THE WEST POINT COMPANION

to the ICRC Updated Commentary on the Third Geneva Convention

SEAN WATTS

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The West Point Companion to the ICRC Updated *Commentary on the Third Geneva Convention*

The *Companion* is intended as an analysis of the International Committee of the Red Cross's updated *Commentary on the Third Geneva Convention*. It alerts readers to both commendable and controversial aspects of the updated *Commentary*. The *Companion* labels and explains the interpretive approaches taken, the evidence cited (and not cited), and the analytical choices made in the production of the work by the International Committee of the Red Cross.

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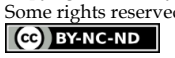

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PREFACE

Produced by the Geneva-based International Committee of the Red Cross, the updated *Commentary on the Third Geneva Convention* offers a comprehensive examination and analysis of how the 1949 Geneva Conventions regulate prisoner of war treatment and internment. Since its publication in June 2020, the updated *Commentary* has drawn widespread praise from academic and private reviewers. Generally, commentators have characterized it as a long-needed and laudable effort to refine understanding of the Third Convention. Most, though not all, remarks have been congratulatory, confirming in general terms the work's simultaneous breadth and focus. Many sources endorse it as a useful survey of challenges and legal developments relating to prisoner of war internment. Most assessments imply the updated *Commentary* will serve as an authoritative, even quasi-official interpretation of the Third Convention. Yet to date, no complete examination or comment-by-comment scholarly analysis has been published. More importantly, no State has issued a comprehensive, official analysis of or response to the updated *Commentary*.

Shortly after publication of the updated *Commentary*, the Department of Law at the United States Military Academy at West Point resolved to examine and understand it as thoroughly as possible. Having taught law, including the law of war, since 1821 to a significant portion of the US Army's future officer corps, the Department of Law immediately recognized the updated *Commentary* as an important and inevitably influential academic resource. To familiarize ourselves and our cadets with it, the Department of Law and its resident law of war think tank, the Lieber Institute for Law and Warfare, designed a semester-long capstone course for our 'Firstie' (fourth-year) law majors around the updated *Commentary*.

At West Point, capstone courses are the culmination of instruction in a cadet's chosen field of study. The Department of Law capstone course challenges cadets to apply skills in legal interpretation, writing, and advocacy across a broad range of legal disciplines. We identified the updated *Commentary* as a promising opportunity to expose capstone cadets to the perennially relevant subject of prisoner of war treatment and to test their ability to read, evaluate, and remark on an exceptionally

complex and weighty work of legal scholarship.

Neither the updated *Commentary* nor the cadets disappointed us. The updated *Commentary* proved a profoundly rich teaching tool. It showcases a stunningly broad collection of interpretive approaches and inputs. From textual formalism to functionalism, originalism to living interpretation, contextual interpretation to clause-bound textualism, integrating statist and private perspectives, and far more, the updated *Commentary* is perhaps unrivaled as a collection and application of diverse international legal interpretive methods and sources. Meanwhile, the cadets proved exceptionally adept at identifying patterns of analysis in the updated *Commentary* and even inconsistencies and biases. They were also quick to grasp the likely military operational consequences and impacts—both positive and negative—of the updated *Commentary*'s claims. To nurture and witness their maturation as careful lawyers and critical thinkers in these respects was a pleasure.

As we designed the course, and as it unfolded, it became clear, to leave the lessons and work of the course "on the blackboard" so to speak, would be wasteful. To capture lessons from the course and to support future instruction of law majors and the wider West Point Corps of Cadets, we resolved to record and expand on our teaching experience with the updated *Commentary*. The product of that effort is this *Companion to the ICRC Commentary on the Third Geneva Convention*. Although this *Companion* is the work of its author, the cadets who completed the capstone course richly informed its content. I hope the *Companion* will both inspire and deepen our cadets' familiarity with the law of war applicable to prisoner of war internment and inform their studies and research with us at West Point. I also hope the *Companion* will influence their future decision making as combat leaders: the end users of the Third Convention and the law of war.

The *Companion* has the secondary purpose of assisting others' efforts to evaluate the updated *Commentary* and the Third Convention itself. Law of war practitioners including military lawyers, States' legal advisors, judges, advocates, and humanitarian lawyers will hopefully be drawn to consult the updated *Commentary* in their work. The updated *Commentary* joins a swarm of International Committee of the Red Cross commentaries, studies, guidelines, review volumes, course books, manuals, strategies, a "cookbook," booklets, reports, checklists, position papers, posters, leaflets, model agreements, teaching outlines, blogs, podcasts, and other resources. The observations of the *Companion* may alert practitioners to aspects of the updated *Commentary* worthy of further research and reflection. The

Companion is certainly no substitute for spending the considerable time required to read the updated *Commentary*. However, the *Companion* may prove a helpful and manageable navigational aid to and summary of the updated *Commentary*'s nearly 2,000 pages of comments on the Third Convention. Finally, some sections offer recommendations to States, particularly where official reactions or input may resolve an interpretive issue presented by the updated *Commentary*.

Our experience with the capstone course confirmed the updated *Commentary* is a remarkable feat of scholarship worthy of intense academic attention. No existing work on the Third Geneva Convention rivals its thoroughness. The International Committee of the Red Cross has generated a product that will occupy the attention of law of war scholars for years or even decades. In addition to its richly informative descriptions of the text and doctrine of the Convention, the updated *Commentary* offers a valuable occasion to consider how to interpret the law of war. It offers opportunities to consider whether the important objects and purposes of the Convention are better served by preserving the careful deals struck in 1949 or by resorting to living and evolving understandings of those bargains between States. To the extent the latter view prevails, the updated *Commentary* raises the question of precisely which developments and opinions, and which expressions and elaborations, should register with or inform our interpretation of the Third Convention. Similarly, the extent to which the Convention should be read in conjunction with States' obligations derived from other legal disciplines is raised by many of the updated *Commentary*'s claims. Each of these questions and more present promising scholarly potential for both ongoing and novel academic debate on the law of war.

Of course, the updated *Commentary* is not intended to be an exclusively academic resource. Indeed, it claims law of war practitioners as its primary audience. Owing to the nature of their duties, practitioners of the law of war will surely read the updated *Commentary* differently than academics. They are more likely to consult it for reliable and settled meanings, elaborations, and analyses of their respective States' legal obligations than to ponder dense methodological or interpretive questions. Still, whether law of war practitioners should consult the updated *Commentary* or their State's legal doctrine for practical purposes is an important question that recurred as we gained familiarity with it.

I must offer a disclosure concerning my participation in the production of the updated *Commentary*. I served as a Reading Committee member for the majority of the International Committee of the Red Cross's work on the 2020

updated *Commentary*. In this capacity, I received early drafts of comments and provided remarks to the editors. It seems some remarks influenced the final comments; however, many other remarks did not.

The editors also invited me to compose the comments to Articles 46–48 on transfers of prisoners of war. The editors and review committees suggested various changes to my initial work, but I had broad authority to accept or reject most edits and the final comments to these articles fully reflect my views on them.

I would also like to share I published early thoughts and reflections on the updated *Commentary* in a blog post that appeared in the Lieber Institute's electronic publication *Articles of War*. Many of those ideas appear in this text. *See* Sean Watts, "Interpretation in the Updated GC III Commentary," *Articles of War*, https://lieber.westpoint.edu/interpretation-updated-gciii-commentary.

Finally, I want to make clear the *Companion* is primarily intended for educational use by the Lieber Institute and the West Point Department of Law. The opinions expressed in this *Companion* are those of the author and do not necessarily reflect views of the United States Department of Defense, the Department of the Army, or the United States Military Academy at West Point.

Sean Watts
West Point, New York
February 2023

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INTRODUCTION

Structure and Overview

As its title suggests, the *Companion* is intended to accompany the International Committee of the Red Cross's updated *Commentary*. The *Companion* offers article-by-article analysis of the *Commentary*'s observations and conclusions concerning the meaning and extent of States' obligations under the Convention. To aid in simultaneous consultation, the *Companion* largely mirrors the *Commentary*'s own organization which tracks that of the Third Geneva Convention.

The *Companion* first addresses elements of the *Commentary*'s front matter (to include a chapeau located on the website where the International Committee of the Red Cross makes the *Commentary* available to readers), including most prominently its lengthy introduction which sets out a number of framing statements and claims regarding methodology.

Part I then addresses the *Commentary*'s treatment of the Third Convention's important opening general provisions. Subjects addressed include the Convention's scope of application (the conflicts to which it applies), its scope of protection (the persons it protects), the timeframe of its operation, and how it may be supplemented and overseen during armed conflict. Part I also includes analysis of the *Commentary*'s longest section on common Article 3 applicable to non-international armed conflicts.

Part II concerns the *Commentary*'s treatment of the Third Convention's leading and very general protections for prisoners of war. Highlights include rules concerning transfers of prisoners of war, the humane treatment of prisoners of war, as well as obligations to accord respect, honor, and equality.

Part III addresses the *Commentary*'s work on regulation of conditions of captivity, perhaps the heart of the Convention. Subjects include post-capture questioning, property dispositions, and evacuations from the battlefield leading to internment. Also included are obligations arising from internment including security, food and clothing, hygiene and medical attention, as well as religious observances. Matters of discipline, military honors, transfers, and labor during internment are also treated. Finally, Part III analyzes the *Commentary*'s work on articles regulating

prisoner of war correspondence and, importantly, the Convention's detailed rules on penal and disciplinary sanctions.

Part IV addresses the termination of internment and captivity. Subjects addressed include repatriation, release, and deaths of prisoners of war. Meanwhile, Part V analyzes the *Commentary*'s treatment of the Convention's four articles on Information Bureaux and the work of relief societies.

Finally, Part VI addresses the *Commentary*'s work on the Convention's administrative articles. These include the important grave breaches regime for individual criminal enforcement of select provisions of the Convention, as well as matters relating to the Convention's treaty status, effect, ratification, and denunciation by States.

The *Companion* does not address content from the *Commentary*'s Annexes.

Editorial Conventions

The *Companion* employs the following editorial conventions. Citations to paragraph numbers without further elaboration are to the updated *Commentary*. The *Companion* refers to article-specific sections of the updated *Commentary* as "comments."

The titles of articles of the Third Convention are those used by the updated *Commentary*. The International Committee of the Red Cross, however, altered some titles from the original titles assigned by the Swiss Federal Council after adoption of the Convention. These alterations are largely unobjectionable as the original article titles were not part of the Convention as adopted by States. Original titles are available in Dr. Jean Pictet's original 1960 *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of war*.

Similarly, the updated *Commentary* adds numbered subparagraphs to many articles of the Convention for reference purposes. Although this numbering is not a feature of the adopted Convention, this work retains it for purposes of cross-reference.

The *Companion* uses the phrases "law of war" and "law of armed conflict" rather than the updated *Commentary*'s preferred term: international humanitarian law. The former terms are consistent with prevailing practice in the US government and the instruction provided at West Point. That the Third Geneva Convention itself favors the phrase "laws and customs of war" is worth noting. For instance, Article 4A(2) of the Third Convention includes a passage that reads, "Conducts operations in accordance with *the laws and customs of war*" (emphasis added).

This *Companion* is also selective in its observations. It does not relate the full range of subjects addressed by the updated *Commentary*. Priority of analysis has gone to subjects thought useful for the education of cadets and students preparing for roles that will involve implementation of the Convention.

SUMMARY ANALYSIS

As its name indicates, the updated *Commentary* revises a predecessor. Before they were 10 years old, the 1949 Conventions inspired four volumes of *Commentaries* edited by Dr. Jean Pictet of the International Committee of the Red Cross and published between 1952 and 1960. As the 1949 Conventions entered force and as they progressed toward universal ratification or accession by States, Dr. Pictet's *Commentaries* became essential resources for understanding the Conventions. Because his work appeared so soon after the Conventions' adoption, he showcased the circumstances that produced those treaties more so than any record of their implementation or practice by States. To be sure, Dr. Pictet's *Commentaries* feature a share of humanitarian editorials, but above all, they present helpful insights into the original intended meanings of the Conventions' many articles.

Just as helpful as his analyses of the text of the Conventions is his work relating materials and text that do *not* appear in the Conventions. Dr. Pictet and his colleagues helpfully showcase humanitarian provisions judged too impractical, too divisive, or simply undesirable by States' representatives at the 1949 Diplomatic Conference of Geneva. Similarly, Dr. Pictet highlights the adjustments to text required to secure the consent of States. Few works have illustrated as clearly the limits of State consensus on the regulation of war.

Not long after publication, Dr. Pictet's *Commentaries* matured into a vital resource on the Conventions. Widely cited and even revered, they achieved nearly canonical status. So much so that by the early 21st century, the Supreme Court of the United States erroneously referred to his work as "the official commentary to the Conventions." *See* Hamdan v. Rumsfeld, 548 U.S. 619, n. 48 (2006). Even Dr. Pictet would have rejected the Court's characterization. Indeed, at the outset of his *Commentaries*, in a remarkably prescient and honest passage, the International Committee of the Red Cross observes, "only the participant States are qualified, through consultation between themselves, to give an official and, as it were, authentic interpretation of an intergovernmental treaty." p. 1. Nonetheless, the *Commentary* became a trusted and reliable source of interpretation among scholars and practitioners alike.

Although framed in terms similar to the work of Dr. Pictet and his team, and printed in a nearly indistinguishable format, whether the updated *Commentary* should so easily assume the mantle of its predecessor as a source of dependable interpretation for the practitioner is not entirely clear. The updated *Commentary* departs from its predecessor in important respects. The very attributes that make the updated *Commentary* so interesting from a scholarly perspective—its wide-ranging collection of interpretive approaches and ready acceptance of evolving understandings of the law of war—may compromise its reliability and interpretive integrity for practitioners. This *Companion* details these concerns comment-by-comment but at the outset, a few themes of both commendation and concern are worth mentioning.

Institutional Affiliation

As noted above, Dr. Pictet and his team were careful to qualify their work and to distinguish it from the official and authoritative interpretations only available from States in consultation with one another. Additionally, the 1960 editors indicated the original *Commentary* was the personal work of Dr. Pictet and his editorial team alone, although the International Committee of the Red Cross published it. The original *Commentary* was not an institutional product and did not, it seems, necessarily reflect the views of the International Committee of the Red Cross. Although the updated *Commentary* appears to challenge or perhaps even to change this characterization of the original—it refers in places to a '1960 ICRC Commentary'—the updated *Commentary* was not originally an International Committee of the Red Cross product. *See, for example,* ¶ 1004.

The updated *Commentary*, however, includes no such disclaimer. It does not appear to be the personal work of its authors and editorial team. Rather, the updated *Commentary* is presented as the work of the International Committee of the Red Cross itself. The extent to which this claim will affect the status of the updated *Commentary* is not yet clear. To some, the institutional affiliation may further bolster the legitimacy of the product. The Committee employs a robust legal team, houses deep research capacity, and has extensive familiarity and experience with the Conventions.

But others will surely view the updated *Commentary* somewhat more cautiously or suspiciously in light of its affiliation with an exclusively humanitarian and nongovernmental organization. The International Committee of the Red Cross enjoys a particular humanitarian mandate rather than an academic or military charge. It plays an important and clearly sanctioned role in the law of war. But that role involves a distinct

perspective on the regulation of war and combat, namely, protection of and care for the victims of war. In this respect, the International Committee of the Red Cross cannot be expected to represent military and war fighting operational interests, perspectives that form an integral part of the balance reflected in the law of war. Many readers of the updated *Commentary* may then find cause to question or even to discount some of its claims.

Revisions

Further concerns about the relationship between the original and updated *Commentaries* occur as well. On occasion, the updated *Commentary* indicates when it departs from the conclusions reached by Dr. Pictet and his team. However, careful review identifies instances of departure not indicated by the International Committee of the Red Cross update. For instance, Dr. Jean Pictet and his co-editors seem to have concluded States enjoyed largely unfettered discretion to consent to or withhold consent from offers of humanitarian relief during armed conflict. The updated *Commentary* departs from this view without explicitly mentioning the contrary conclusion of Dr. Pictet. *See* ¶ 1349. Considering the extent to which practitioners integrated Dr. Pictet's view on such offers into their understandings of the Convention, a more careful and consistent effort to catalog points of disagreement between the original and updated *Commentaries* seems appropriate.

Textual Ambiguity

A further departure from the updated *Commentary*'s predecessor is reflected in its reduced tolerance for the Convention's rampant but essential ambiguity. Dr. Pictet's *Commentaries* often conclude the meaning of an article of the Third Convention is unsettled. On occasion, the updated *Commentary* similarly concedes ambiguity. For example, it indicates the Third Convention does not clearly prescribe how to treat hunger-striking prisoners of war. ¶ 1733. The updated *Commentary* concedes further ambiguity concerning prisoner of war escapes, concluding the question of when an escape is complete is "unsettled." ¶ 2554.

Overall, however, the updated *Commentary* devotes significantly greater effort toward lending clarity to the Convention than its predecessor does. Indeed, the extraordinarily diverse and sometimes conflicting interpretive methods employed by the updated *Commentary* seem mostly attributable to its ambition to resolve ambiguity. For instance, the updated *Commentary*'s treatment of the common Article 1 obligation to "respect and ensure respect"

for the Convention and its significant elaborations on States' obligations toward humanitarian relief display greatly reduced tolerance for ambiguity, despite State practice pointing precisely to the contrary.

Improvements

The Third Convention is not always optimally organized for consultation and implementation by practitioners. Many related concepts and obligations lie scattered throughout the Convention. On a positive note, the updated *Commentary* includes helpful cross-references, although considering the length of the updated *Commentary* itself, these may be difficult for the practitioner to collect and identify. A table or chart of related obligations and concepts may have been a useful feature for the updated *Commentary*. *See, for example,* Jean Pictet (ed.), *Commentary III Geneva Convention* (1960) p. 106, 397–98.

The updated *Commentary* also helpfully anticipates and recommends resolutions to important issues of application and practice. For example, concerning the evacuation of prisoners in vehicles that also transport ammunition, the comment to Article 20 suggests an evaluation and balancing of comparative safety benefits. ¶ 1902. This comment is a good example of analysis that foresees a conflict of obligations and suggests a reasonable approach.

