protected by the Fourth Convention.

This subparagraph also expands the scope of the provisions of the four Conventions of 1949 to include any new rights associated with a fair and regular trial that might yet be accorded by the Protocol.

15. Article 74, paragraph 5.

Paragraph 5 states that without prejudice to the application of the Conventions and the Protocol, grave breaches of these instruments shall be regarded as war crimes. This provision is the culmination of efforts by the U.S.S.R. since 1949 to classify grave breaches as either war crimes or serious crimes. Several such proposals by the Soviet Union were defeated during the 1949 Geneva Diplomatic Conference. Different reasons were given in 1949 in opposition to the use of the word "crime" rather than the phrase "grave breach." It was stated that the word crime had a different meaning in different legal systems and would not be an appropriate word in the context of the Geneva Conventions. More importantly, it was emphasized that acts only become crimes when they are made punishable by domestic law. Since the 1949 Diplomatic Conference was not drafting a penal code, grave breaches could not be deemed to be crimes until they were implemented by domestic legislation. Another argument posed specifically against paragraph 5 is that by classifying grave breaches as war crimes, one inserts an emotional element into the Protocol and adds nothing of value to the Conventions or the Protocol.

It would appear that the main effect of making a grave breach a war crime might be to avoid, at least for some States, the necessity of implementing legislation. It might serve to make

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155 Id. at arts. 87, 100.

156 Fourth Convention, Aug. 12, 1949, arts. 65-78, supra note 7.

157 Statement sponsored by Australia, France, the Netherlands, the United Kingdom and the United States, in 2A Final Record of the Diplomatic Conference of Geneva of 1949, at 33 (not dated); see also 2B id. at 86, 116, 133.


the prohibited act a crime by virtue of self-executing language in a treaty. Such an approach is apparently consistent with United States law.\textsuperscript{161}

B.

\textit{Article 11}

Article 11 on the Protection of Persons\textsuperscript{162} was adopted at the Second Session by Committee II.

This provision prohibits any unjustified act or omission which endangers the physical or mental health and integrity of persons who are in the hands of an adverse party, or any other person deprived of liberty as a result of hostilities and occupation. This includes prisoners of war, the civilian population of occupied territories, and a Party's own detained nationals. The provision precludes the employment of any medical procedure on individuals protected by the article which is not intended for the therapeutic benefit of the individual concerned or which is not consistent with accepted medical standards. These standards are those which would be applied under similar medical circumstances to nationals of the Party conducting the medical procedures who are not deprived of their liberty. The exceptions to these provisions are narrow ones. They permit the voluntary donation of blood for transfusion and skin for grafting, provided that strict requirements are met.\textsuperscript{163}

A fourth paragraph to Article 11 states that:

Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person described in paragraph 1 of this Article and which either violates any of the prohibitions contained in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of the present Protocol.

\textsuperscript{161} See generally the discussion on \textit{Ex Parte Quirin}, 317 U.S. 1 (1942), note 32 supra. A provision such as paragraph 5 may, however, pose difficulty for some civil law nations. The reason is that, in some such states, implementing legislation is generally deemed necessary in order to make an act a crime. The language in paragraph five might be construed as requiring States to bypass implementing legislation while their constitutional system does not permit such a procedure. It may thus complicate matters for some nations, while not providing a definite benefit to others.

\textsuperscript{162} Art. 11, CDDH/II/276. The first paragraphs of this provision are largely based on an amendment proposed by Australia, Austria, Hungary, the Netherlands, Poland, Sweden, Switzerland, the United Kingdom, the United States, and the U.S.S.R. CDDH/II/43.

\textsuperscript{163} Art. 11, CDDH/II/276, paras. 3 & 6.
This paragraph is consistent with preexisting law, as codified in the 1949 Conventions.\textsuperscript{164} It reflects a concern with improper medical experimentation that resulted in criminal prosecutions for similar acts that occurred during World War II.\textsuperscript{165} It differs from the original proposal for this article in that wilfulness is explicitly made an element of the offense. Furthermore, the scope of the paragraph's proscriptions is limited to acts or omissions which seriously endanger the persons protected by the article. The report of Committee II's Drafting Committee on this latter provision emphasized the latter point and the fact that in order to constitute an offense, there had to be a violation of either paragraphs 1, 2, or 3.\textsuperscript{166}