The updated *Commentary* also includes helpful doctrinal recommendations, couched as measures that "should" be adopted. For instance, the comment to Article 17 concerning questioning prisoners of war counsels use of "only" qualified interrogation personnel and "strong control mechanisms and oversight" including recording methods. ¶ 1831. These sorts of recommendations will no doubt be helpful. But a clear and early warning to readers that the updated *Commentary* includes such optional or hortatory measures is warranted in the introductory material and in relevant comments themselves.

Subsequent Practice and Application of the Convention

Although the introduction to the updated *Commentary* showcases 70 years of subsequent State practice as the primary motivating force behind the effort to revise the earlier Pictet *Commentaries*, that practice is not as extensively catalogued as might be expected either in the comments themselves or in their supporting citations. In many cases, the updated *Commentary* buries citations to State practice in footnotes rather than featuring and analyzing them in comments. *See, for example,* notes 309–317 (addressing State practice concerning common Article 3. *See also* comment

to Article 75 (providing particularly thin evidence of State practice and implementation). Rather than cataloguing authoritative interpretations from text or from State practice, the updated *Commentary* frequently resorts to its own exercises of logic as might a State or a tribunal. An academic work might similarly deduce and advocate an interpretation, but that work would likely not provoke claims to authoritative status as the updated *Commentary* does. *See, for example,* ¶¶ 440–444.

The updated *Commentary* appears during a period of significant law of war activity and purported development by international tribunals. Sorting through the work of these courts is an important task for the updated *Commentary*. Still, a consistent approach to judicial decisions is difficult to identify. The updated *Commentary* makes seemingly selective resorts to tribunals, easily embracing some interpretations and casually rejecting others, even from the same body or judgment. For instance, a comment to Article 15 endorses the Eritrea-Ethiopia Claims Commission finding that a Detaining Power's economic hardships do not mitigate or excuse the obligation to provide for the maintenance and medical care of prisoners of war. ¶¶ 1719–20. Meanwhile, the updated *Commentary* rejects the Commission's findings with respect to prisoner of war repatriation and reciprocity. ¶ 4451. A more systematic or principled effort to incorporate or reject judicial work on the Third Convention would have been welcome.

On a broader note, in many cases it may have been worth considering whether the tribunals the updated *Commentary* cites present authoritative clarifications or accepted developments of the law. *See, for example,* ¶ 460 (addressing the non-international armed conflict threshold). Another account of these tribunals' work might conclude their legal pronouncements simply permitted those courts to perform the function of dispute adjudication or guilt determination. Authoritative or binding clarifications of the law only crystallize once States clearly and nearly universally adopt the contributions of these tribunals. Evidence to that effect would be far more persuasive than mere recitations of the tribunals' judgments. Moreover, crediting these tribunals with interpretive finality is problematic outside their proceedings considering the trial and appellate-level judges, often staffed by the very same jurists, have disagreed and reversed rulings among themselves. Again, the extent of State incorporation of the various tribunals' work seems more relevant to the updated *Commentary*'s goal of informing practitioners of subsequent State practice concerning the Convention than the judgments themselves.

To continue with respect to legal developments subsequent to adoption of the Third Convention, the updated *Commentary* is usually careful to distinguish

obligations derived from the 1949 Third Convention from obligations derived from other treaties. *See, for example,* ¶ 981. Yet frequently, references to the 1977 Additional Protocol I fail in this respect. The updated *Commentary* seems in some cases to slip the less-widely adopted Additional Protocol through the back door of the Third Convention. For example, the comment to Article 105 acknowledges the Third Convention's silence on a prisoner of war's presence at trial. However, the comment concludes the inclusion of that obligation in 1977 Additional Protocol I, Article 75 is evidence that presence at trial is "integral to the right to defend oneself . . ." under the Third Convention. ¶ 4101. *See also* comment to Article 109. These circumstances suggest an opportunity for States to address the Third Convention's silence rather than an invitation to incorporate what the Additional Protocol explicitly provides into space left open by the Third Convention.

Practitioners and academics alike will no doubt appreciate the updated *Commentary* as a bibliography of sorts on the Third Convention. Each comment section includes an extensive list of sources relevant to the article analyzed. Still, the updated *Commentary* might have indicated more clearly when observations are based on academic or private deliberations and when conclusions are based on the clear and near-universally established practices of States.

Although the text of the updated *Commentary* is generally well-supported by footnotes, on occasion it does not specify the source of observations, particularly from the former sources. *See, for example,* bibliography to Art. 14 comment. Because the updated *Commentary* promises an examination of the Third Convention chiefly with respect to subsequent State practice, it may lead readers to conclude such developments are the source of every observation offered. In fact, many observations are drawn almost exclusively from academic or International Committee of the Red Cross sources. *See, for example,* ¶ 541 (identifying human rights law obligations applicable to non-international armed conflict). In other cases, citations to State practice are buried in footnotes rather than featured and analyzed in comments. *See, for example,* ¶ 447 (addressing classification of armed conflict under common Article 3).

Length

Additionally, at times, the updated *Commentary* appears to have been swept up in private and academic discussions more so than in interpretive issues acknowledged by States. *See, for example,* ¶¶ 488–494 (addressing the geographic scope of common Article 3). In that vein, the updated *Commentary* is simply too long for its purported purpose. Many comments

appear to indicate the personal zeal of their contributors for a subject or an unfettered account of their research interests rather than considered judgment as to utility. For example, the comment to Article 35 seems adequate to its task by the end of its introductory section. The remaining treatment seems to undermine the utility of the work and put too fine a point on the article. For other provisions that seem superfluous or excessive, see ¶ 2402 (indicating religious personnel may find it helpful to have access to the libraries and reading rooms made available to prisoners' representatives). The comment to Article 123 includes a lengthy historical section that recounts activities of the International Prisoners of war Agency in various conflicts since 1870. ¶¶ 4809–13. The section seems out of proportion with the historical sections of comments on other articles and its utility to the practitioners who are the purported main audience of the updated *Commentary* is not clear. Meanwhile, the updated *Commentary* has relocated much of the historical information from Dr. Pictet's 1960 *Commentary* to early comments on Article 129. These historical comments run to excess, providing a history of war crimes generally rather than of the Conventions' treatment of the subject. The editors surely faced a difficult task paring down the submissions of various authors but might have provided readers closer editing.

Principles

Some of the updated *Commentary*'s most interesting work concerns its identification of principles. The original 1960 Pictet *Commentary* observes with respect to the Third Convention, "The time for declarations of principle is past; the 1929 Convention showed the advantages to be gained from detailed provisions." p. 10. The updated *Commentary*'s resort to principles ranges from the unobjectionable and familiar to the questionable and arcane. For the latter, consider, "[t]he principle of retention of a prisoner's civil capacity during captivity" expressed in ¶ 1700. Consider also the proffered "general principle" that "the application of IHL will cease once the conditions that triggered its application in the first place no longer exist." ¶ 314. Although each is a familiar aspect of the Convention, few if any international lawyers will recognize them or are likely to have resorted to them in their practice as principles.

Later, the updated *Commentary* suggests the role principles might play in interpretation. For instance, a chapeau comment indicates Part II of the Third Convention sets forth "fundamental principles" for the protection of prisoners of war. It asserts these principles "serve as a reference for the understanding and application of the more technical provisions of Parts

III and IV." ¶ 1495. The comment includes one exception in this respect, however. It identifies Article 13 as a hybrid provision, noting it includes a principle of humane treatment and "complimentary obligations, both positive and negative." ¶ 1498.

Further principles emerge throughout the updated *Commentary*. The comment to Article 31 detects from medical ethics a "principle of voluntary and informed consent" but acknowledges inspection against the will of a prisoner of war is permissible when a "serious threat to the lives and health of the rest of the camp population" is present. ¶ 2297–98. It may have been worth developing clearer delineations of principles from obligations of conduct or result that appear in other law of war treaties and instruments.

The updated *Commentary* ascribes the status of principle to entire articles of the Convention as well. For instance, the comment to Article 71 characterizes that article as "a statement of principle." ¶ 3181. The comment estimates Article 71 is significant as a principle rather than merely as a rule or conduct obligation. In a similar vein, the comment to Article 82 identifies a "basic principle" of applicability of laws of the Detaining Power's armed forces to prisoners of war. ¶ 3556. This is a bold conclusion that likely requires careful consideration by States. Although the alleged "basic principle" sounds much like an effort at assimilation, the next comment implies the comment to Article 82 intends to identify a distinct principle.

The updated *Commentary* frequently resorts to principles to help explain the Convention, but they are chiefly or even exclusively humanitarian as opposed to military principles. For instance, a comment acknowledges the scope of the Article 69 notice concerning measures taken to connect prisoners of war to the outside world does not extend to all measures. The comment notes precise procedures of censorship may be withheld for security reasons. ¶ 3111. This interpretation is clearly informed by a principle the updated *Commentary* applies but does not explicitly acknowledge: that of security of the Detaining Power or the imperative of effective detention.

A more deliberate effort to identify and acknowledge military principles such as security, force protection, and economy of force would improve the updated *Commentary*'s survey of principles and provide a fuller understanding of the Convention. For instance, despite a seemingly absolute prohibition on stripping military decorations from prisoners of war, the comment to Article 87(4) permits confiscation of potentially harmful military decorations. Resort to a principle of security or effective detention might have justified the updated *Commentary*'s nonliteral interpretation of the Article 40 and 87(4) prohibitions on stripping badges and decorations from prisoners of war.

Consistency

On occasion, the updated *Commentary* suffers a degree of internal inconsistency. This is unsurprising considering its scale as well as the fact that it compiles work by multiple authors. An important example of internal inconsistency concerns information on the location of prisoner of war camps. The updated *Commentary* explains the drafters of the Third Convention resolved to change the term "destination" from the 1929 Convention to the phrase "postal address" in the 1949 Convention to limit, for security reasons, disclosure of the precise geographic locations of prisoner of war camps. ¶ 2645. This is a helpful account of a deliberate change in language between the 1929 and 1949 Conventions. However, this interpretation apparently conflicts with an earlier interpretation of the phrase "all useful information" concerning camp locations which the updated *Commentary* interprets to include an obligation to communicate precise geographic coordinates of prisoner of war camps. ¶ 2042.

Further inconsistency appears with respect to the Article 70 obligation to complete capture cards on prisoners of war. In light of technological advancements, the comment to Article 70 anticipates electronic transmittal of cards rather than the production and delivery of hard or paper copies. ¶ 3169. Yet the comment observes, "the use of such technologies does not relieve the Detaining Power of the obligation to forward to the Central Tracing Agency the *actual capture card* filled in by each prisoner of war." ¶ 3169 (emphasis added). This comment seems a somewhat stubborn adherence to legacy means of accountability and communication. In fact, earlier the updated *Commentary* envisions providing "electronic devices . . . to complete the cards." ¶ 3132. An earlier comment also refers to "digital capture cards, which may be completed electronically, provided that the process is secure." ¶ 3143. Further, a comment notes, "A standard card or electronic template also facilitates rapid censorship." ¶ 3145.

Burying the Lede

Of serious concern for practitioners, the updated *Commentary* frequently hides important concessions to operational reality, or overstates obligations initially, only to temper them later in a comment. For instance, with respect to the Article 23 obligation to shelter prisoners of war from effects of attack, the comment includes an important concession to military realities, indicating prisoners of war must be "held in areas that are *as safe as possible* from exposure to fire of the combat zone." ¶ 2024. (emphasis added). However, that important point regarding interpretation of text is stashed late in the comment to Article 23. The reading seems reasonable and an

important concession to reality. But its placement long after the preceding comments indicates an unqualified or absolute obligation of protection is likely to mislead readers.

Similarly, the comment to Article 34 respecting exercise of religious duties emphasizes complete latitude to worship is required, but the following section admits disciplinary routines qualify that freedom. ¶¶ 2368, 2369. The first point's separation from the second in the updated *Commentary* risks selective citation. It would be advisable to introduce such qualified obligations in a way that makes clear from the outset their contingent or qualified nature. Presenting them as the updated *Commentary* does, particularly emphasizing language that suggests an absolute obligation, is likely to mislead readers who consult the comment partially, as most will almost surely do.

The updated *Commentary* repeats this practice with respect to the obligation to deliver relief parcels. Addressing permissive restrictions on relief parcels, the comment to Article 72 dutifully relates only Protecting Powers and humanitarian organizations may limit shipments. ¶ 3241. This is certainly a plain reading of Article 72(3). But Article 72(4) permits the Parties to form special agreements between themselves, including restrictions. ¶ 3245. Although the International Committee of the Red Cross admits as much, the comment is buried four paragraphs later, permitting a quick consultation to form the wrong impression. A fuller synopsis at the beginning of the section would have been preferable. In defense of the updated *Commentary*, it must be conceded the Convention itself buries the lede on this issue. But surely, when possible, the updated *Commentary* should remedy these shortcomings, particularly as its purpose is to guide faithful implementation of the Convention.

The updated *Commentary* repeats this practice again. The comment to Article 66 indicates, "Article 66(1) regulates the procedure that the Detaining Power must follow on the termination of prisoners' captivity, so that the prisoners and the Power on which they depend have all the information they need for the prisoners to receive the balances of their accounts." ¶ 3040. This is true except, rather than being a provision Parties "must follow," Article 66(1) is more of the nature of a rare default provision of the Convention. Article 66(2) provides Parties an opportunity to conclude a special agreement negating Article 66(1). Here is a further example of where the updated *Commentary* might frontload analysis of a succeeding provision in light of its effect on the character of a preceding provision.

Still further-buried concessions appear concerning the Convention's

enforcement regime. The comment to Article 129 concedes the grave breaches regime may not have operated as originally envisioned, but only after advancing a strict reading in earlier passages. It observes,

> On paper the grave breaches regime amounts to a watertight mechanism, which should have been an effective means of countering serious violations of the Conventions and the impunity of war criminals throughout the world. Grave breaches can be prosecuted on the basis of various titles of jurisdiction, such as territoriality, active and passive personality, the protective principle or universality. States Parties have, however, made little use of this mechanism, which was ground-breaking at the time. ¶ 5154.

The comment records the first instance of resort to universal jurisdiction took place only in 1994. ¶ 5154. Meanwhile, the succeeding comment to Article 130 indicates, States "have not often followed through on the obligation to either prosecute or extradite perpetrators of the grave breaches listed in Article 130." ¶ 5174.

***Lex Specialis* Doctrine**

Precisely how the Third Convention relates to legal regimes that have matured since its adoption proves an important issue for the updated *Commentary* as well. The so-called *lex specialis* doctrine gives preference to application of legal regimes and rules that specifically address, or are designed precisely for, circumstances over legal rules or regimes that address circumstances generally. Of late, the *lex specialis* doctrine has been admitted to permit interaction of rules from separate regimes. For instance, in its advisory opinion on nuclear weapons, the International Court of Justice resorted to the *lex specialis* of the law of war to understand the international human right to life in the context of armed conflict. International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, (1996) ¶ 25.

The updated *Commentary* makes similar attempts to reconcile or merge concepts from outside the law of war with law of war rules. However it often does so in reverse fashion. That is, rather than use the Third Convention as *lex specialis* for prisoner of war internment to condition or inform the content of human rights law and other regimes as *lex generalis*, the comment does the opposite. It resorts to human rights law and other legal regimes to inform or

fill out understandings of the Third Convention. *See* ¶ 744 et seq.

For example, a comment to Article 34 resorts to a State's detention standard operating procedure for guidance on measures "interfering with good order and discipline of the camp, posing a threat to himself or another detainee, threatening a guard or other staff member or destroying property." ¶ 2371, n. 29. But the supporting citation continues by reference to religious rights guaranteed by a variety of human rights instruments. The comment's point seemed adequately understood and supported without resort to a legal regime outside the law of war. Moreover, the law of war includes a provision expressly dedicated to the subject. This is a regrettable example of resort to a human rights provision of the *lex generalis* to inform a provision of *lex specialis* in the law of war—a curious reversal of the usual flow of the *lex specialis* informing the *lex generalis* to the extent overlapping application is admitted.

The updated *Commentary* repeats this practice in a comment on the Article 42 regulation on using weapons against prisoners of war. Noting human rights law and legal standards for law enforcement operations, the comment states, "the [International Committee of the Red Cross] is nevertheless of the view that requirements under Article 42 would in many respects match the international human rights rules and principles of necessity, proportionality and precaution." ¶ 2536. The comment underestimates the extent to which these additional limits and precautions augment and effectively amend the Convention's article. A warning requirement is clearly included in the text of the Third Convention, as is the notion that resort to lethal force should be exceptional. The effort to clarify what is meant by "exceptional" is understandable but misplaced. Resorting to human rights law to understand a specific provision of the law of war again reverses the usual process of interpreting rules from a generally applicable regime and that of a regime specifically designed for a context such as the law of war with respect to armed conflict or the Third Convention with respect to prisoner of war treatment. Although admittedly less detailed than the use of force regime of human rights, the Convention's ambiguity seems a deliberate and justified concession to the unique context of armed conflict and preventive detention of the armed forces of a nation's enemy.

In a similar vein, the comment to Article 49 includes historical background on proposals for more detailed regulation of prisoner of war labor involving the International Labor Organization. However, the comment makes plain States rejected the proposed elaborations on existing standards and rules. ¶ 2681. The comment is a clear account of how States

identified the level of specificity appropriate to the context of armed conflict and prisoner of war internment. Although more refined regulation was available from another regime of law and even proposed, States chose comparatively less-developed regulations. This episode counsels caution toward efforts to develop or refine the Convention's regulations, particularly through the incorporation of standards developed in separate legal regimes.

Further evidence of a desire to incorporate separate legal regimes is evident in other passages. Article 51 of the Convention expressly incorporates "national legislation concerning the protection of labour . . . ." Importantly, when the Convention intends to incorporate standards from legal regimes outside the law of war, it does so explicitly. Great reluctance should be exercised in implying incorporation of outside standards into the obligations of the Third Convention, particularly considering comparatively more frequent and recent refinements and the development of other regimes, such as human rights law, imply incorporation has attracted reinterpretations of the Third Convention. These reinterpretations should be in most cases rejected.

Concluding Thoughts

These and other concerns, outlined comment-by-comment in this companion, should give significant pause to practitioners that consult the updated *Commentary*. Above all, the updated *Commentary* is an impressive academic and research project on a subject of enduring relevance to the law of war community. Scholars will no doubt find it an inexhaustible source of inspired and searching scholarship and an instructional tool. However, the updated *Commentary* is a significant departure from its predecessor. It veers far from simply identifying universally understood and agreed-upon interpretations of the Third Convention and more closely resembles a project to exhaust humanitarian interpretive possibilities. We at the West Point Department of Law and the Lieber Institute will no doubt continue to use the updated *Commentary* in our teaching. But we will do so with a strong message of caution to our cadets concerning its interpretive approaches. States, jurists, and practitioners are advised to do the same.

FRONT MATTER

WEBPAGE CHAPEAU

The International Committee of the Red Cross has made the updated *Commentary on the Third Geneva Convention* (2020) available at *https://ihl-databases.icrc.org/ihl/full/GCIII-commentary*. Additionally, the updated *Commentary* is available in a two-volume printed edition that runs to well over 2,000 pages.

The chapeau comment indicates experiences during the Second World War as well as "living conditions of peoples" necessitated updating the 1929 Geneva Convention Relative to the Treatment of Prisoners of war. The comment indicates the 1929 Convention left too much to interpretation. It concludes, "Experience had shown that the daily life of prisoners depended specifically on the interpretation given to the general regulations."

The chapeau comment also reminds Article 41 requires the Third Convention to be posted in camps; thus, the drafters of the Third Convention aimed for it to be readable.

FOREWORD

The Foreword reminds readers Dr. Jean Pictet and his editorial team published the original *Commentary to the Third Geneva Convention* in 1960. The Third Convention entered force in 1950 and therefore stood on its own, without a commentary, for 10 years. The Foreword observes, "the Convention is a living instrument." p. xi. Identifying its intended audience, the Foreword indicates the updated *Commentary* "equips practitioners and scholars with a new tool in the continuing effort to alleviate human suffering during armed conflicts. It provides guidance on and contextualization of the Convention's rules. It presents the ICRC's interpretation of the law and indicates the main diverging views and issues requiring further discussion and clarification." p. xii.

As noted above, the Foreword to the 1960 *Commentary* includes a disclaimer indicating the work is that of the authors alone. No such disclaimer appears in the updated *Commentary*.

INTRODUCTION

The Introduction to the updated *Commentary* provides general context and background on the 1949 Third Geneva Convention. It characterizes the Convention as part of an effort "to fill some of the gaps" the Second World War revealed. ¶ 2. It identifies themes and major subjects of the Convention and outlines the updated *Commentary*'s interpretive methodology. At its outset, the Introduction also identifies humane treatment as a "fundamental principle," setting an important and recurring subject for the updated *Commentary*'s work on the Convention. ¶ 1. The updated *Commentary* frequently identifies principles at work in the Convention as well as so-called "principles of the Convention" itself. It also identifies and employs principles of the broader law of war, of other regimes of international law, and of general international law.

The updated *Commentary* chiefly involves the work of treaty interpretation. But it often considers and comments on customary international law as well. The Introduction indicates the Convention is "generally considered to be part of customary law." ¶ 3. This claim respecting custom is not novel or widely contested. Many consider the Convention to reflect obligations that bind States regardless of their status as Parties. The updated *Commentary* frequently resorts to the claim of customary status to indicate a State's withdrawal from or renunciation of the Convention would have little effect on its obligations in armed conflicts.

Still, the updated *Commentary* does not include an exhaustive, article-by-article analysis or particularly deep sourcing for the claim of customary status. The International Committee of the Red Cross likely declined to include such work in the updated *Commentary* in light of its substantial and ongoing work on codifying the customary law of war in its separate publication, *Customary International Humanitarian Law*. *See* International Committee of the Red Cross, (Cambridge: Cambridge University Press, Jean-Marie Henckaerts and Louise Doswald-Beck eds, 2006). Indeed, the Head of Project for the updated *Commentary*, Dr. Jean-Marie Henckaerts, was also the coeditor of the International Committee of the Red Cross customary law study.

Yet as the updated *Commentary* itself indicates, many provisions of the Convention have not been exercised by States regularly or as originally envisioned by the Convention. It seems, rather than identifying the entire Convention as customary, more detailed work might have been undertaken to identify particular provisions that lack evidence of State practice to merit customary status. For instance, as the updated *Commentary* concedes, States have not observed the Convention's obligation to appoint Protecting

Powers during armed conflict with any regularity. Neither State practice nor *opinio iuris* exists to lend the obligation status as an obligation of customary international law.

In another effort to address a matter technically outside the Convention, the Introduction helpfully reminds 17 articles of the Regulations annexed to the 1907 Hague Convention IV also concern prisoner of war treatment. The Third Convention does not replace the Hague Convention prisoner of war provisions but rather complements them. A later comment analyzes Article 135 of the 1949 Third Convention, which more fully addresses the Convention's relationship to the Hague Regulations' provisions on prisoners of war. ¶¶ 5370–5379.

Interestingly, two provisions of the Hague Regulations do not find counterparts or amendments in the Third Geneva Convention. First, Article 6 of the 1907 Hague Regulations permits prisoners of war "to work . . . on their own account." Second, Article 12 indicates prisoners of war on parole who are later recaptured, having borne arms "forfeit their right to be treated as prisoners of war, and can be brought before the courts." By virtue of Article 135, each of these Hague Regulations provisions operates free from alteration by the Third Convention of 1949.

The Introduction also includes a brief historical section. It describes conditions of armed conflict that gave rise to the 1949 Geneva Conventions and the diplomatic and other meetings that produced them. The updated *Commentary* indicates 47 States were Parties to the 1929 Convention at the start of the Second World War. ¶ 9. It also notes, "Japan declared that it was ready to apply the Convention during the Second World War 'under conditions of reciprocity and *mutatis mutandis.*'" ¶ 9. Noting the shockingly poor experiences of many prisoners of war and highlighting the compelling need for international legal reform, the Introduction emphasizes the Second World War went so far in many circumstances as to convert detention into a means of killing. ¶ 10.

Continuing to relate the history of the Convention, the Introduction highlights a general methodological choice States faced in 1949 as they updated the Geneva Conventions. It indicates,

> A choice had to be made between developing more detailed rules covering all possible eventualities or formulating general principles sufficiently flexible for their implementation to be adapted to the context. In the end, the Diplomatic Conference, meeting in Geneva in 1949, agreed on a compromise that

> included detailed provisions, as well as certain general and inviolable principles. ¶ 11.

The updated *Commentary* undertakes a difficult task in this effort to generalize the Convention. The bargain struck by States at the 1949 Diplomatic Conference of Geneva eludes easy or obvious generalizations. The Convention is an extraordinarily complex instrument which is clearly the product of sharp negotiation and disagreement and frequently of compromise. As the Introduction indicates, many provisions of the Convention are quite detailed; many are not detailed at all. Additionally, principles, though undoubtedly present, are not always clearly delineated by the Convention, nor do they always find consistent expression.

In his own introduction to the 1960 *Commentary* on the Third Convention, Dr. Jean Pictet observes, "The time for declarations of principle is past; the 1929 Conventions showed the advantages to be gained from detailed provisions . . . . This is undoubtedly a great step forward in humanitarian law." Pictet, *Commentary* p. 10. Thus, where Dr. Pictet estimated the Convention reflects law maturing from vague principles to detailed rules, the International Committee of the Red Cross appears to second-guess that view, detecting a work based on compromise rather than consistency. Like the Convention itself, the updated *Commentary* swings between resorting to general principles and developing specific rules of conduct to achieve its purposes.

The Introduction also helpfully reminds readers of the possibility under the Convention of special agreements to augment the protections afforded to prisoners. ¶ 11. The passage is an important reminder that, despite its considerable length and complexity, the Convention is not in any sense complete or comprehensive, although the comment characterizes it as a "comprehensive framework." ¶ 1. The Convention's anticipation of supplemental agreements makes clear States left unregulated many issues arising from the internment of prisoners of war. Even subjects the Convention regulates explicitly and in detail are not always fully or thoroughly treated. As the updated *Commentary* accepts at many points, the meaning of the Convention is often unclear or unsettled and despite its clear origins in efforts to better humanize armed conflict, the Convention leaves many humanitarian interests and outcomes unvindicated. The availability of special and supplemental agreements under the Convention is compelling evidence in this respect.

Although each comment in the updated *Commentary* addresses the

history and development of its respective article, the Introduction provides general information on the drafting and diplomatic work that produced the Convention. It explains a Preliminary Conference of National Red Cross Societies took place in 1946 immediately following the Second World War. In 1947, a Conference of Government Experts met to consider a draft that later formed the basis for work at the 17th International Conference of the Red Cross in Stockholm in 1948. The latter conference produced the so-called Stockholm drafts which were the starting point for the final round of negotiations and adoption of the Convention at the 1949 Diplomatic Conference of Geneva. ¶ 13. The Introduction shares representatives of 59 States attended the Diplomatic Conference of Geneva from 21 April to 12 August 1949. An additional four States sent observers. ¶ 14.

Turning to the general content and themes of the Convention, or as the updated *Commentary* refers to them, "transversal issues," the Introduction observes, "The basic principle underlying all four Conventions is respect for the life and dignity of the individual . . . in situations of armed conflict." ¶ 19. Recalling the Introduction earlier referred to a "fundamental principle" of "humane treatment" (¶ 1), the question of precisely how the updated *Commentary* identifies and employs various principles is important. What parameters the International Committee of the Red Cross uses to discern a "fundamental principle" from the "basic principle" identified here is unclear. The interpretive or other significance of a principle being "basic" versus "fundamental" is also unclear.

Moreover, the updated *Commentary* does not disclose how, or if, it has distinguished these principles from rules or obligations of conduct for Parties. As this *Companion* will reveal, the updated *Commentary* is replete with passages that identify principles and fundamental principles bearing on a wide variety of subjects. Yet their significance to the practitioner is not clearly established. In most cases, such as with the purported fundamental principle of "respect for the life and dignity of the individual . . . in situations of armed conflict," the goal appears to be to achieve emphasis or to develop in the reader a foundational mindset. Although understandable, a more concrete approach to principles would enhance the integrity and practical impact of the updated *Commentary*.

Another goal of the updated *Commentary* is to update certain terminology of the Convention. For instance, the comment characterizes sexual violence as impacting on "physical and psychological integrity" rather than, as the Convention does, on "*honour or family rights*." ¶ 24 (emphasis added). Although appealing and consistent with movements and emerging

attitudes in the regions of some States Parties, the extent to which the latter terms are universally agreed to be obsolete is unclear. Amending the language, or at a minimum the meaning, of the Convention in this respect must be done very cautiously. States objecting to this form of amendment or evolution of meaning and the motives behind it should respond to the updated *Commentary* on this point.

The Introduction returns to the subject of law of war principles when it addresses the Third Convention's frequent resort to legal assimilation. ¶ 30. Many Third Convention standards of treatment are expressed by reference to members of the armed forces of the Detaining Power. The Introduction observes, "[O]ver the course of modern history, prisoners of war have thus been for the most part 'assimilated' into the armed forces of the Detaining Power." ¶ 30. It continues, "[T]he term 'assimilation' reflects an understanding that prisoners of war will be treated on the same terms as members of the armed forces of the Detaining Power." ¶ 30. The citation supporting this passage, however, illustrates a variant of the principle of assimilation seen in the Convention. It refers to Articles 51 and 53 which assimilate standards applicable to *nationals* of the Detaining Power rather than to its armed forces with respect to labor conditions. ¶ 30, n. 51. Article 24 also includes an interesting example of internal assimilation—that is, assimilation between categories of prisoners of war. That article assimilates conditions in permanent transit and screening camps to those of permanent prisoner of war camps.

The Introduction adds assimilation featured extensively in the preparatory work for the Convention. ¶ 31 (citing *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 518). In addition to finding direct expression in the Convention, assimilation is also the foundation for many rules. In this respect, the updated *Commentary* recites:

> Section VI, Chapter III (penal and disciplinary sanctions) (see, for example, art. 82);
>
> Article 20 (conditions of evacuation);
>
> Article 25 (quarters);
>
> Article 46 (conditions for transfer);
>
> Article 84 (courts);
>
> Article 87 (penalties);
>
> Article 88 (execution of penalties);

Article 95 (confinement awaiting hearing);

Article 102 (conditions for validity of sentence);

Article 103 (confinement awaiting proceedings);

Article 106 (the right to appeal);

Article 108 (the establishments and conditions for serving a sentence).

The Introduction indicates the assimilation principle is also implicit in Article 33 (rights and privileges of retained personnel), Article 52 (dangerous or harmful labour), and Article 60 (advances of pay). ¶ 32.

The comment to Article 25 notes, "Historically, 'the principle of assimilation' had been used to regulate food for prisoners of war in the 1899 and 1907 Hague Conventions." ¶ 2106. The 1929 Geneva Convention Relative to the Treatment of Prisoners of war provided similarly, requiring rations "equivalent in quantity and quality to that of the depot troops." ¶ 2108. Here is an example of the principle of assimilation, as the updated *Commentary* itself indicates, where States abandoned military assimilation as a protective measure. Rather than assimilation, the Third Convention imposes a results-based standard. Prisoners of war must be kept in good health, maintain weight, and not develop nutritional deficiencies. The updated *Commentary*, particularly the Introduction's earlier treatment of assimilation as a principle of the Convention, may be insufficiently sensitive to, or informative of, this development.

Article 51 also resorts to a form of assimilation. In this case, the Convention equates prisoner of war working conditions to similarly employed "nationals of the Detaining Power." This standard reflects a change from the 1929 Convention which assimilated standards for "depot troops of the Detaining Power." The change is notable as a rare instance where the Convention incorporates a standard applicable to a civilian population rather than to armed forces. Given the rarity, it seems incorporation of civilian treatment standards by implication should be disfavored and asserted exceptionally and very cautiously, if not abandoned entirely.

Although elsewhere the updated *Commentary* identifies so-called principles of international law, general principles, principles of international humanitarian law, fundamental principles, and basic principles, the Introduction discerns assimilation as a specific principle of the Third Convention. The same section of the Introduction also recites a "principle of equivalency." ¶ 31 (citing United States, District Court for the Southern District of Florida, *Noriega case*, Judgment, 1990, p. 1526).

It bears emphasis, however, that the Convention resorts to assimilation only in relation to particular issues. Reactions to the updated *Commentary*'s treatment of assimilation illustrate the concept can easily be taken too far. For example, some have suggested the Convention's general (yet selective) regime of assimilation commands a Detaining Power provide equivalency to prisoners of war in matters not explicitly mentioned by the Convention. For instance, a prominent commentator has suggested equivalency of the human rights owed to the Detaining Power's armed forces. This argument clearly proves too much; the Convention, based on hard-learned historical lessons, frequently departs from assimilation to order the Detaining Power's relationship with and obligations toward prisoners of war.

Still, the updated *Commentary* somewhat reduces the requirements of any absolute application of the principle of assimilation. It often emphasizes assimilation requires treatment that reflects merely "similar" rather than identical treatment. ¶ 33. The updated *Commentary* nonetheless fills out the notion of assimilation, asserting, "Where the Convention applies the principle of assimilation in a specific context, the result is that prisoners of war benefit indirectly from the relevant domestic legal framework, as informed by applicable international law, to the same extent as members of the Detaining Power's armed forces." ¶ 34. The Introduction also emphasizes assimilation cannot serve to lower treatment below applicable domestic and international legal standards. ¶ 36. It may be worth further emphasizing these assimilation benefits are, as the updated *Commentary* indicates, limited to specific contexts. They do not apply when the Convention provides a separate standard of treatment for prisoners of war.

Although a generally useful and often efficient tool for regulating treatment, assimilation is not without difficulties. The Introduction concludes applying assimilation to civilian categories of prisoner of war under Article 4A(4) & (5) "raises particular challenges." ¶ 57. Generally, the Convention makes little effort to adapt its treatment obligations for civilians, such as merchant crews and certain journalists, who qualify for prisoner of war status. The Introduction does not delve into resolutions of these challenges; however, a later comment addresses them in more detail. *See* ¶ 1046.

As a historical point not made by the updated *Commentary*, assimilation made an early appearance in the 1785 Treaty of Amity and Commerce between the King of Prussia and the United States of America. A provision on prisoners of war provided,

> common men be disposed in cantonments open and extensive enough for air and exercise, and lodged in barracks as roomy and good as are provided by the party in whose power they are for their own troops; that the officers shall also be daily furnished by the party in whose power they are, with as many rations, and of the same articles and quality as are allowed by them . . . to officers of equal rank in their own army.

Despite its ancient roots, assimilation has not proved a failsafe. Like its successor, the original Pictet *Commentary* includes caution concerning assimilation. Reflecting on experience with assimilation during the First World War, Dr. Pictet observes, "The experience of the 1914-1918 war showed, however, that abuses might result from any strict assimilation of prisoners of war with the armed forces of the Detaining Power." p. 406.