The consensus reached in Committee II on the grave breaches portion of this Article was that the paragraph would have to be reconsidered after Article 74 had been dealt with in Committee I.\textsuperscript{167} Committee I finished its consideration of grave breaches at the Third Session. Article 74 refers to Article 11 as having defined a grave breach. Committee I's report indicates that

\ldots a number of delegations pointed out that the acts or omissions defined in Article 11, paragraph 4, ought not, technically speaking, to create a grave breach if committed against a country's own nationals. The delegations concerned asked the Chairman of the Committee to raise the matter with the Chairman of Committee II.\textsuperscript{168}

No further action was taken by Committee II at the conclusion of the Third Session. Inasmuch as a Party's own nationals may be the objects of the grave breaches denounced by the First and Second Convention, Committee II did not consider it unusual to draft paragraph 4 so as to include within its scope all persons protected under paragraphs 1 through 3. Nevertheless, Article 11 is broader than other provisions for the protection of the wounded and sick. It encompasses the scope of the I.C.R.C. draft

\textsuperscript{164} See, e.g., First Geneva Convention, \textit{supra} note 7, at arts. 12, 50; Second Geneva Convention, \textit{supra} note 7, at arts. 12, 51; Third Geneva Convention, \textit{supra} note 7, at arts. 13, 130; Fourth Geneva Convention, \textit{supra} note 7, at art. 147.

\textsuperscript{165} United States v. Brandt, \textit{2 Trials of War Criminals Before the Nuremberg Military Tribunals} 171 (1947).

\textsuperscript{166} CDDH/II/SR. 39, at 4 (1976).


\textsuperscript{168} Committee I Draft Report, Third Session, CDDH/1/332, at 10 (1976).
of Article 65(c),\textsuperscript{169} which is intended to protect persons who would not receive more favorable treatment under the Conventions or the Protocol, including a Party's own nationals. It is noteworthy that, in Article 74, paragraph 2, Committee I limited the scope of grave breaches against the wounded, sick or shipwrecked to such persons of the adverse Party protected by the Protocol, or against medical or religious personnel, medical units, or medical transports under the control of the adverse Party. By taking this action, Committee I excluded from the scope of the additional grave breaches, acts or omissions against a Party's own civilian wounded, sick and shipwrecked, as well as those against its own civilian and religious personnel, medical units and medical transports.

As a result of the different coverage of individuals protected by the grave breaches provisions of Articles 74 and 11, a reconsideration of Article 11 may be expected during the Fourth Session.

C.

\textit{Article 76}

Article 76 on failure to act\textsuperscript{170} was adopted by Committee I at the Third Session. The first paragraph emphasizes that there is a duty on the part of a State to repress grave breaches and to suppress other breaches which result from a failure to act when under a duty to do so. The terms "repress" and "suppress" were employed because in some legal systems, "repress" only connotes penal sanctions. The term "suppress" also encompasses administrative and disciplinary measures. The duty to institute penal proceedings, as contemplated by the 1949 Geneva Conventions, applies only to grave breaches.

The second paragraph states that it is a superior's responsibility to intervene when he knows that a breach is going to be committed or is being committed. This duty arises if a superior has information which should enable him to know that such action is to be expected. Article 76 thus requires some showing that specific information was indeed available to a superior which would have given him notice of the anticipated breach.

Article 76 was originally proposed by the I.C.R.C., in part be-

\textsuperscript{169} Art. 65, CDDH/226, at 124 (to be considered at the Fourth Session).

\textsuperscript{170} Art. 76, CDDH/1/325.
cause it was aware that the legislation of several States did not address failure to act when there may be an implied duty to do so under the 1949 Conventions. Several delegates were of the view that the failure of the officer in charge of a prisoner of war camp to provide food for his prisoners or of a non-commissioned officer to stop a mob from lynching prisoners of war were acts that constitute breaches which could not be left unpunished. It was pointed out in the plenary debate that the principles upon which Article 76 was based were not new, and that they had played an important part in post-World War II jurisprudence.

As adopted, Article 76 does not establish new law, but it does reemphasize a commander’s responsibility and provides a duty upon States to ensure that this is a recognized obligation.