In the Third Convention, assimilation is most apparent in the criminal or disciplinary sections. *See* Part III, Section VI, Chapter III. The limits on assimilation are reflected, however, in the prohibition on compelling service in the war effort. Prisoners of war, unlike their counterparts in the armed forces of the Detaining Power, may not be assigned or compelled to perform tasks that support the war effort of the Detaining Power. Limits on assimilation are further reflected in the absence of a duty of loyalty by prisoners of war to the Detaining Power. Prisoners of war are not paid according to full assimilation either; in most cases they are paid at a greatly reduced rate from forces of the Detaining Power. Of course, prisoners of war also do not enjoy the same freedom of movement or communication as their counterparts.

d. Developments in science and technology since the adoption of the Convention

The world and armed conflict have seen staggering advances in technology since adoption of the 1949 Geneva Conventions. The Introduction acknowledges the Third Convention's several references to outdated technology. ¶ 39. For instance, Article 71 of the Convention refers to telegrams as substitutes for letters. ¶ 40. Of course, the Third Convention makes no mention of recent technological developments such as cyberspace. The updated *Commentary*'s Introduction, however, notes foresight by the Convention's drafters' use of the phrase, "the most efficient methods available" for medical inspections. ¶ 43. The updated *Commentary* does not explain, however, why the Convention's drafters did not resort to this

helpful phrase in its other references to technology. States may wish to note and preserve the phrase for future drafting efforts.

e. The role of Protecting Powers

No practical evaluation of the Third Geneva Convention's subsequent implementation by States can be made without reference to its failed Protecting Powers system. Collapse of that regime stands out as one of the Convention's most significant failures. The updated *Commentary* walks a realistic, if careful, line in its treatment of the Protecting Powers regime. Although the International Committee of the Red Cross accepts States' near complete abandonment of the practice of appointing Protecting Powers during armed conflict, it resists the conclusion that the regime has passed into desuetude (a condition of disuse that renders an obligation obsolete or extinct).

The Introduction offers significant history and context to the Protecting Powers system, nonetheless. It notes the Geneva tradition of the law of war imported Protecting Powers from diplomatic practices between States in times of peace. The 1929 Geneva Convention Relative to the Treatment of Prisoners of war first codified a Protecting Powers system, though implementation was not required. ¶ 45 (citing 1929 Geneva Prisoner of War Convention, art. 86). The updated *Commentary* notes the 1929 Convention's Protecting Powers system was not well implemented in the Second World War; 70% of prisoners of war were deprived of the services of a Protecting Power. ¶ 46. Nonetheless, that system reappeared in the 1949 Convention and the International Committee of the Red Cross has identified it as a "lynchpin" of monitoring compliance. ¶ 1186.

The Introduction notes, although the role of Protecting Powers extends to numerous aspects of the Convention, it features most prominently in the oversight of judicial proceedings by a Detaining Power against prisoners of war. ¶ 47. Still, acknowledging the system's rampant disuse, the comment indicates,

> since 1949 Protecting Powers have only been appointed in five international armed conflicts; the last instance being in 1982. There has been no protest at the failure of States to fulfil this obligation in subsequent conflicts. The same is true for Article 10 with regard to the appointment of substitutes; indeed, none have formally been appointed since 1949. Based on this subsequent practice, appointing

> a Protecting Power or a substitute no longer seems to be considered an obligation on Parties to a conflict. At the same time, there is no indication that the High Contracting Parties consider that Article 8 has fallen into desuetude. ¶ 49 (emphasis added).

Notwithstanding negative subsequent practice, the comment maintains, "The fact that . . . States . . . have interpreted the obligations in Articles 8 and 10 as optional does not diminish their obligations to permit effective supervision of the rules of the Conventions that require the involvement of a Protecting Power." ¶ 50. This is a peculiar, almost stubborn, observation considering the previously showcased practice by States. To imagine a clearer case for desuetude by practice is difficult, especially in light of the updated *Commentary*'s commitment to consider State practice subsequent to adoption of the Convention to inform its meaning. The observation has potential to undermine the integrity of resort to subsequent practice informing other provisions of the Convention. States may wish to weigh in on the matter or to reconvene for purposes of clarifying the precise state of obligations concerning the supervision of the Convention's implementation in the absence of Protecting Powers.

2. The ICRC's role in the interpretation of the Conventions and Protocols

The Introduction touts the position of the International Committee of the Red Cross "as guardian and promoter of humanitarian law," a role it emphasizes is recognized in Statutes of the International Red Cross and Red Crescent Movement. ¶ 71. Indeed, the production and publication of the updated *Commentary* itself stands as strong evidence of the International Committee of the Red Cross's conception of its role with respect to the development and understanding of the law of war. The updated *Commentary* provides an important opportunity for States and the various constituencies of the law of war to evaluate the International Committee of the Red Cross's contributions.

Although the International Committee of the Red Cross enjoys, and surely should enjoy, a strong degree of independence in determining how it can best fulfill its mandate and where to invest time and resources, the updated *Commentary*, and for that matter the growing catalog of International Committee of the Red Cross legal publications and products, afford the entities from which it enjoys support and the States that issued its mandate, an opportunity to evaluate its contributions. In particular, the extent to

which the International Committee of the Red Cross and its capacity as so-called "guardian" of the law of war entitles it to offer independently formed and held interpretations of any authoritative character is worthy of debate.

An equally interesting aspect of the role of the International Committee of the Red Cross in the law of war may be its maintenance of archives of practice. The Introduction notes, though archives of material collected during consultations between the International Committee of the Red Cross and States are confidential, older materials have been opened for public examination. Currently, archives of materials from 1975 and older are open and have been integrated into the updated *Commentary*. ¶ 73.

As a further comment on State practice, the Introduction helpfully identifies important international armed conflicts that have taken place since adoption of the Convention and that involved prisoners of war:

> These conflicts include: the Six-Day War between Israel and Egypt, Syria, Jordan, and Iraq in June 1967 and the conflicts between Armenia and Azerbaijan (period covered: 1988–1994), Eritrea and Ethiopia (1998–2000), India and Pakistan (period covered: 1970–1971), Iran and Iraq (1980–1988), Russia-Georgia (2008), and the international armed conflict between the US-led coalition and Iraq (2003–2004). Other conflicts in which the ICRC visited prisoners of war include, for example, the 1991 First Gulf War and the international armed conflict in the Democratic Republic of the Congo (1998–2002). ¶ 74, n. 102.

C. Methodology

3. Context

The updated *Commentary* identifies the 1969 Vienna Convention on the Law of Treaties as its chief source of instruction for interpretive methods. ¶ 75. The Introduction identifies Articles 31–33 of that treaty as particularly relevant. ¶ 75. Those articles appear as follows,

Section 3. Interpretation of Treaties

Article 31. – General rule of interpretation

> 1. A treaty shall be interpreted in good faith in accordance

with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. – Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or

to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33. – Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

The updated *Commentary* concludes the Third Convention's preamble and annexes constitute "context" for purposes of Vienna Convention on the Law of Treaties, Article 31(2). ¶ 83. Regarding context, that the 1949 Geneva Conventions have exceptionally brief, almost perfunctory preambles is worth recalling. The interpretive significance of this departure from common practice is not considered in depth by either the Introduction or the respective comment on the Third Convention's preamble. Specifically, the possibility that the Convention's nominal preamble reflects failure by States to agree on issues usually included in preambles is worthy of consideration.

The Introduction also recalls the 1949 Geneva Conventions have no official article titles. The Swiss Federal Council added the titles that appear in most reproductions of the Conventions after the 1949 Diplomatic Conference of Geneva for ease of reference. ¶ 86. The updated *Commentary* does not emphasize the point, but the interpretive significance is the titles should receive no weight concerning the meaning of the articles or their text. They should be treated as nothing more than navigational guides to the Convention. The International Committee of the Red Cross discloses, though in a less-than-prominent passage, it has modified the titles of some articles to aid reference. ¶ 86. This practice reinforces the point that the article titles have no interpretive value or role.

4. Object and purpose

The Introduction acknowledges the preambles to the 1949 Geneva Conventions do not indicate the object and purpose of those treaties. ¶ 88. It observes nonetheless, "The overall object and purpose of the Third Convention is to ensure that prisoners of war are humanely treated at all times, while allowing belligerents to intern captured enemy combatants to prevent them from returning to the battlefield." ¶ 89. This seems a fair expression of the Convention's purpose. It acknowledges both the humanitarian and military equities represented in the Convention's provisions. However, a well-placed US commentator has criticized the Introduction's work concerning a purported object and purpose of the Convention. Michael Meier, 'The updated GC III Commentary: A Flawed Methodology?', *Articles of War*, 3 Feb. 2021.

The comment offers a further object and purpose of the Convention, noting, "It should be recalled that common Article 3 provides the Third Convention, and the other Conventions, with an additional object and purpose, as it serves to protect persons not or no longer participating in hostilities, including persons deprived of liberty, in situations of non-international armed conflict." ¶ 90. This seems another unobjectionable, if somewhat incomplete and partial, statement of an object and purpose of the Convention. A more complete statement might add the Convention protects such persons while allowing belligerents to effectively wage those conflicts. The updated *Commentary* nods toward this refinement later when it indicates, "The balance between humanitarian considerations, on the one hand, and military necessity, on the other, is a hallmark of international humanitarian law." ¶ 91.

5. Additional elements of interpretation

Considering the goal of the updated *Commentary* to account for developments in the 70 years since States' adoption of the Convention, that it devotes significant attention to subsequent practice as a method of treaty interpretation is unsurprising. ¶ 92. Important to recall is Article 31(3) of the 1969 Vienna Convention recites "subsequent practice in the application of the treaty *which establishes the agreement of the Parties regarding its interpretation*." (emphasis added).

The terms "establishes," and "agreement" are crucial to principled application of this interpretive approach. The Vienna Convention does not refer merely to practice, but sufficient practice to establish agreement. Additionally, agreement "of the Parties," not merely agreement within the field of the treaty's subject matter, establishes meaning. In this respect, the Vienna Convention deliberately echoes the customary international law formula's dual requirements of State practice and *opinio iuris* (sense of legal obligation). Agreement for purposes of Article 31(3) seems to require evidence of consent among the States Parties. Consent in turn seems to call for some discernible consultation between the Parties as much as discernible practice itself. Indeed, it seems Article 31(3) subsequent practice calls for consensus on the scale and the extent of agreement that formed the Convention in the first place. The disclaimer of the foreword of Dr. Pictet's 1960 *Commentary* understands this when it acknowledges "*only the participant States are qualified*, through consultation between themselves, *to an official . . . and authentic interpretation*." (p. 1, italics in original, middle emphasis added).

Yet the updated *Commentary* observes, "Subsequent practice that does not fulfill the criteria of this provision, i.e., to establish the agreement of the Parties regarding the interpretation of a treaty, may still be relevant as a supplementary means of interpretation under Article 32." ¶ 93. Vienna Convention Article 32 admits supplementary means of interpretation. Article 32 supplementary means are resorted to when Article 31 sources leave the treaty meaning ambiguous or lead to absurd or unreasonable meanings. This restrictive understanding of subsequent practice is justified in light of impulsive practices' potentially radical effect on treaty text secured by the deliberate, often painstaking process of drafting and negotiation. Only equally careful, consultative, and deliberate efforts should influence meaning. But Article 32 refers, as an illustrative example, to preparatory work and circumstances of conclusion. Article 32 appears, at least on its face, to be State focused in its survey for sources of meaning. Readers of

the updated *Commentary*, and particularly States and their representatives that evaluate International Committee of the Red Cross interpretations for possible implementation or enforcement purposes, should carefully evaluate respective interpretations for evidence they are supported by subsequent practice and consensus as understood by the Vienna Convention.

The updated *Commentary* asserts, "The seven decades since the adoption of the Geneva Conventions have seen the development of significant practice in their application, which is particularly useful in this respect." ¶ 93. Earlier, however, the updated *Commentary* indicates only nine international armed conflicts have taken place in these 70 years, most involving only two States conducting prisoner of war operations on a comparatively small scale. ¶ 74, n. 102. Addressing this body of practice, the comment observes, "This consists of conduct by one or more Parties in the application of the treaty after its conclusion." ¶ 93. The reference to conduct by *one* Party is surprising. It seems this can only be correct if that conduct were clearly supported through agreement by the other Parties to the Convention. In this sense, the updated *Commentary* may have overstated at its outset the scope and scale of the Convention's actual practice by States.

b. International human rights law

On the fraught subject of interface between the law of war and international human rights law, the Introduction observes, "[I]t is widely recognized that human rights law provisions applicable in armed conflict complement the protection afforded by humanitarian law." ¶ 99 (citing two advisory opinions of the International Court of Justice and two International Committee of the Red Cross publications). Yet the International Court of Justice *Nuclear Weapons* advisory opinion cited by the comment does not seem to go as far as the comment contends. Rather than insist the two legal regimes were complementary, the Court seemed instead to employ the law of war during armed conflict as a means by which to understand a human rights law norm—in that case, the right not to be arbitrarily deprived of life. The Court understood the law of war to greatly limit the scope and character of the human right to life. Ultimately, the updated *Commentary* resolves to take a case-by-case approach to integrating or accounting for human rights law in its interpretation of the Convention. ¶ 100. It observes,

> In the event of a real conflict between the respective norms, resort must be had to a principle of conflict resolution such as lex specialis derogat legi generali, by which a

> more specific legal norm takes precedence over a more general one. The clearest example of such a conflict is the fact that humanitarian law provides for the internment of enemy personnel who qualify as prisoners of war under the Third Convention based solely on that status and without court review of the lawfulness of internment. ¶ 104.

However, the updated *Commentary* frequently departs from the promised approach. In many instances, human rights law informs the meaning of law of war provisions rather than *vice versa*. These instances are highlighted throughout this *Companion* for readers' careful attention.

8. Absence of practice and desuetude

Finally, the Introduction recognizes the concept of desuetude, but perhaps surprisingly, finds no role for it in the Convention. It observes, "no provision was found to have fallen into desuetude." ¶ 122. This conclusion is remarkable in light of scattered provisions of the Convention that lack significant implementation by States. The possibilities of desuetude are addressed in greater detail by the respective comments on articles of the Convention and will be evaluated respectively in this *Companion*. The Introduction does, however, highlight "Examples of provisions in the Third Convention with no or only limited practice . . . ." ¶ 123. These include:

- Articles 8 and 10 on Protecting Powers and their substitutes, which have rarely been used since 1949;
- Articles 11 and 132 on the conciliation and enquiry procedures, which have not been relied upon as such in recent conflicts;
- Article 57 in relation to prisoners working for private employers. The practice of using the labour of prisoners of war has decreased, and even more so the practice of allowing prisoners to work away from a camp;
- Article 61 on supplementary pay for prisoners of war. In international armed conflicts since 1949, this provision does not appear to have been resorted to;

- Article 75 regarding special means of transport for relief parcels. There has been no specific practice under this provision since 1949. ¶ 123.

Still, the updated *Commentary* insists, "these provisions continue to exist as valid treaty rules and must be applied where their conditions for application are fulfilled." ¶ 123. Again, this decision is curious, especially with respect to the provisions that were technically applicable to armed conflicts and situations in those conflicts but neglected by States. It may have been possible for the updated *Commentary* to distinguish mandatory provisions neglected by States from provisions of limited applicability to which States have not resorted. The binding character of the former is surely subject to erosion in light of subsequent practice and apparent consensus, whereas the latter have simply proved inapplicable to conditions of warfare and may be regarded as lying in reserve, awaiting such conditions should they materialize. States may wish to consider clarifying their own understandings of the legal status of the provisions helpfully highlighted by the updated *Commentary*.

PREAMBLE

> *The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of revising the Convention concluded at Geneva on July 27, 1929, relative to the Treatment of Prisoners of war, have agreed as follows:*

The comment to the Third Convention's preamble notes its cursory character and that it now stands in contrast with the fuller preambles of the 1977 Additional Protocols to the 1949 Geneva Conventions. ¶ 133. A draft of the Conventions submitted by the International Committee of the Red Cross to the 1948 conference that preceded the 1949 Diplomatic Conference of Geneva included no preamble; the Diplomatic Conference of Geneva added the preamble but only after intense debate in committees, where agreement on content proved difficult to achieve. ¶ 137. For instance, the comment indicates France proposed a robust preamble at the 17th International Conference of the Red Cross in Stockholm. The French preamble identified "respect for dignity" as a universal principle but was rejected. ¶ 136. Although States declined to include that principle in the

final preamble, worth noting is the updated *Commentary* includes "respect for . . . dignity of the individual" as a "basic principle" of the Convention in its introduction. ¶ 19. Perhaps all that can be said about the Third Convention's preamble is it clearly records an intent to revise the 1929 Geneva Convention Relative to the Treatment of Prisoners of war and emphasizes the representatives ultimately agreed to and adopted the text of the 1949 Convention.

PART I

GENERAL PROVISIONS

The comment to Part I addresses the Convention's common articles—those it shares with the other three 1949 Geneva Conventions—generally. It helpfully notes the Fourth Convention Relative to the Protection of Civilian Persons in Time of War offsets its numbering of the later opening common articles with its intervening and unique Article 6 on the end of application of that treaty. ¶ 149. The result is the 1949 Conventions' common articles appear in the respective Parts I of the four Conventions as follows:

1949 GENEVA CONVENTIONS COMMON ARTICLES				
	GC I	GC II	GC III	GC IV
Respect for the convention	Art. 1	Art. 1	Art. 1	Art. 1
Application of the convention	Art. 2	Art. 2	Art. 2	Art. 2
Conflicts not of an international character	Art. 3	Art. 3	Art. 3	Art. 3
Special agreements	Art. 6	Art. 6	Art. 6	Art. 7
Non-renunciation of rights	Art. 7	Art. 7	Art. 7	Art. 8
Protecting Powers	Art. 8	Art. 8	Art. 8	Art. 9
Activities of the ICRC and other impartial humanitarian organizations	Art. 9	Art. 9	Art. 9	Art. 10
Substitutes for Protecting Powers	Art. 10	Art. 10	Art. 10	Art. 11
Conciliation procedure	Art. 11	Art. 11	Art. 11	Art. 12

ARTICLE 1

RESPECT FOR THE CONVENTION

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

The comment asserts Article 1 "reiterate[s] the general principle that the Conventions are binding upon its Parties, which have 'to respect' them." ¶ 151. The comment thus offers a further principle, in this case a so-called "general principle," of respect for the law. The comment does not explain the significance of designating a general principle, as contrasted with earlier-identified "fundamental" or "basic" principles. A general principle may indicate broader application or even a sort of universal utility not found in fundamental or basic principles.

It would not be unreasonable to regard respect for law as a general principle of international law or for that matter as a general principle of law as understood by the 1945 Statute of the International Court of Justice, Article 38 when it refers to "general principles of law recognized by civilized nations." The latter principles are entirely distinct from principles of international law. They are most commonly derived from municipal legal systems, particularly from notions of procedure applicable to litigation or adjudication.