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173 See, e.g., Trial of Eric Heyer, supra note 171. An officer ordered his subordinates to escort prisoners of war but not to interfere if civilians molested the prisoners. The officer and a subordinate who refrained from interfering with a crowd that killed the prisoners were convicted of violating the laws and customs of war. A summary of the Tribunal’s proceedings gives the following account of the prosecutor’s argument:

Referring to the member of the escort, Private Koenen, the Prosecutor pointed out that his position was somewhat difficult because his military duty and his conscience must have conflicted. He was given an order not to interfere and he did not interfere. He stood by while these three airmen were murdered. Mere inaction on the part of a spectator is not in itself a crime. A man might stand by and see someone else drowning and let him go and do nothing. He has committed no crime. But in certain circumstances a person may be under a duty to do something. In the Prosecutor’s submission this escort, as the representative of the Power which had taken the airmen prisoners, had the duty not only to prevent them from escaping but also of seeing that they were not molested. Therefore it was the duty of the escort, who was armed with a revolver, to protect the people in his custody. Koenen failed to do what his duty required him to do. In the Prosecutor’s opinion, his guilt was, however, not as bad as the guilt of those who took an active part, but a person who was responsible for the safety of the prisoners and who deliberately stood by and merely held his rifle up to cover them while other people kill them, was “concerned in the killing.”

Id. at 90.


VI.

ARTICLES REMAINING TO BE CONSIDERED
AT THE DIPLOMATIC CONFERENCE

A.

Article 76 bis

At the Third Session, the United States introduced a new Article 76 bis\(^{175}\) on the duty of commanders. The purpose of the proposal is to provide a clear statement describing the responsibilities of military commanders to prevent, and, where necessary, to repress breaches.\(^{176}\) The provision is based on a premise often referred to in the Conference’s discussions: that the establishment of valid administrative, disciplinary, and penal procedures to prevent breaches is one of the most effective ways to ensure compliance with the law.\(^{177}\)

Article 76 bis complements several provisions already adopted in Committee I. Article 72,\(^{178}\) for example, obligates the Contracting Parties to include the study of the Conventions and the Protocol in programs of military instruction. Article 70\(^{179}\) states that the Contracting Parties shall give orders and instructions to ensure observance of the Conventions and the Protocol and shall supervise their execution. Article 71\(^{180}\) obligates the same entities to ensure that in times of armed conflict there shall be available, as necessary, legal advisors to acquaint military commanders with the Protocols and Convention. They are to advise on the application of the Conventions and the Protocol and on the appropriate instruction that is to be given to members of the armed forces. By addressing the affirmative duty of commanders, however, Article 76 bis is primarily complementary to Article 76 on failure to act.

Under the United States proposal in Article 76 bis, High Contracting Parties and parties to the conflict are specifically given the responsibility of requiring military commanders to prevent, suppress, and report breaches to competent authorities. By plac-

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\(^{175}\) 76 bis, CDDH/I/307 and CDDH/I/307 Rev. 1, New article on duty of commanders.

\(^{176}\) CDDH/I/SR. 50, at 15 (1976).

\(^{177}\) Id. at 16.

\(^{178}\) Dissemination, art. 72, CDDH/I/291.

\(^{179}\) Measures for execution, art. 70, CDDH/I/289.

\(^{180}\) Legal advisors in armed forces, art. 71, CDDH/I/290.
ing the obligation directly on States to ensure the application of the article, Article 76 bis is consistent with other provisions pertaining to sanctions, especially Article 74.

The second paragraph of the proposal states that commanders are, commensurate with their level of responsibility, to: (1) ensure that those under their command are aware of their responsibilities under the Conventions and the Protocol; (2) that procedures for reporting breaches are established or implemented, as appropriate; (3) and that commanders exercise reasonable supervision to ensure that persons under their command are properly implementing the Conventions and the Protocol.

The third paragraph requires that any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach to intervene or, when appropriate, to initiate disciplinary or penal action against violators of the Conventions or the Protocol.

Article 76 bis has the advantage of placing an obligation on those acceding to the Protocol to ensure that commanders properly execute the Conventions and the Protocol. By including responsibilities with respect to penal and other sanctions, the provision is addressed, in essence, to those individuals who can be most effective in securing the implementation of the law and satisfactory compliance therewith.

B.

**Article 78**

The I.C.R.C. has submitted a provision on extradition for grave breaches of the Conventions and the Protocol.\(^1\) Extradition for war crimes is not uncommon and there were over 8,000 requests for extradition made to the United States after World War II.\(^2\) A provision dealing with such matters is now a common article in the four Geneva Conventions of 1949.\(^3\)

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1. The distinction between individuals under a commander’s command and under his control is necessitated because, in many instances, a military commander’s authority over civilians may be limited. Personnel of different military services may also be outside a commander’s zone of command authority. The requirement of teaching or disseminating the Conventions and the Protocols may be limited with respect to these individuals. Consequently, the obligations of paragraph 2 of this provision are more narrow than those in paragraph 3.