However, the comment's characterization of Article 1 of the Convention as involving a general principle may have been unnecessary. A clearer comment might simply have noted common Article 1's consistency with the 1969 Vienna Convention on the Law of Treaties, Article 26, *pact sunt servanda*, and its likely customary incarnation which dictates, "Every treaty in force is binding upon the parties to it and must be performed in good faith."

The comment interprets the High Contracting Parties to the Convention's obligations under common Article 1 "to respect and to ensure respect" to include themselves and their own organs with respect to the former and "by other High Contracting Parties and non-State parties to an armed conflict" with respect to the latter. ¶ 152. That is, the comment detects from common

Article 1 both an obligation for a State to "respect" the Convention itself and an obligation for that State to "ensure respect" for the Convention by other States. To reinforce this interpretation, the comment observes, "The interests protected by the Conventions are of such fundamental importance to the human person that every High Contracting Party has a legal interest in their observance, wherever a conflict may take place and whoever its victims may be." ¶ 152.

Although many obligations of the Convention are of fundamental importance to regulating warfare and the treatment of prisoners of war, this is surely not true of *every* provision of the Convention. For instance, making tobacco available in canteens is difficult to conceive as fundamental. GC III, art. 28. Still, the comment concludes "The Conventions thus create obligations *erga omnes partes*, i.e. towards all of the other High Contracting Parties." ¶ 152. The International Committee of the Red Cross seems in this comment to indirectly assert its own evaluation of the Conventions' importance or fundamentality and elevates them to an *erga omnes* status. Meanwhile, the footnote supporting the assertion cites an International Court of Justice advisory opinion on the Convention on the Prevention and Punishment of the Crime of Genocide rather than any source dealing directly with the Third Convention. ¶ 152, n. 2.

The comment later adds,

> [T]he proper functioning of the system of protection provided by the Conventions demands that States Parties not only apply the provisions themselves, but also do everything reasonably in their power to ensure that the provisions are respected universally . . . . The Conventions thus create obligations erga omnes partes, i.e. obligations towards all of the other High Contracting Parties. ¶ 152.

This passage warrants careful examination. It seems, at first blush, in tension with the specifically delineated and quite selective obligations of the grave breach provisions of Articles 129 and 130 of the Convention. These articles' grave breach regime explicitly describes universal enforcement obligations for all States with respect to clearly enumerated, but only select, provisions of the Third Convention. The comment seems to extend this notion to common Article 1 without the benefit of treaty language comparable to the grave breach articles. The comment may detect distinct responsibility and enforcement functions from Article 1 and the grave breach provisions of the Convention. That is, it may be possible

to read Articles 129 and 130 as referring to a regime of enforcement against individuals whereas Article 1 refers to States' breaches. Yet no State has clearly proffered or implemented such an understanding. The comment does not cite any such State regime or instances of practice in this respect. Moreover, within the same instrument, surely some account must be made of the difference in drafting and construction between Article 1 and the grave breach articles.

A further possibility may be that the comment regards the Convention's later grave breach provisions, particularly Article 130, as reflecting *erga omnes* rules that require an injured State (read: "all States") to take action to prosecute or extradite, whereas all other rules of the Convention are *erga omnes* but do not require the specific acts of prosecution or extradition. Still, this is not the view offered by the updated *Commentary*. The comment's interpretation *obliges* positive external obligations with respect to the Convention's supposed *erga omnes* rules. Additionally, an *erga omnes* character does not carry an *obligation* to enforce. It merely entails a right to do so; *erga omnes* character justifies universal enforcement but *does not oblige* it. The updated *Commentary* acknowledges the distinction later in its comment on Article 129. It observes, "Furthermore, the grave breaches regime imposes on States Parties the obligation to either prosecute or extradite alleged offenders, regardless of their nationality, as opposed to a right to do so recognized in international law in connection with alleged perpetrators of war crimes." ¶ 5087.

To its credit, the comment later acknowledges a narrower reading of common Article 1 but insists nonetheless, "[t]he prevailing view today and supported by the ICRC, is that Article 1 requires in addition that States ensure respect for the Conventions by other States and non-State Parties. This view was already expressed in the 1960 ICRC Commentary." ¶ 153.

It is true, the 1960 Pictet *Commentary* expresses support for a broad reading of common Article 1. Yet a few clarifications are in order. First, the 1960 *Commentary* is not an International Committee of the Red Cross institutional commentary but rather the private work of its editors. Second, Dr. Pictet mentions an external component but with the qualifier "should" in each case. The more clearly emphasized meaning from Dr. Pictet is his rejection of reciprocal observance as a condition of application between Parties and a requirement breaches be prevented *ex ante*, thus accounting for the "ensure respect" language. Third, and as perhaps further evidence of the still modest nature of common Article 1 as originally adopted, the original *Commentary* is quite brief, running to about one printed page. It identifies

nothing comparable to the elaborate system of enforcement and responsibility between States envisioned by the updated *Commentary*. Last, though citations to the preceding, original *Commentary* are helpful for awareness purposes, particularly for busy practitioners, the question of bootstrapping arguments developed by an earlier edition warrants consideration. Rather than the fact of the view having been expressed previously, it seems the extent to which that view has been adopted and incorporated into practice by States is relevant to assessing the meaning of common Article 1.

Meanwhile, the comment asserts the broad, external view is "prevailing" but does not clarify in what sense. The observation is not supported by sufficient authority or citations to indicate the broad, external view is a numerically prevailing view held and expressed by States. Nor is there any indication the prevailing practice of States during armed conflict has been to exercise common Article 1 obligations externally. By its own methodology it seems the updated *Commentary* would turn to the Vienna Convention on the Law of Treaties Article 31(3)(b) standard for subsequent practice and agreement. Yet again, evidence of both subsequent practice and agreement is lacking in this respect.

This leaves the possibility the International Committee of the Red Cross considers the external view to be prevailing in academic circles and among select commentators. Yet even this assessment is not overwhelmingly clear from the citations or from a survey of available academic commentary on the subject. The comment does not offer, nor does it seem feasible to compile, an especially reliable accounting in this respect. The title of a private work cited by the comment suggests a novelty the updated *Commentary* does not readily concede. This lone passage on the issue appears in the private commentary of Bothe et al., *New Rules for Victims of Armed Conflict*: "the obligation to ensure respect for the Protocol falls also upon Parties not involved in the conflict. They have to use any lawful means at their disposal in their international relations to ensure that the HCP involved respect the Protocol." ¶ 2.8.

Turning to the history and development of common Article 1 to better understand its meaning, the comment notes the 1929 Geneva Convention's obligation to ensure respect in all circumstances appears in Article 25. ¶ 156. The comment indicates the 1948 draft at the 17th International Conference of the Red Cross in Stockholm moved the obligation to Article 1 of that draft. The 1948 Stockholm Conference also added the element of "ensure respect" to "stress that if the system of protection of the Convention is to be effective, the High Contracting Parties cannot confine themselves to implementing the Convention" but "must also do everything in their power to ensure that the humanitarian principles on which the Convention is founded shall be universally

applied." ¶ 157 (quoting draft Conventions submitted to 1948 Stockholm Conference, p. 5). If so, this does not seem a fully accurate interpretation.

As an aside, the comment notes the International Committee of the Red Cross's own *Customary International Humanitarian Law* study extrapolates the obligation of common Article 1 of the Conventions to the entire body of the law of war. ¶ 159. This conclusion would not be objectionable if it were limited to the narrower understanding of common Article 1 as a provision intended to restate the obligation to fulfil legal duties (*pact sunt servanda*) during a State's own operations and by its own forces. However, if the very broad and obligatory external and *erga omnes* meaning offered by the International Committee of the Red Cross is retained, then the conclusion would mean every State has an *erga omnes* obligation to ensure respect for every provision of the law of war. The humanitarian allure of this view is far more apparent than the legal support for it.

The comment validly notes, "Common Article 1 is addressed to the 'High Contracting Parties'. Contrary to some other provisions in the Convention, it is not addressed to the 'Parties to the conflict'. Hence, it does not cover non-State armed groups which are party to a non-international armed conflict." ¶ 164. This is an interesting concession by the International Committee of the Red Cross. From a humanitarian standpoint and considering the object and purpose of common Article 3 respecting non-international armed conflicts, identified earlier in the Introduction to the updated *Commentary*, an interpretation that non-State armed groups hold obligations might have been expected.

The comment distinguishes obligations applicable to non-international armed conflict, however, observing the obligation to ensure respect does not apply to non-State actors with respect to common Article 3. ¶ 165. Again, the humanitarian motive for this conclusion is clearer than the legal basis. International Committee of the Red Cross products and two private academic comments are the cited sources for the conclusion. The comment does not mention State practice after the adoption of common Article 1 or evidence of agreement between States to that effect. Moreover, the interpretation rests uneasily with a later conclusion international organizations bear obligations under common Article 1 regardless of whether they are High Contracting Parties to the Convention.

The comment emphasizes arrangements of operational control during multinational operations do not reduce the *erga omnes* obligation. ¶ 168. However, the contingent contributions of forces to these alliances are usually evidence contrary to the International Committee of the Red

Cross's understanding of common Article 1. That is, notwithstanding shared operational arrangements, States frequently retain jurisdiction over their armed forces with respect to disciplinary and penal matters such as enforcement of the Convention. Clarification from States in this respect would be useful.

As noted above, the comment extends the obligation of common Article 1 to international organizations. ¶ 171. This seems in tension with the comment's prior observation with respect to non-State Parties. ¶ 164. In that case, the International Committee of the Red Cross emphasizes common Article 1 uses the term "High Contracting Parties" as opposed to "Parties to the conflict." With respect to international organizations, the latter seems better suited than the former as international organizations cannot become High Contracting Parties to the Convention.

3. The obligation to ensure respect by others

Building on its earlier claim common Article 1 includes an external component, the comment asserts, "States, whether neutral, allied or enemy, must do everything reasonably in their power to ensure respect for the Conventions by others that are Party to a conflict." ¶ 186. It continues,

> This duty to ensure respect by others comprises both a negative and a positive obligation. Under the negative obligation, High Contracting Parties may neither encourage, nor aid or assist in violations of the Conventions by Parties to a conflict. Under the positive obligation, they must do everything reasonably in their power to prevent and bring such violations to an end. This external dimension of the obligation to ensure respect for the Conventions goes beyond the principle of pacta sunt servanda. ¶ 187

The comment offers a contrasting view. It notes Professor Frits Kalshoven, a highly influential law-of-war commentator who frequently contributed work to the International Committee of the Red Cross, had offered a far narrower interpretation of common Article 1. ¶ 188, n. 66 (citing Frits Kalshoven, 'The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit', *Yearbook of International Humanitarian Law*, Vol. 2, 1999, pp. 3–61, 28). The comment also notes the United States and Norway advocated narrow understandings of common Article 1 at the 1949 Diplomatic Conference of Geneva. ¶ 188 (citing *Final Record of the Diplomatic Conference of Geneva of 1949*,

Vol. II-B, p. 53 (Norway and United States).

Nonetheless, the comment rebuts these views with the "overwhelming humanitarian importance" of the Conventions and indicates the International Committee of the Red Cross had made its broad understanding clear prior to the 1949 Diplomatic Conference of Geneva. ¶ 188. The latter is a curious comment. It has an air of estoppel, seeming to indicate because the International Committee of the Red Cross placed States on notice, it regarded the proposed language as carrying a certain meaning for States adopting that language, even States that adopted that language understanding it to hold a contrary meaning, could not effectively rebut or reject the notified view. At least the United States and Norway appear to have expressed a contrary understanding prior to adopting common Article 1. It seems just as likely, by making their narrow understanding clear *during* the 1949 Diplomatic Conference of Geneva and not having provoked significant resistance to their view, estoppel instead might run against the International Committee of the Red Cross's view. Ultimately, it may be best to regard the matter as unresolved by preparatory work.

The comment offers a raft of "subsequent practice" in support of the *erga omnes* view drawn from conferences and unrelated treaties. ¶ 189. At minimum, these citations are worth careful examination by States.

The comment also notes, in addition to a positive obligation of enforcement against all other Parties, common Article 1 involves a negative obligation not to aid or assist violations of the Convention. ¶ 192. This part of the comment tracks the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, Article 16 which provides,

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.

The comment identifies "transferring weapons if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions" as a violation of the alleged common Article 1 external negative obligation. ¶ 194. This observation is likely correct; however, a qualification is required. Under the Articles on Responsibility

of States, aid or assistance is itself a wrongful act and is not a means for attributing other States' internationally wrongful acts to the supporting State. The extent to which common Article 1 fully incorporates the aid or assistance regime of the Articles on Responsibility of States is unclear. The Convention significantly predates the International Law Commission's final draft Articles on Responsibility of States, although that work began soon after the adoption of the Convention and codified in many respects existing customary international law on State responsibility.

To return to the comment's weapons transfer example, whether a breach of common Article 1 requires a transferring State to specifically direct its support or transfers to acts that amount to violations by the receiving State is also unclear. The comment appears to suggest a mere expectation of prohibited use is sufficient to constitute the knowledge element of prohibited aid or assistance. Yet a commentary to the Articles on Responsibility of States explains prohibited aid or assistance "must be given with a view to facilitating the commission of that act, and must actually do so." Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, Article 16, ¶ 3, p. 66.

Thus, an account of the weapons transfer scenario involving prohibited aid or assistance would require that the transferring State intended to facilitate the receiving State's breach of the Convention. To the extent the International Committee of the Red Cross comment means to suggest a departure from the general international law regime of State responsibility, strong evidence supporting this claim seems to be required. This is so particularly considering the updated *Commentary*'s incorporation of the Articles on Responsibility of States with respect to other Articles. *See, for example,* ¶ 1514 (concerning Article 12 responsibility for treatment of prisoners of war by organs of the State). Practitioners should carefully consult their own State's legal positions on this issue as well as their State's views on the Articles on Responsibility of States more generally. States should also consider making their views on this issue clear.

In addition to negative obligations to refrain from certain conduct, the comment claims the external element of common Article 1 includes a positive obligation involving affirmative acts. It asserts,

> The High Contracting Parties also have positive obligations under common Article 1, which means they must take proactive steps to bring violations of the Conventions to an end and to bring an erring Party to a conflict back to an

> attitude of respect for the Conventions, in particular by using their influence on that Party. ¶ 197.

More significantly perhaps, it alleges,

> This obligation is not limited to stopping ongoing violations but includes an obligation to prevent violations when there is a foreseeable risk that they will be committed and to prevent further violations in case they have already occurred. ¶ 197.

This is a stunning interpretation considering the number of States Parties to the Convention, their various capabilities and means of influence, as well as the preventive dimension of the obligation as couched by the International Committee of the Red Cross. The notion that the Convention has been enforced by States as prescribed by the comment is not supported by strong evidence. Combined with the quite expansive substantive obligations outlined throughout the updated *Commentary*, positive obligations to undertake preventive steps present perhaps as many destabilizing effects on international relations as humanitarian advantages.

To support its view with respect to positive obligations, the comment cites State responses to an International Committee of the Red Cross questionnaire circulated in 1973. ¶ 204. A commentator, however, has questioned whether the comment fairly and accurately characterizes State responses to the survey. Verity Robson, 'Ensuring Respect for the Geneva Conventions: A More Common Approach to Article 1', *Opinio Juris*, 20 July 2020, http://opiniojuris.org/2020/07/17/ensuring-respect-for-the-geneva-conventions-a-more-common-approach-to-article-1/.

The comment concedes, "Certainly, the precise content of this positive obligation is difficult to determine in the abstract, yet this difficulty is not sufficient in itself to deny the existence of such an obligation. Common Article 1 is a living provision which must be interpreted in the overall context of the Conventions." ¶ 205. Yet had subsequent State practice established an external positive obligation under common Article 1, surely those seventy years would have yielded a wealth of State practice and agreement to support the claim. That the comment offers no citation to a State unilaterally undertaking the sorts of measures envisioned as obligatory weakens its claim. The comment includes a list of individual measures States might undertake. ¶ 214. But again, a much stronger case

would have been made by citing actual examples of State practice rather than by resorting to private scholarship or interpretation.

Finally, the suggestion that every State is responsible for ensuring respect for the Convention by every other State exists in tension with Article 12 of the Convention, which outlines a clear system of responsibility in this respect between transferring and receiving Powers. The negotiating history considered a broader and joint allocation of responsibility but rejected it in favor of fixing responsibility on a single Party. The comment's novel reading effectively makes every State responsible for the treatment of every prisoner of war at all times, displacing or rendering as surplus the Convention's dedicated regime of responsibility in cases of prisoner of war transfer.

F. The phrase 'in all circumstances'

This section of the comment begins with two uncontroversial understandings of the function of common Article 1. First, it indicates,

> This phrase was originally linked to the abolishment of the so-called si omnes clause, a provision contained, among others, in the 1906 Geneva Convention and in the 1907 Hague Conventions to the effect that the Conventions were only applicable if all of the belligerents in a given conflict were party to it. ¶ 217.

The 1899 and 1907 Hague Conventions had restricted their operation to wars exclusively involving States Parties to those instruments. Participation in a war by any State not Party to the Hague Convention sidelined the Hague obligations of every Party to the conflict. By contrast, the 1929 Geneva Convention abandoned the *si omnes* clause through its Article 82. This is also a widely agreed-upon function of common Article 1 with respect to the 1949 Geneva Conventions. The comment to common Article 1 observes, "The undertaking to respect and to ensure respect 'in all circumstances' also reaffirms the strict separation of *jus ad bellum* and *jus in bello* as one of the basic safeguards for compliance with the Conventions." ¶ 219.

The comment discerns a further function for the "all circumstances" passage with respect to reciprocity. It asserts, "The words 'in all circumstances' moreover support the non-reciprocal nature of the Conventions, which bind each High Contracting Party regardless of whether the other Parties observe their obligations." ¶ 221. In addition to this purported purpose of the Article, the comment cites Vienna Convention on the Law of Treaties,

Article 60(5) to reject failure of reciprocity as a basis for the Third Convention's obligations. ¶ 221. But strict application of the Vienna Convention on the Law of Treaties to the Third Convention seems precluded by the former's non-retroactivity provision. Article 4 of the Vienna Convention on the Law of Treaties limits that instrument's application to treaties that postdate it. The Third Convention significantly predates the Vienna Convention on the Law of Treaties. Furthermore, vestiges of reciprocity as a condition to the operation of many law of war rules persist. *See* Sean Watts, "Reciprocity and the Law of War," *Harvard International Law Journal* (2009). Conceiving of the non-reciprocity rule of Article 60(5) as reflecting a retroactive customary rule of interpretation is possible. Still, extensive State practice and comment would be expected to justify such a claim. The comment does not muster such evidence. The comment concedes, however, "On the other hand, respect 'in all circumstances' does not seem to imply, by itself, an absolute prohibition on reprisals beyond those prohibitions specifically provided for in the Conventions." ¶ 222.

Ultimately, the comment to common Article 1 proves one of the more problematic of the updated *Commentary*. It suffers from strained interpretation—seemingly no humanitarian possibility is unvindicated by the reading of the updated *Commentary*—and, more significantly, the subsequent practice and agreement between States the updated *Commentary* indicates it was undertaken to account for is thoroughly lacking.

ARTICLE 2

APPLICATION OF THE CONVENTION

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

At its outset, this comment notes the innovative character of common Article 2. It characterizes the article as a departure from previous provisions that had tied law of war applications exclusively to formalities such as declarations of war. The comment portrays common Article 2 as involving a threshold of application based on objective rather than subjective criteria. Nonetheless, the comment wisely acknowledges, "States are frequently reluctant to admit that they are engaged in [armed conflict]." ¶ 227.

The comment also helpfully catalogs the provisions of the Convention referred to in the first clause of common Article 2 that apply to peacetime conditions. These include obligations to adopt sanctions for grave breaches, to suppress other violations of the Convention, to adopt legislation to prevent misuse and abuse of emblems, to train armed forces and civilian populations, and to disseminate the Conventions. ¶ 232.

1. The concept of declared war

As the comment notes, declaration of war remains an effective threshold for application of the Convention. The comment highlights war declarations' unilateral and subjective character, "regardless of the position and behaviour of the addressee(s)," emphasizing the possibility of a state of war without any conduct of hostilities. ¶ 236. Declarations of war, the comment observes, are merely an "expression of the States' belligerent intent." ¶ 237. The comment notes the legal effects of a declaration of war including, "the transition from the application of the law of peace to the law of war. It will also bring about other legal consequences, such as the application of the law of neutrality, the potential disruption of diplomatic relations between belligerents, and the application of international prize law." ¶ 238.

The comment acknowledges the declining practice of war declaration but determines a condition of desuetude (disuse resulting in extinction or suspension of a legal obligation) does not apply to the common Article 2 declared war clause. ¶ 240. Concerning declarations of war not followed by hostilities, the comment notes implementation of the 1949 Conventions may yet result in beneficial protection, particularly with respect to the Fourth Convention Relative to the Protection of Civilian Persons in Time of War and obligations owed to protected persons present in enemy territory. ¶ 241. Although true of the Fourth Convention, armed conflict not involving hostilities appears to have little call for application of the Third Convention, aside from the Convention's preparations and notices provisions such as those involved in setting up an official Information Bureau pursuant to Article 122.

2. The concept of armed conflict

Turning to the notion of armed conflict in the absence of a declaration of war, the comment observes, "the existence of an armed conflict within the meaning of Article 2(1) must be based solely on the prevailing facts demonstrating the *de facto* existence of hostilities between the belligerents, even without a declaration of war." ¶ 244. The comment seeks to insulate the determination of the Convention's applicability from State characterizations of the confrontation. ¶ 246. Yet it concedes "there is no central authority under international law to identify or classify a situation as armed conflict." ¶ 247. Ultimately, the comment concludes States must determine in good faith the applicable legal framework for their military operations. ¶ 247. The comment also recalls conflict characterizations under the Convention are made independently from *ius ad bellum* determinations under the UN Charter.

¶ 248. It also helpfully adds whether hostilities are authorized by the UN Security Council, undertaken as a legitimate measure of self-defense, or amount to aggression, has no bearing on the applicability or operation of the Convention. ¶ 248.

The comment notes the Third Convention does not define armed conflict. ¶ 250. However, it indicates State practice, case law, and academic literature have refined the notion of armed conflict and its interpretation. ¶ 250. It recites a standard offered by the International Criminal Tribunal for the former Yugoslavia in the *Prosecutor v. Duško Tadić* case indicating, "an armed conflict exists whenever there is a resort to armed force between States." ¶ 251, n. 35 (citing International Criminal Tribunal for Former Yugoslavia, Tadić Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 70). The comment indicates, however, without specific citations, the *Tadić* definition has been widely adopted by "other international bodies" and "is generally considered as the contemporary reference." ¶ 251. Refining the *Prosecutor v. Tadić* definition, the comment observes armed conflict "requires the hostile resort to armed force involving two or more States." ¶ 252.

According to the comment, armed conflicts for purposes of common Article 2(1) are "limited to armed conflicts [that involve] opposing States." ¶ 253. The comment indicates further, "statehood remains the baseline against which the existence of an armed conflict under Article 2(1) will be measured." ¶ 254.

Interestingly, the comment rejects a definition of armed conflict offered by Dr. Pictet's preceding 1958 *Commentary on the Fourth Geneva Convention*. The comment notes, "the 1958 Commentary on the Fourth Geneva Convention refers to '[a]ny difference arising *between* two States and leading to the *intervention of members of the armed forces*." ¶ 255 (quoting Jean Pictet (ed.), *Commentary on the Fourth Geneva Convention* (1958) p. 20 (emphasis added)). The comment concludes the Pictet understanding would mean, for an armed conflict to exist in the sense of Article 2(1), the simultaneous involvement of at least two opposing States through their armed forces is required. The comment judges Dr. Pictet's interpretation to be "too narrow." ¶ 255. Specifically, the comment rejects Dr. Pictet's seeming exclusion of cases of unilateral use of force by one State against another. ¶ 256. In this vein, the comment concludes acts of blockade may trigger application of the Convention as may uncontested invasions. ¶ 256. The comment contends "any attack directed against the territory, population, or the military or civilian infrastructure constitutes a resort to armed force against the State to which this territory, population or infrastructure belongs." ¶ 257. States and legal

sources that had incorporated Pictet's narrower view may wish to consider the comment's revised interpretation and review their stance on this question.

Addressing the means involved, the comment concedes armed conflict "presupposes" a role for armed forces of at least one State. ¶ 258. However, the comment immediately abandons its presupposition, acknowledging the possibility armed conflict may involve "non-military State agencies." ¶ 259. The necessity of the presupposition is then questionable. Ultimately, the comment concludes the identity or character of State organs involved should not affect classification of international armed conflict. ¶ 261. The comment might have led with this conclusion to avoid misquotation or initial misperceptions concerning the view of the updated *Commentary*.

The comment adheres to a traditional view on the question of the intensity of violence required to establish international armed conflict. The comment notes, "Article 2(1) itself contains no mention of any threshold for the intensity or duration of hostilities." ¶ 269. Although true, this observation is of little interpretive value in this case. Common Article 3, the Convention's threshold of application to non-international armed conflict, also does not mention intensity or duration as conditions. Yet both intensity and duration are commonly regarded as elements of armed conflict under common Article 3. Moreover, the updated *Commentary* itself cites intensity and duration as elements of common Article 3 or non-international armed conflicts. *See* ¶¶ 455, 474.

In contrast to the question of whether States must engage in hostile acts to constitute common Article 2 or international armed conflict, the comment retains the work of Dr. Pictet's preceding 1958 *Commentary on the Fourth Geneva Convention* concerning intensity of violence. The comment observes approvingly, "Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2." ¶ 269, n. 68 (quoting Jean Pictet (ed.), *Commentary on the Fourth Geneva Convention* (1958) p. 20–21). Note the quoted passage appears to require involvement of armed forces. This passage should likely be read in conjunction with the comment's previously expressed view armed forces need not be involved in every case and the nature or character of State organs involved is immaterial to conflict character. ¶¶ 258–261.

In that vein, the comment asserts, "Even minor skirmishes between the armed forces, be they land, air or naval forces, would spark an international armed conflict and lead to the applicability of humanitarian law." ¶ 270. The comment admirably recites an example of State practice indicating capture of a single member of armed forces was sufficient to activate the

Convention. ¶ 271, n. 71 (citing Digest of United States Practice in International Law (1981–1988), Vol. III, 1993, p. 3456).

A more complete survey of State practice, however, would have improved the comment. As the comment concedes, States have been reluctant to admit situations involving violence between them amount to armed conflict. One might even acknowledge an upward trend has emerged in the level of violence required. A more thorough and current exploration of these situations and the State views expressed would surely lend valuable insight into the development and interpretation of common Article 2 through subsequent practice and agreement. To its credit, the comment acknowledges a view that a higher threshold of violence applies to international armed conflict than the International Committee of the Red Cross view contends, though the acknowledgment refers to a private report rather than to State practice directly. ¶ 275, n. 80 (citing International Law Association, 'Committee on the Use of Force, Final Report on the Meaning of Armed Conflict in International Law', The Hague Conference (2010) p. 32–33).

The comment addresses the question of non-consensual armed intervention in the territory of another State during a conflict not involving the latter, territorial State. ¶ 290. It offers an expansive view of the application of the Convention through common Article 2 in such cases. The comment asserts incursions "carried out without the consent of the territorial State . . . would amount to an international armed conflict between the intervening State and the territorial State." ¶ 293. In this case, the comment appears to backtrack on its previous commitment to objective criteria indicating armed conflict. For instance, the comment rejects the relevance of the fact violence is not directed against any organ of the territorial State in any respect. ¶ 294. To rebut a view that narrows international armed conflict to violence directed at the territorial State itself rather than taking place on its territory, the comment cites the inevitable effects of hostilities on "the population and public property of the territorial state [which] may be present in areas [subject to intervention]." ¶ 295. The rebuttal, though sensitive to humanitarian interests, reflects, to some extent, a departure from the factual circumstances presented by the non-consensual intervention scenario and the narrow view. Should an incursion affect a civilian population or significant property of the territorial State, it seems even the narrow view would consider such violence relevant to the common Article 2 threshold for international armed conflict.

Ultimately, the question may be best resolved by resorting to the practicalities involved. For instance, the comment does not specify what

would be accomplished by extending a characterization of international armed conflict to a situation involving non-consensual intervention in another State that does not involve clashes or confrontations between that State and the intervening State. Without captures, control of populations, or hostilities against the territorial State or between the intervening State and the territorial State, the Third Convention would have little work to do. Would the supposed Parties to the conflict be expected to establish a Tracing Agency? Would they undertake the various notices required by the Conventions? To consider the entire 1949 Geneva Conventions regime, would they regard and undertake all obligations owed citizens of the other State involved as protected persons under the Fourth Convention? Would all neutral States be required to undertake their respective responsibilities in response to the legal fiction of hostilities between the supposed Parties to the "armed conflict?" It seems the view amounts to an unnecessary and empty formalism not overwhelmingly practiced by States since 1949. The true motive of the broad interpretation seems to be to restrain such interventions—a restraint in the nature of the *ius ad bellum* governing resort to force—rather than to faithfully interpret or apply the Convention and its subsequent practice by States.

The comment also regards armed conflict under common Article 2 as including hostilities in which a State exercises a requisite level of control over a non-State actor engaged in hostilities with another State. ¶ 298. The comment identifies a "relationship of subordination between the armed group(s) and the intervening State, which, depending on its degree, might turn a pre-existing non-international armed conflict into a purely international one." ¶ 299 (parenthetical in original). The comment notes debate concerning the level of control required to convert what is otherwise a non-international armed conflict into an armed conflict for purposes of common Article 2. ¶ 301. It notes both a demanding "effective control" test that requires demonstration of material support as well as supervision and instructions in specific operations. ¶ 302. The comment also acknowledges a comparatively less demanding "overall control" test that merely requires general support and broad coordination or assistance with general planning by a non-State group. ¶ 302. The comment concludes the overall control test "better reflects the relationship between the armed group and the third State for the purpose of attribution." ¶ 304. Furthermore, the comment argues the restrictive "effective control" test's focus on specific operations rather than the general relationship between the State and the non-State group requires operation-by-operation assessments ill-suited to the task of armed conflict classification. ¶ 304.

Although State support for and involvement in armed conflicts between non-State actors and other States is frequent, the comment offers no independent survey or review of State practice or statements of law. It confines its treatment of the question to the judgments of tribunals and academic work instead. A brief review of military legal manuals reveals few, if any, State views on the question. Absence of practice or expressions of *opinio iuris* on the question would seem to leave the issue of application to the discretion of States. States may wish to make clearer their views on the question of State support for and involvement in armed conflicts between non-State actors and other States.

C. The end of international armed conflict

The comment notes the Third Convention's conspicuous silence on when armed conflict ends. ¶ 307. Providing context, it detects an evolution in State practice concerning peace treaties and conflict termination. ¶¶ 308–309. Of late, States have more commonly agreed to ceasefires or merely tapered hostilities rather than concluding conflict through definitive peace treaties. ¶ 309. The comment concludes "a 'general close of military operations' is the only objective criterion to determine that an international armed conflict has ended in a general, definitive and effective way." ¶ 310.

The comment again cites approvingly Dr. Jean Pictet's 1958 *Commentary on the Fourth Geneva Convention*, indicating a general close of military operations involves, "the 'final end of all fighting between all those concerned.'" ¶ 311 (quoting Jean Pictet (ed.), *Commentary on the Fourth Geneva Convention*, (1958) p. 62). The comment also adopts an appropriately pragmatic approach, indicating "In a similar vein to the 'general close of military operations' test, it has been suggested that the assessment of the end of an armed conflict revolves around one basic general principle, namely that 'the application of IHL will cease once the conditions that triggered its application in the first place no longer exist.'" ¶ 314 (quoting Marko Milanovic, 'End of IHL Application: Overview and Challenges', in *Scope of Application of International Humanitarian Law*, Proceedings of the 13th Bruges Colloquium, 18–19 October 2012, College of Europe/ICRC, Collegium No. 43, Autumn 2013, (2013) p. 86–87). Whether the observation constitutes a "general principle" or not is unclear. But the comment helpfully untethers the question of conflict termination from technical or political considerations and reorients the inquiry toward the functions of the *ius in bello*. That is, so long as the situation presents conditions that call for application of the Convention, or Parties resort to means and methods regulated by the Convention, armed conflict should be considered underway.

This objective, *de facto* view on conflict termination also provides an opportunity to reconsider the comment's earlier view that incursions into another State's territory amount to international armed conflict even when the territorial State is not a Party to the "armed conflict." *See* ¶¶ 290–295. How such a conflict, lacking actual hostilities and other objective indicia of conflict between the putative Parties, would end under the objective, *de facto* view of conflict termination is unclear and not addressed by the updated *Commentary*. Would it end abruptly once the territory of the otherwise uninvolved State no longer hosted hostilities? Or would it continue until the actual warring Parties terminated their conflict under the objective standard? States may wish to weigh in on this matter or cite it to reject the earlier view on existence of an international armed conflict in such conditions.

E. Paragraph 2: Applicability of the Conventions in case of occupation

Turning to situations of belligerent occupation, historically a focal point of the *ius in bello*, the comment emphasizes imposition of foreign authority, even in the absence of armed resistance, gives rise to a condition of belligerent occupation. ¶ 321. It further emphasizes, "The fact that part of the local population may welcome the foreign forces has no impact on the classification of the situation as an occupation." ¶ 322.

The comment concedes the Convention includes no definition of occupation. ¶ 327. Thus, the comment reproduces the 1907 Hague Convention IV Regulations Article 42 which states, "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." The comment concludes the Third Convention does not alter this definition. ¶ 327. The comment notes in this respect the operation of Article 154 of the Fourth Geneva Convention which characterizes that Convention as supplementary to the Hague Regulations. ¶ 329. At first blush, a reference to the Fourth Convention may seem out of place. The Third Convention includes, at Article 135, its own characterization of its relationship with the 1907 Hague Convention, explaining itself as "complementary to" the latter. However, Article 135 refers only to the prisoner of war regime of Section I, Chapter II of the Hague Regulations. The Hague Regulations address occupation in Sections II and III. The comment does not explain, but the reference to the Fourth Geneva Convention in this respect seems appropriate.

The comment fully equates occupation as described in the 1907 Hague Regulations Article 42 with occupation as described in the Third Convention's common Article 2. Yet the comment warns "Some norms of the law of occupation may well apply during the invasion phase." ¶ 334. Again, the Third Convention includes very few provisions directly addressed to belligerent occupation aside from Article 4B addressing prisoner of war qualifications. The updated *Commentary* does not elaborate on how an invasion preceding occupation might implicate law applicable to the latter. Presumably, the International Committee of the Red Cross will elaborate on its notion of invasion implicating occupation law norms in greater detail in the forthcoming updated *Commentary on the Fourth Geneva Convention*. States may wish to monitor this development closely or make their views on the subject known beforehand.

Identifying constitutive elements of occupation, the comment adopts the notion of "effective control." ¶ 335. Though the comment unequivocally embraces the Hague Regulations in the preceding section, it does not simply start with and elaborate on the term "authority" as used by the Hague Regulations. The reason becomes clear later when the comment observes, "effective control does not require the exercise of full authority over territory; instead, the mere capacity to exercise such authority would suffice." ¶ 336. It thus reads out or at least diminishes an essential touchstone for discerning conditions of belligerent occupation, namely the exercise of authority. The comment's resort to effective control seems an effort to expand coverage beyond the plain or literal meaning of the Hague Regulations. States should evaluate and make clear their own positions on this important question.

Further refining the notion of occupation, the comment identifies three constituent elements including "the unconsented-to presence of foreign forces, the foreign forces' ability to exercise authority over the territory concerned in lieu of the local sovereign, and the related inability of the latter to exert its authority over the territory." ¶ 337 (citing International Committee of the Red Cross, *Occupation and Other Forms of Administration of Foreign Territory*, pp. 16–26). The comment is curiously devoid of examinations of State practice recognizing, admitting, or alleging conditions of occupation that would confirm the elements proffered. No deficit of putative State practice has emerged since the previous edition of the *Commentary* to justify the omission.