2. Extradition, art. 78, CDDH/226, at 141.


The text of the articles is given *supra* note 89.
The I.C.R.C. text states that grave breaches, whatever their motivation, shall be deemed to be extraditable offenses in any extradition treaty existing between the High Contracting Parties, which will undertake to include these grave breaches as extraditable offenses in any future extradition treaty to be concluded between themselves. If such Parties receive a request for extradition from a State with which it does not have an extradition treaty, it shall consider the Conventions and the Protocol to be the legal basis for extradition. If extradition, under the State's municipal law, is not conditioned upon the existence of a treaty, then the Protocol is to be considered a sufficient basis for extradition. In every case, extradition is to be subject to the conditions of the law of the State from which extradition is requested.

The necessity for an extradition provision has apparently been made moot by the adoption of Article 74. The first paragraph of Article 74 incorporates the penal sanctions provisions of the 1949 Conventions, including its extradition provision. As this provision is applicable to grave breaches of the Protocol, it was the position of many States at the Third Session that an extradition provision is no longer necessary.

The importance of an act being a grave breach is that the offender is subject to the universal jurisdiction of States. The 1949 Conventions, without using the term "extradition," place obligations on Contracting Parties which in essence provide for extradition unless the State from which an individual's extradition is requested chooses to prosecute. While a new provision may therefore be unnecessary, the technical language in the different proposed extradition clauses, if any is adopted, may refine the existing standards for some nations.

C.

Article 79

The I.C.R.C. draft of Article 79 on the mutual assistance in
criminal matters\textsuperscript{187} states that the Parties to the treaty shall afford to one another the greatest measure of assistance in connection with criminal proceedings with respect to grave breaches. The law of the High Contracting Party is to apply in all cases. Article 79 is based on Article 10, paragraph 1, of the Convention for the Suppression of Unlawful Seizure of Aircraft.\textsuperscript{188} Article 79, which may be deemed to be a “best efforts” clause, was generally well received. It does not appear, however, that this provision adds significantly to obligations already assumed by Parties to the Conventions.

D.

Article 77

The I.C.R.C. has introduced into the Protocol a provision on the superior orders defense. Defendants in war crime prosecutions have raised several types of special defenses, including military necessity,\textsuperscript{189} diplomatic immunity,\textsuperscript{190} self-defense,\textsuperscript{191} mistake of fact,\textsuperscript{192} state immunity\textsuperscript{193} and superior orders.\textsuperscript{194} The de-

\textsuperscript{187} Art. 79, CDDH/226, at 142.

\textsuperscript{188} See note 185 supra.

\textsuperscript{189} See, e.g., United States v. Ohlendorf, 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 462-65 (1948); United States v. Flick, 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1200-02 (1947); In Re von Lewinski, 16 ANN. Dig. 509, 511-13 (Brit. Mil. Ct., Hamburg, W. Ger., 1949); The Peleus Trial, 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 15-16 (Brit. Mil. Ct., Hamburg, W. Ger., 1945).

\textsuperscript{190} See, e.g., In Re Abetz, 17 ANN. Dig. 279 (Court of Cassation, France, 1950); In Re Best, 17 ANN. Dig. 434, 435 (Eastern Provincial Ct. of Copenhagen, Denmark, 1949); In Re Weizsaecker, 16 ANN. Dig. 343, 361 (U.S. Mil. Trib., Nuernberg, 1949); In Re Hirota, 15 ANN. Dig. 356, 372 (Int’l Mil. Trib. for the Far East, Tokyo, 1948).

\textsuperscript{191} See, e.g., In Re Weizsaecker, supra note 190, at 350-51; In Re Hoffman, 16 ANN. Dig. 508, 508 (Eastern Provincial Ct., Denmark, 1948).

\textsuperscript{192} United States v. Calley, 46 C.M.R. 1131, 1179 (A.C.M.R. 1973), aff’d 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973). In this connection, it is noted that the defense of ignorance of the law was also rejected. 46 C.M.R. at 1179. It is noted that Ayala, who wrote that “[a]nother privilege of a soldier is that he is not prejudicially affected by ignorance of law, for it is his business to understand arms rather than laws” recognized that this concept was inapplicable in the case of derelicts. B. Ayala, De Jure et Officis Bellicis et Disciplina Militari Libri III, at 199 (J. Bate trans. 1582).

\textsuperscript{193} See, e.g., Trial of Greiser, 13 LAW REPORTS OF TRIALS OF WAR CRIMINALS 70, 117 (Supreme Nat’l Trib., Poland, 1946); Trial of Altstotter, 6 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 60-61 (U.S. Mil. Trib., 1947). On judicial immunity, see 6 LAW REPORTS OF TRIALS OF WAR CRIMINALS 50.

\textsuperscript{194} See, e.g., United States v. Calley, supra note 192, 46 C.M.R. at 1183-84; United States v. Ohlendorf, supra note 189, at 470-88 (1948); United States v. von
fense of superior orders has been one of the most controversial defenses, and has been a subject that has received considerable juridical discussion and academic study.\textsuperscript{195}

The I.C.R.C. provision reflects the concern about the superior orders defense in post-World War II war crimes cases. Article 8 of the Charter of the International Military Tribunal, for example, states that "[t]he fact that the defendant acted pursuant to order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."\textsuperscript{196}

The International Law Commission stated the general principle applied by the relevant war crime tribunals after World War II as being that "[t]he fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under International Law, provided a moral choice was in fact possible to him."\textsuperscript{197} The law applied by war crimes tribunals after World War II has been summarized in the following manner:

The true test in practice is whether an order \textit{illegal} under international law, on which an accused has acted was or must be presumed to have been known to him to be so illegal, or was obviously so illegal ("illegal on its face" to use the term employed by the Tribunal in the \textit{High Command Trial}) or should have been recognized by him as being so illegal . . . . [I]f the order comes within one or more of these categories, then the accused cannot rely upon the plea of superior orders.\textsuperscript{198}

Although all legal systems impose on their military men a duty to obey lawful orders only, a subordinate frequently lacks knowledge of facts upon which the legality of orders depends.\textsuperscript{199} Thus, the subordinate can be held criminally liable if he had special knowledge of the criminality of the order, or if the order is so

\textsuperscript{195}See, e.g., Y. Dinstein, \textit{The Defense of 'Obedience to Superior Orders' in International Law} (1975); L. Green, \textit{Superior Orders in National and International Law} (1976); M. Greenspan, \textit{supra} note 101, at 490-96.

\textsuperscript{196}Art. 8, \textit{supra} note 47.

\textsuperscript{197}\textit{International Law Commission}, Principle No. 4, \textit{supra} note 74.

\textsuperscript{198}Digest of Laws and Cases, in 15 \textit{Law Reports of Trials of War Criminals} 158 (1949).

\textsuperscript{199}McCall v. McDowall, 15 F. Cas. 1235, 1240-41 (9th Cir. 1867) (No. 8,673).
plainly illegal that a person of ordinary sense or understanding would recognize it to be illegal. The United States Field Manual 27-10 recognizes this when it states that the claim of superior orders does not constitute a defense, unless the individual did not know and could not reasonably have been expected to know that the act ordered was unlawful.\textsuperscript{200}

The I.C.R.C. proposal on superior orders states that no person shall be punished for refusing to obey an order of his Government or of a superior which, if carried out, would constitute a grave breach of the provisions of the Conventions or the Protocol. This provision was one of the most controversial provisions discussed at the Third Session. Many States argued that this kind of provision could have a negative effect on military discipline.\textsuperscript{201} In part this was because the provision was not addressed only to States, but also to individuals. It provides individuals with a direct defense for their refusal to obey an order to commit an act that might be criminal. Some States complained that in essence, the paragraph interfered too extensively in matters of domestic law. One proposal was that the I.C.R.C. text should be replaced with a provision which would be primarily addressed to the States involved. It would provide that a State's internal law governing disobedience to lawful orders would not apply to orders to violate the Conventions or the Protocol.\textsuperscript{202}

Article 77 also proposed by the I.C.R.C. states that even though one acts pursuant to superior orders, he is not relieved of penal responsibility if, in the circumstances at the time, he should have reasonably known that he was committing a grave breach of the Conventions or the Protocol, and provided he had the possibility of refusing to obey the order.

Article 77 can be considered to be one of the crucial provisions in the Protocol. It tests the basic willingness of States to accept constraints on military operations. The approach States take toward the concept of superior orders is indicative of the degree of responsibility that is accorded to individuals in their armed forces. It is precisely those combat situations in which orders are given to commit violations of the law that the laws of armed conflict must seek to regulate. Opposition to codifying this concept in an international treaty stems largely from considerations of discipline.