F. Paragraph 3: Applicability of the Conventions when a Party to the conflict is not a Party to the Conventions.

The comment notes Third Convention common Article 2(3) cures the effect of the Hague Conventions' *si omnes* or all participation clauses which prevent those instruments entirely from operating during conflicts involving any non-State Party to the latter. ¶ 378. The comment confirms even when a conflict features a non-State Party to the Convention, the remaining belligerent States Parties to the Convention are bound by it in their mutual relations. ¶ 380. However, the comment concedes, common Article 2 does not result in fully unilateral, nonreciprocal application of the Convention. In this respect, the comment confirms, "when one Party to a conflict is not bound by the Geneva Conventions, the State in conflict with that Party is not bound in relation to that State either, even when it is a Party to the Conventions . . ." thus maintaining obligational reciprocity as a condition of application. ¶ 381. *See* Sean Watts, "Reciprocity and the Law of War," *Harvard International Law Journal* (2009) p. 371–378 (describing obligational reciprocity).

ARTICLE 3

CONFLICTS NOT OF AN INTERNATIONAL CHARACTER

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed "hors de combat" by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

The comment to common Article 3 is the longest of the updated *Commentary*. In fact, the comment presents well over twice the word count of the entire Third Convention. This observation is both a fair warning to readers as well as an insight into the comment's approach. The comment seems, as much or perhaps more than any other comment, an effort at gap filling. It leaves few of the article's ambiguities intact and represents an active effort to render more complete the Third Convention's rudimentary regulation of non-international armed conflict. Considering this approach, readers, particularly States and their legal advisors, are well-advised to turn an acutely careful and critical eye to the comment's work. The extent to which the comment seeks, from a humanitarian perspective, to perfect rather than to objectively parse the article is worthy of consideration.

The comment begins by placing common Article 3 in international legal and historical context. It indicates until 1949, States had regarded civil war "as being exclusively their domestic affair." ¶ 385. Some readers will know the United States' experience in the American Civil War may indicate late-nineteenth century inclinations otherwise. The US Army issued General Order No. 100 to its forces during that war. Although a unilateral order rather than an instrument of international law, Dr. Francis Lieber, the primary author of the Order, appears to have believed it reflected in large part the laws and customs binding on all Nations.

The comment indicates common Article 3 applies to conflicts not of an international character at sea as well as on land. ¶ 386. This is interesting to consider in light of the Article's passage concerning "territory of one

of the High Contracting Parties." The high seas do not qualify as such. Yet, notably, States included common Article 3 in the Second Geneva Convention which regulates treatment of the wounded and sick at sea.

B. Historical background

The comment reminds readers early, multilateral law of war instruments such as the 1864 Geneva Convention applied only to international armed conflict. ¶ 392. It cites concern with elevating the status of rebel parties as a source of State reluctance to commit civil wars to international law. ¶ 392. Interestingly, the comment identifies a 1928 Convention on Duties and Rights of States in the Event of Civil Strife as a little-known source of obligations between States applicable during civil war. ¶ 393. However, on closer examination, the 1928 Convention reveals itself as not a regulation of civil war itself or conduct between belligerents.

On the largely historical subject of belligerency, the comment indicates recognition of belligerent status by a State might implicate neutrality law but historically had no effect on relations between the Parties to a civil war. ¶ 395. That is, recognition of the belligerent status of rebels by a third State could not impose law of war obligations on the belligerent State. Only recognition of belligerency by the warring State itself could do so.

The comment also records early attempts to extend the law of war beyond international armed conflicts. It observes,

> In 1912, two reports by individual National Red Cross Societies addressing the role of the Red Cross in situations of 'civil war' and 'insurrection' were presented to the 9th International Conference of the Red Cross, but strong resistance from States prevented them from being opened to detailed discussion and vote. ¶ 396.

Describing a renewed effort in that respect, the comment recites draft Article 2(4) prepared for the 17th International Conference of the Red Cross in 1948 in Stockholm which formed in significant part the basis of the final Third Convention:

> In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of

> the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in nowise depend on the legal status of the parties to the conflict and shall have no effect on that status. ¶ 404 (quoting Draft Conventions submitted to the 1948 Stockholm Conference, pp. 5, 34–35, 52, 153 and 222).

Note this early draft refers to conflicts "in the territory of one *or more* of the High Contracting Parties . . . ." (emphasis added). Recall the final text of common Article 3 does not include the "or more" passage seeming to restrict application to armed conflict contained within the political borders of a single State Party to the Convention.

The comment also notes early textual revisions intended for inclusion in what became the 1949 Third Convention, and the newly anticipated Fourth Convention Relative to the Protection of Civilian Persons in Time of War, added a reciprocity requirement to draft Article 2(4). ¶ 407. Although the reciprocity clause does not appear in the final draft of either Convention, conditions ensuring some degree of reciprocity persist in the form of group conditions for prisoner of war status, especially the Article 4 condition of "conducting their operations in accordance with the laws and customs of war." Note this condition appears in the Article 13 qualifications for the First and Second Geneva Conventions on the wounded and sick protections as well.

Overall, the comment emphasizes regulation of non-international armed conflict proved an exceedingly difficult task at the 1949 Diplomatic Conference of Geneva. ¶ 409 (citing *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 16, 26, 45–47, 76, 122–24). Views among States' delegations at the 1949 Diplomatic Conference of Geneva varied wildly on the subject of civil war. The comment reminds readers the Union of Soviet Socialist Republics delegation even submitted a (likely disingenuous) proposal to apply the entire Conventions to non-international armed conflicts. ¶ 416 (*Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B 97–98 and 127).

C. Paragraph 1: Scope of application of common Article 3

Noting common Article 3's passage addressing the scope of its application, which reads, "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . ." the comment observes, "the wording agreed upon does not resolve the persistent question of the scope of application of common Article 3. The intentional

lack of detail on this point may have facilitated States' adoption of common Article 3." ¶ 420. This is an impressively frank evaluation by the International Committee of the Red Cross of the deliberate uncertainty of the Convention's text. However, the remainder of the comment's extensive efforts to resolve many of the ambiguities of common Article 3 cast doubt on its willingness to permit the article's uncertainty to survive.

Addressing the notion of armed conflict, the comment concludes, "A situation of violence that crosses the threshold of an 'armed conflict not of an international character' is a situation in which organized Parties confront one another with violence of a certain degree of intensity." ¶ 421. Informed readers will recognize this definition seems to encapsulate several subsequent and widely accepted definitions of conflict not of an international character. But the paragraph includes no citations to these sources. It adds the element of confrontation not explicit in other definitions but which an evaluation of State practice and agreement may well support.

The comment indicates common Article 3 does not regulate the conduct of hostilities. ¶ 423. Rather, the comment appears to regard common Article 3 as having the nature of a "respect and protect" provision of the law of war applicable to situations involving custody or control of victims of war or vulnerable persons. This is interesting to consider. The clause of the article referring to "active part in hostilities" in combination with the prohibitions on violence, especially "violence to life and person" seems to suggest some role in regulating targeting operations. States may wish to express their own views on the subject.

As an additional introductory matter, the comment assesses the legal distinction between international and non-international armed conflict remains relevant. ¶ 425. In light of the perceived convergence between the bodies of law that regulate international armed conflict on one hand and non-international armed conflict on the other, the comment is an important reminder conventional law retains a distinction. The comment indicates the International Committee of the Red Cross makes its own evaluations of conflicts to facilitate its humanitarian work. ¶ 426. This observation could have clarified such International Committee of the Red Cross evaluations do not have any general legal effect. The comment does not indicate how disagreements between International Committee of the Red Cross characterizations and States' own characterizations are resolved. The comment leaves related practical questions unaddressed. Presumably, should a State regard a situation as short of armed conflict, the International Committee of the Red Cross would not attempt to conduct

its functions without State consent. On the other hand, how would the International Committee of the Red Cross approach a situation in which a State contended it was involved in armed conflict and the International Committee of the Red Cross concluded it was not? Would the Committee withhold its services in a situation it did not regard as armed conflict notwithstanding a State's conclusion to the contrary?

The comment also emphasizes the negative character of common Article 3. ¶ 427. It applies to armed conflict "not of an international character." The comment suggests at least one Party to the conflict must not be a State. ¶ 427. However, the comment concludes armed conflict between two non-State actors activates common Article 3. ¶ 428. The supporting citation for the latter conclusion is thin although the comment asserts the claim is "widely accepted." Only a single international criminal tribunal decision and a scholarly article by an International Committee of the Red Cross lawyer are cited. A later passage in the paragraph is perhaps more persuasive when it points to the Rome Statute article 8(2)(d) for the proposition in light of that instrument's adoption by States, although the purpose of the Rome Statute is distinct from that of the Third Geneva Convention. Indeed, the International Criminal Court, created by the Rome Statute, has expressed views that the law of war and the substantive regulations of conduct within the Statute may not be entirely consistent. *See* Appeal Chamber Judgment, Prosecutor v. Ntaganda (2021).

To illustrate how the legal character of conflicts under the Convention may evolve, the comment relates an initial International Committee of the Red Cross classification of the 2001 Afghanistan situation as an international armed conflict when the Taliban regime controlled 90 percent of Afghan territory. It notes, however, the International Committee of the Red Cross reclassified the conflict in June 2002 as a non-international armed conflict upon establishment of a new Afghan government. ¶ 435. The comment acknowledges some States classified the conflict differently. ¶ 436. In light of the updated *Commentary*'s resolution to address subsequent State practice, it seems these latter, State-issued characterizations should be more clearly featured than the International Committee of the Red Cross's own evaluation for its internal purposes.

The comment then turns to the question of State involvement on behalf of a non-State actor opposing another State in non-international armed conflict. The comment notes a 1971 International Committee of the Red Cross Conference of Government Experts rejected the complete "internationalization" of an armed conflict by virtue of a State's intervention

on behalf of a non-State actor. The experts preferred to retain a "differentiated approach" wherein a legally separate conflict exists between the various various parties and States involved in the conflict. ¶¶ 437–38. The 1971 proposal read, "When, in case of non-international armed conflict, one or the other Party, or both, benefits from the assistance of operational armed forces afforded by a third State, the Parties to the conflict shall apply the whole of the international humanitarian law applicable in international armed conflicts." The experts noted a conflict consolidation approach would incentivize non-State Parties to enlist international support. ¶ 437 (citing International Committee of the Red Cross, *Report of the Conference of Government Experts of 1971*, Vol. V, 21, 51–52).

Thus, the International Committee of the Red Cross appears to side with the differentiated approach. But it suggests overall control of an armed group by the intervening State might convert a conflict, including operations involving the former, to an international armed conflict, nonetheless. ¶ 438 (citing ¶¶ 440–444). This is an interesting development. It seems somewhat unresponsive to the experts' rejection of the consolidation proposal in 1971 and the concerns behind the experts' rejection. The comment does not clarify whether adequate evidence exists that States have subsequently consented to this alteration.

Internationalization of non-international armed conflict raises the question of requisite control by an intervening State. To what level or extent must a State support an armed group to lend the conflict an international character? The comment indicates the level of control over a non-State armed group sufficient to internationalize a conflict "is debated." ¶ 440. This seems a helpful concession to the ambiguity of the Convention. The comment relates the details of the International Court of Justice *Paramilitary Activities* case's "effective control" test and the International Criminal Tribunal for the former Yugoslavia *Prosecutor v. Duško Tadic* case's "overall control" test. ¶ 441. The comment indicates preference for the latter overall control test for both conflict classification and "for the purpose of attribution." ¶ 443. The comment offers a persuasive justification for the overall control standard in that the effective control test, in light of its resort to evaluating specific operations, as opposed to the parties' general relationship, and requiring State connections thereto, "might require reclassifying the conflict with every operation . . . ." ¶ 443. The comment concedes the International Committee of the Red Cross position "is not at present uniformly accepted." ¶ 444. The concession is wise but leaves unanswered why the comment showcases the International Committee of the Red Cross's position so prominently. As a

tool intended to guide practitioners outside the International Committee of the Red Cross, the comment does not clarify why it does not catalog various State positions and practices on the question instead.

The International Committee of the Red Cross maintains the differentiated approach to conflict classification in multinational operations as well. ¶ 447. The comment buries a citation to State practice in a footnote rather than showcasing it as commentary. For example, this passage appears in a footnote: "The differentiated approach in the case of intervention of multinational forces has also found the support of States party to the Geneva Conventions." *See, for example,* Germany, Federal Prosecutor General at the Federal Court of Justice, *Fuel Tankers case*, Decision to Terminate Proceedings, 2010, p. 34 ¶ 447 n. 114.

Further emphasizing the distinction between international and non-international armed conflicts, the comment detects distinct thresholds of violence for each. The former includes "any 'resort to armed force between States.'" The comment indicates the latter requires far more. ¶ 450 (citing International Criminal Tribunal for Former Yugoslavia, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 70).

Although likely accurate, it would be far more useful for the updated *Commentary* to survey subsequent State practice for acceptance or incorporation of this international criminal law judgment than to merely restate it. Here, the comment could make a significant contribution to understanding of the armed conflict violence threshold. Even more significantly, the comment might have surveyed State characterizations of internal violence. By now, a wealth of State practice has resulted from non-international armed conflicts as well as from situations of violence that did not meet the violence threshold. Showcasing these situations and the legal opinions of States these situations have provoked would be of great assistance to practitioners evaluating their own circumstances.

The comment addresses the well-known "convenient criteria" for application of common Article 3 proposed in Dr. Jean Pictet's 1952 and 1960 Commentaries to the First and Third Conventions. ¶ 453 (citing Jean Pictet (ed.), *Commentary on the Third Geneva Convention* (1960) p. 36). The so-called Pictet Criteria appear as follows:

> (1) That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate

territory and having the means of respecting and ensuring respect for the Convention.

(2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.

(3) (a) That the de jure Government has recognized the insurgents as belligerents; or
(b) That it has claimed for itself the rights of a belligerent; or
(c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
(d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.

(4) (a) That the insurgents have an organization purporting to have the characteristics of a State.
(b) That the insurgent civil authority exercises de facto authority over the population within a determinate portion of the national territory.
(c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war.
(d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

The comment indicates Dr. Pictet drew his criteria from various proposed amendments to drafts of what became common Article 3. ¶ 453. It characterizes them, however, as "merely indicative" of how the article is intended to apply. ¶ 454. The comment suggests the criteria's selectivity was a function of the prospect of applying the entire Convention regime to a narrowly defined set of non-international armed conflicts—an approach ultimately abandoned by States at the 1949 Diplomatic Conference of Geneva. It indicates "not all of these criteria are fully adapted to common

Article 3" in its final form. ¶ 454. The comment identifies two criteria "now widely acknowledged as being the most relevant . . . . that the violence needs to have reached a certain intensity and that it must be between at least two organized Parties/armed groups." ¶ 455. But the paragraph includes no citations. The claim "widely acknowledged" certainly begs for strong support, particularly from States Parties to the Convention.

Addressing in greater detail the two criteria that remain of Dr. Pictet's work, the comment restates an International Committee of the Red Cross encapsulation of "armed conflict,"

> Non-international armed conflicts are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation. ¶ 457 (citing International Committee of the Red Cross, How is the Term 'Armed Conflict' Defined in International Humanitarian Law?, Opinion Paper (March 2008) p. 5) (emphasis in original).

Again, the comment does not explain why it does not resort to a State's or several States' definitions rather than bootstrapping its own efforts. A short survey of State practice is included, though somewhat buried, in a footnote. *See* ¶ 458, n. 128 (observing "See e.g. Canada, *Use of Force for CF Operations*, 2008, para. 104.6; Colombia, *Operational Law Manual*, 2009, Chapter II; Netherlands, *Military Manual*, 2005, para. 1006; Peru, *IHL Manual*, 2004, Chapter 9, Glossary of Terms; and United Kingdom, *Manual of the Law of Armed Conflict*, 2004, p. 29. See also Colombia, Constitutional Court, *Constitutional Case No. C-291/07*, Judgment, 2007, pp. 49–52; and Germany, Federal Prosecutor General at the Federal Court of Justice, *Fuel Tankers case*, Decision to Terminate Proceedings, 2010, p. 34").

In addition to its own work, the International Committee of the Red Cross showcases that of international tribunals on the question of the non-international armed conflict threshold. It observes, "In the 1990s, rulings by the [International Criminal Tribunal for the former Yugoslavia] and the [International Criminal Tribunal for Rwanda] made an important contribution to the clarification of the definition or constitutive criteria of

non-international armed conflict." ¶ 460. It notes congruence between the international criminal tribunals' approaches and the view of the International Committee of the Red Cross. ¶ 462. The comment further showcases elaborations made by criminal tribunals on the organization and intensity criteria. ¶ 464–65. Again, the comment does not clarify why it rests on two non-authoritative, merely subsidiary means rather than on authoritative sources such as States' agreement on and subsequent incorporation of these respective views.

The comment turns to the 1977 Additional Protocols to the 1949 Geneva Conventions to understand common Article 3 as well. It alleges a passage of 1977 Additional Protocol II, Article 1(2) that indicates inapplicability to "situations of internal disturbances and tensions, such as riots, isolate and sporadic acts of violence . . ." also "defines the lower threshold of common Article 3." The comment claims this understanding is confirmed by State practice. ¶ 465. However, on closer examination, the initial claim is supported only by academic and International Committee of the Red Cross work. ¶ 465, n. 140. The State practice surveyed actually cites other treaties that refer to both Additional Protocol II and common Article 3 including: International Criminal Court Statute (1998), Article 8(2)(c)–(d); Second Protocol to the Hague Convention for the Protection of Cultural Property (1999), Article 22(1)–(2); and Amendment to Article 1 of the 1980 Convention on Certain Conventional Weapons (2001), Article 1(2). ¶ 465, n. 141.

The comment does not specify how these treaties do the work the comment claims with respect to State practice concerning common Article 3. Presumably, the comment maintains these treaties are evidence of subsequent agreements that modify the meaning of common Article 3. But the evidence of State intent in that respect is not entirely clear from the face of those treaties as is so clearly the case with respect to the Third Convention and the preceding 1907 Hague Regulations at Article 135 of the former.