\textsuperscript{200} FM 27-10, supra note 3, ¶ 509, at 182-83.
\textsuperscript{201} See, e.g., CDDH/I/SR. 52, at 2-14 (1976); CDDH/I/SR. 51, at 14-17 (1976).
\textsuperscript{202} CDDH/I/Gt/96.
To the extent, however, that States are drafting a detailed, highly complex treaty, the basic willingness to accept such a restriction may provide the degree of realism necessary in assessing whether the rules are indeed going to be seriously implemented.

E.

Article 79 bis

Article 79 bis is a proposal to establish a fact-finding enquiry commission. It is a proposal sponsored by Sweden, Denmark, and New Zealand, and a different proposal has also been made by Pakistan. This fact-finding enquiry commission would operate without the advance consent of belligerents during a conflict, and thus to strengthen existing voluntary enquiry procedures that are to be found in the First Hague Convention and common articles in the 1949 Geneva Conventions. The main concern of some States is that the commission, however devised, must be an objective one. A decision must be made as to whether it should be an ad hoc tribunal or a full time one. The tribunal would not be a criminal court. Its basic purpose would be to determine the facts of a particular complaint and to inquire into any alleged violation of the Conventions or the Protocol or other rules relating to the conduct of international armed conflict.

Summary

This survey has addressed those provisions of Protocol I that pertain to penal sanctions for violations of the laws of armed conflict. The Committees of the Diplomatic Conference have adopted several articles on penal sanctions for violations of the Protocol.

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204 CDDH/1/267.
205 Hague Convention (I) for the Pacific Settlement of International Disputes, Oct. 18, 1907, arts. 9-36, 36 Stat. 2199, T.S. No. 536. For the practical implementation of these provisions, see N. BAR-YAACOV, THE HANDLING OF INTERNATIONAL DISPUTES BY MEANS OF INQUIRY 89-108 (1974).
207 Protocol II on non-international conflicts does not contain a provision on penal sanctions for violations of the Protocol. A provision was adopted, however, pertaining to the prosecution and punishment of criminal offenses relating to the armed conflict. Art. 10, Penal prosecutions, CDDH/1/331. It does not confer any immunity from prosecution for the omission of warlike acts. It does extend certain procedural rights. Article 10 provides that no sentence or penalty shall be passed or executed unless the individual has been convicted by a tribunal offering the essential guarantees of independence and impartiality.
These articles expand the category of individuals upon whom protection against grave breaches is conferred. They contain a detailed statement specifying the elements of the criminal offenses proscribed. Article 74 adds several offenses to the Geneva Conventions of 1949. These offenses pertain to the conduct of combat operations. It also contains a separate list of offenses that is addressed to high level government officials. Article 11 refines existing sanctions against the endangering of the physical or mental health of specified persons. Article 76 addresses failures to act when under a duty to do so.

These provisions and others will be discussed by the Fourth Session of the Diplomatic Conference. The full Conference must still consider whether these provisions are to be adopted.

The particular rights which an accused is entitled to include notice of the charges against him and of his rights and means of defense; the presumption of innocence; the right to be present at his trial; and the right of not being compelled to testify against himself. An individual can only be convicted on the basis of individual penal responsibility and if the act with which he is charged was a crime at the time the offense was committed. Defendants are to benefit from provisions for lesser sentences if such lesser penalties are provided for by changes in the law, subsequent to the time the act was committed. Convicted individuals are to be informed of their judicial and other remedies and the times during which they must be exercised. Art. 10, paras. 2, 3. Article 10 limits the rights to impose the death penalty on specified individuals. Paragraph 4 states that the death penalty is not to be pronounced on individuals who are below 18 years of age at the time of the offense and is not to be carried out on pregnant women or mothers of young children. In those prosecutions which are carried out strictly because of an individual's having taken part in the hostilities, the court is to take into consideration, to the greatest extent possible, that the accused respected the Protocol's provisions. Art. 10, para. 5. In such cases, the death penalty can not be carried out until the end of the conflict.

During the last meeting of Committee I pertaining to Article 74, one delegation introduced a new provision which would make the use of certain weapons a grave breach. CDDH/I/SR. 60, at 5 (1976). After debating the proceedings (id., at 5-10) the issue was put aside on the understanding that the question of including in the Protocol a provision concerning the use of weapons as a grave breach could be taken up at the Fourth Session. Draft Report of Committee I, supra note 168, at 11.