Further developing its case for the two criteria for non-international armed conflict, the comment offers, "The fact that these two criteria have been referred to from soon after the adoption of common Article 3, and have been reaffirmed and fleshed out over the years, confirms their decisiveness for determining the threshold of application of common Article 3." ¶ 469. Still, State support seems particularly important with respect to the adoption of these later private refinements of the notion of armed conflict considering States' overwhelmingly clear decision originally *not* to define armed conflict at their adoption of the Convention. That courts would seek to refine the

notion is not surprising considering their very different function than that of States. Where courts require clarity to adjudicate disputes, States may tolerate, or even require indeterminacy.

The comment identifies conflict duration as "particularly suited to an assessment after the fact, for example during judicial proceedings." ¶ 473. It ultimately identifies duration as an element of intensity but adds brief duration might be overcome by particularly intense hostilities. ¶ 474. The source of this conclusion is unclear and the citation in the footnote to the Inter-American Court of Human Rights' *Tablada* 30-hour conflict case does not incorporate the full extent of negative treatment of that case. If the previous indication the 1977 Additional Protocol II Article 1(2) clause applies to common Article 3 (*see* ¶ 465) is to be believed, then the term "sporadic" seems important and inadequately accounted for by the comment. Noting disagreement about duration, the comment identifies apparently conflicting observations from the International Criminal Tribunal for the former Yugoslavia. ¶¶ 475, 476. Conflicting observations would seem to indicate an unclear standard, but this point is not made by the comment.

The comment notes the International Criminal Court's Rome Statute, Article 8(2)(f) reads:

> [It] applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is *protracted armed conflict* between governmental authorities and organized armed groups or between such groups [emphasis added by updated *Commentary*]. ¶ 477.

The comment notes some have interpreted Article 8(2)(f) as recognizing a form of non-international armed conflict situated *between* common Article 3 and 1977 Additional Protocol II with added emphasis on duration. ¶ 478. Importantly, each of these interpretations is by an academic commentator; none is attributed to a State. The comment indicates the International Criminal Court has not recognized such an intermediate category. Yet neither does the comment clearly recount that Court's treatment of the duration issue in any detail. ¶ 478 (citing International Criminal Court, *Prosecutor v. Lubanga* Trial Judgment, 2012, ¶ 538; International Criminal Court, *Prosecutor v. Katanga* Trial Judgment, 2014, ¶ 1187;

and International Criminal Court, *Prosecutor v. Bemba* Trial Judgment, 2016, ¶¶ 138–140).

The comment notes inclusion of a "political purpose" as an additional characteristic of non-international armed conflict. It indicates States rejected the condition, however, at the 1948 17th International Conference of the Red Cross in Stockholm and the 1949 Diplomatic Conference of Geneva. ¶ 482 & n. 164. Ultimately, the comment rejects motive as an indication of non-international armed conflict for its own reasons including the difficulty of discerning motive. ¶ 484. This subjective evaluation of practicality, though academically useful, may not be a particularly useful contribution to interpretation. Again, State practice on the question would be far more persuasive and helpful.

3. Geographical scope of application

Since the adoption of common Article 3, the geographic aspects of conflicts not of an international character have changed greatly. No longer confined to the political borders of single States—if they ever really were—many such conflicts have taken on transnational, and even global characteristics, raising questions about the legal reach of common Article 3. The comment acknowledges "these questions have gained considerable prominence, in particular with respect to questions on the use of force. They are, at the time of writing, the subject of ongoing discussion." ¶ 488.

Although certainly true of academic circles—the so-called "geography of armed conflict" question has spawned extensive scholarly writing and discussion—the observation may not equally describe the issue with respect to States. The issue of geography in common Article 3 presents intriguing instructional and heuristic opportunities, yet it seems of comparatively less interest in the more pragmatic spheres of military and State legal advisors. States do not appear to have struggled with the issue of common Article 3's application in these conditions. Worth considering is the extent to which the updated *Commentary* has been swept up in a largely academic question as opposed to capturing an actual legal problem faced by States.

The comment observes, "Once the threshold of a non-international armed conflict has been crossed in a State, the applicability of common Article 3 and other humanitarian law provisions governing non-international armed conflict can therefore generally be seen as extending to the whole of the territory of the State concerned." ¶ 493. The comment does not offer a particularly extensive survey of State practice on this question. Observations from the International Criminal Tribunal for the

former Yugoslavia *Prosecutor v. Tadić* case and a German Prosecutor's submission in the *Fuel Tankers* case are the sole sources of support offered. This may be why the comment soon hedges the conclusion. It adds, not all "acts within that territory . . . fall necessarily under the humanitarian law regime." The comment also adds, "Acts that have no such connection to the conflict generally remain regulated exclusively by domestic criminal and law enforcement regimes, within the boundaries set by applicable international and regional human rights law." ¶ 494 (citing an International Committee of the Red Cross report and two cases). Thus, the belligerent nexus requirement mitigates the severity of the comment's "whole of the territory" view.

It soon becomes apparent that questions of authority to engage in lethal targeting may be the chief motive behind the comment's (and academia's) interest in the geography question. That is, by asking whether common Article 3 applies to cross-border conflicts not of an international character, the comment means to inquire about much more than whether the restrictions of common Article 3 apply; the comment means to inquire whether authority to resort to law-of-war targeting procedures is available as well. This is a curious motive considering the comment's preceding claim common Article 3 does not address the conduct of hostilities. *See* ¶ 423. The approach is also curious considering the generally prohibitive character of the law of war, which is seldom, if ever, examined or resorted to for an authorizing function.

Confirming the above supposed motives, the comment identifies four approaches to persons susceptible to intentional lethal targeting yet located outside an area of ongoing hostilities. The views range from a model drawn exclusively from law-of-war targeting and a concept for use of lethal force drawn exclusively from law enforcement situations. The views are as follows:

> According to one view, the humanitarian law rules on the conduct of hostilities will govern the situation described above, without restraints other than those found in specific rules of humanitarian law. According to the second view, the use of force in that scenario is to be governed by Recommendation IX of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law. That Recommendation in conjunction with its commentary states that in the more peaceful areas of a State, the "kind and degree of force which

> is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances". Yet another view holds that the applicable legal framework for each situation will need to be determined on a case-by-case basis, weighing all of the circumstances. Lastly, there is the view that in such circumstances, the use of force would be governed by the rules on law enforcement based on human rights law ¶ 497 (citations omitted).

The comment does not expressly advocate or adopt any particular view though it showcases the Recommendation IX portion of the International Committee of the Red Cross's own *Interpretive Guidance on Direct Participation in Hostilities*. ¶ 497. It would have been helpful for the updated *Commentary* to survey State approaches and practices with respect to these views, especially considering the extensive resorts to targeting operations practice in non-international armed conflicts of late.

Further to the question of the geography of application, the comment identifies two approaches to the common Article 3 clause "in the territory of one of the High Contracting Parties." One view emphasizes the term "one" and suggests common Article 3 does not apply to a conflict taking place in more than one State. A second view emphasizes the phrase "High Contracting Parties." That view indicates if at least one of the territorial States hosting a non-international armed conflict is a Party to the Conventions, then common Article 3 applies. ¶ 500. As with the preceding catalog of views on the geography of common Article 3, and especially considering the updated *Commentary*'s commitment to mining subsequent practice, citations to sources supporting each view would be helpful. The latter view is attributed to a prominent law of war scholar; however, no further citations are provided.

To further consider the geographic question, the comment turns to "the object and purpose of common Article 3"—namely minimum protections for persons not actively participating in hostilities—to support application to non-international armed conflicts that involve territories of multiple States. ¶ 501. The object and purpose of the Convention, and by extension of common Article 3 has provoked debate. Of course, the object and purpose may not simply be humanitarian. As the updated *Commentary* concedes, part of the object and purpose of common Article 3, evident at

the 1949 Diplomatic Conference of Geneva, is to keep international law at bay. ¶ 450 (noting "the fact that States may have a greater tendency to guard against regulation of their domestic affairs by international law than against regulation of their external relations with other sovereign States.") In that respect, the object and purpose of common Article 3 might not indicate application to extraterritorial non-international armed conflicts. Moreover, the object and purpose offered by the comment may prove too much. That is, any number of extended applications might result from such a broad and unqualified object and purpose. In this case, particularly considering the ambiguous meaning of the object and purpose of common Article 3, subsequent State practice as well as supplemental forms of interpretation such as the negotiating history may better inform the article's meaning.

The comment does recount portions of the negotiating history of common Article 3. It acknowledges States abandoned the phrase "one or more" in favor of "one" during the 1949 Diplomatic Conference of Geneva. But the comment declines to attribute significance to the alteration because the change resulted from "unspecified reasons." ¶ 503 (citing See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 10–15). This is an odd reading of the negotiating history. The evidence of a deliberate drafting choice presented by the *travaux préparatoires* is striking. Thus, the comment is either suggesting a scrivener's error or an arbitrariness on the part of States with respect to rejecting the proposed "one or more" text.

These explanations seem unlikely considering the then-prevailing notion of internal armed conflict as confined to the territory of single State, a conception acknowledged by the International Committee of the Red Cross at several points in the updated *Commentary* itself. (*See* ¶¶ 489, 499). The comment indicates a more detailed history is available at: Katja Schöberl, "The Geographical Scope of Application of the Conventions" in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, 2015, pp. 67–83, at 79–82. ¶ 503, n. 191. Whatever the case, the comment is too dismissive of both text and drafting history and devotes inadequate attention to the subsequent practice of States. Ultimately, the comment indicates between object and purpose on one hand and drafting history on the other, the former prevails and therefore common Article 3 should apply to non-international armed conflicts not confined to the territory of "one" State. ¶ 504.

The comment identifies "some evidence of practice by States" supporting the notion of a cross-border or multi-territory non-international armed conflict. ¶ 505. The comment features examples of so-called spillover armed

conflicts regarded as common Article 3 conflicts. *See* ¶ 508, n. 199. But only three examples follow, and they are buried in footnote discussions rather than featured and analyzed as they might have been in full comments. Additionally, much of the coverage of this State practice comprises subsidiary academic accounts rather than primary sources. Ultimately, the comment concludes, "Practice has not yet established a clear rule, although different legal theories have been put forward" with respect to how far into another State's territory a conflict must spill to extend application of common Article 3 to all its territory. ¶ 510.

The comment considers the question of a non-international armed conflict without a clear or primary geographic location, a so-called "global or transnational non-international armed conflict." It notes such a concept could render common Article 3 applicable in the territory of a State not otherwise involved. ¶ 512–13. However, the International Committee of the Red Cross's reluctance to concede application of the common article is apparent. In particular, the comment seems reticent to concede operation of the law of war, particularly to displace peacetime or law enforcement legal regimes concerning resort to lethal force. In this vein, the comment expresses concern that recognition of global non-international armed conflict would tolerate attacks resulting in collateral damage in otherwise uninvolved non-territorial States. ¶ 514. Although true, surely such effects would only be lawful in a *ius in bello* sense. They would not necessarily be lawful as a matter of general international law between the attacking and territorial States, particularly to the extent consent was not given by the latter. Again, the comment concludes State practice supporting global or transnational non-international armed conflict "remains isolated." ¶ 516 & n. 214. Considering increasingly extensive State practice in global non-international armed conflicts, the comment's survey seems incomplete. In addition to accounting for growing resorts to lethal targeting in such circumstances, it seems some account should be taken of State reactions to such operations. Even if a survey could produce only isolated practice, other comments in the updated *Commentary* seem to rest on partial or select surveys in this respect.

4. Temporal scope of application

Turning to the timing of common Article 3's application, the comment notes, "No guidance is given in common Article 3 on when such an armed conflict is to be regarded as 'occurring.'" Unlike the Geneva Conventions in their application to international armed conflicts, or indeed Additional

Protocol I and Additional Protocol II to their respective armed conflict types, common Article 3 contains no specific provision whatsoever on its temporal scope of application. ¶ 517. This is a helpful textual comparison considering the variety of approaches by various instruments applicable to non-international armed conflict and international armed conflict. Despite the noted common Article 3 comparative textual silence, the updated *Commentary* identifies four criteria to identify the end of armed conflict not of an international character. It indicates first, a Party to the conflict may cease to exist. ¶ 523. Second, agreements "are neither necessary nor sufficient on their own to bring about termination." ¶ 524. Third, "lasting cessation without real risk of resumption" is sufficient to terminate a non-international armed conflict. ¶ 525. Fourth, temporary lulls may not indicate termination; intensity may "oscillate." ¶ 526. States may wish to react to these criteria as proposals on the part of the comment rather than as established interpretations of common Article 3.

The comment helpfully notes common Article 3 also includes no provisions for application after conflict termination. ¶ 531. Here is yet another respect in which common Article 3 differs from the rest of the Convention as well as from 1977 Additional Protocol II, art. 2(2) applicable to certain non-international armed conflicts. Still, the updated *Commentary* concludes common Article 3 applies while persons "are in a situation for which common Article 3 provides protection" even if the conflict is over. ¶ 535. This seems entirely desirable from a humanitarian standpoint yet legal support for the conclusion is thin. In fact, the conclusion is at odds with textual evidence, comparison with the remainder of the Convention, and the very limited scheme of common Article 3. It may reflect an attempt to perfect the article rather than to capture either the original or current state of its meaning.

D. Paragraph 1: Binding force of common Article 3

This section of the comment focuses on the passage of common Article 3 that reads, "each Party to the conflict shall be bound to apply . . . ." The comment indicates the duty to apply common Article 3 does not require any further express acceptance or acknowledgment. Also, the obligation is independent of reciprocal acceptance or adherence by opposing forces. ¶ 538.

This is an interesting conclusion to consider. Previous drafts of the article included a reciprocity provision as a condition of application. But the provision was not retained. In this case, rejection of draft text

in preparatory work is given clear effect, where previously this rejection is not given effect by the comment. *See* ¶ 503. Further, reciprocity is a widely acknowledged condition of treaty application with the somewhat strange and perhaps contested Vienna Convention on the Law of Treaties Article 60(5) exception for humanitarian provisions. The comment observes, "The exact mechanism by which common Article 3 becomes binding on an entity that is not a High Contracting Party to the Geneva Conventions is the subject of debate." ¶ 541. But again, this debate appears to be confined to academic circles. Little evidence exists of intense or regular statements by or exchanges between States in this regard.

E. Subparagraph (1): Persons protected

This section of the comment addresses the passage of common Article 3 that reads, "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause." The comment relates the scope of persons protected by common Article 3 provoked little discussion at the 1949 Diplomatic Conference of Geneva. ¶ 552. Nevertheless, the comment observes, "outside common Article 3, humanitarian law contains a number of provisions that benefit persons during the time they are actively participating in hostilities. These include the general prohibition on the use of means or methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering, and prohibitions on specific means and methods of warfare." ¶ 555. Here is a helpful reminder that common Article 3 is limited in its scope of protection. To benefit, persons must take *no* active part in hostilities. Persons taking any active part in hostilities must look elsewhere for protection under the comment's view.

The comment helpfully reminds, "persons taking no active part in the hostilities include non-combatant members of the armed forces, namely medical and religious personnel." ¶ 556. No citation is provided to support this characterization. The position would seem to inform the meanings of the terms "active" and "hostilities." The latter especially involves inflicting harm on or at least military disadvantage to an enemy. The comment elaborates, "It has become widely accepted that 'active' participation in hostilities in common Article 3 and 'direct' participation in hostilities in the Additional Protocols refer to the same concept." ¶ 559. The support for this conclusion is thin: a single International Criminal Tribunal for Rwanda decision and the International Committee of the Red Cross's own

Interpretive Guidance on Direct Participation in Hostilities. More support seems essential considering the resort to separate terms to perform a nearly identical function in a single regime of treaties. More research seems appropriate, particularly with respect to State practice. The United States, for a time, maintained the terms referred to distinct notions. The comment acknowledges debate concerning the meaning of "direct" for purposes of targeting. ¶ 560. Presumably, that debate applies equally to the term "active" in the opinion of the International Committee of the Red Cross.

The comment maintains the phrase "members of armed forces" as it appears in common Article 3 is not limited to formally organized units of a State. The term must, according to the comment, have broader meaning to include members of non-State armed groups. ¶ 564. Yet protection does not include combatant immunity for members of non-State armed groups. ¶ 565. The comment also notes, "The notion of *hors de combat* is not defined in common Article 3 or the Geneva Conventions more generally." ¶ 570. It resorts to 1977 Additional Protocol I to define the phrase and concludes the definition reflects customary international law, citing the International Committee of the Red Cross's own study on that source of law. Elements of the *hors de combat* category include: "(a) he is in the power of an adverse Party; (b) he clearly expresses an intention to surrender; or (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided in any of these cases he abstains from any hostile act and does not attempt to escape." ¶ 571.

It should be emphasized the comment is doing an enormous amount of interpretive work here. First, the comment is expounding on a term that conspicuously lacks definition or internal textual clues to its meaning. Second, the comment incorporates, without explicit reference by text, a definition produced by a separate, though related treaty. It does so without any overt evidence of State intent to form subsequent agreements to that effect, including most starkly, failure to incorporate the definition into 1977 Additional Protocol II applicable to non-international armed conflicts. Third, the comment alleges customary law status for both the incorporated provision and its extension to circumstances of non-international armed conflict. All this work is done with only a citation to an internally produced International Committee of the Red Cross product. It may be that comment is correct; however, States and practitioners are advised to research the issue for themselves and to formulate responses to this comment considering its extensive resort to interpretation.

The comment next observes,

> When a person abstains from hostile acts and does not attempt to escape, there is no longer a reason to harm that person. These conditions would therefore also seem relevant for common Article 3, determining from what moment a member of armed forces (or a civilian who is taking an active part in hostilities) is to be regarded as placed hors de combat and therefore protected under common Article 3. ¶ 572.

This observation is not clearly correct. Mere abstention from hostile acts does not in every case eliminate the necessity of targeting. For instance, though a member of enemy armed forces or an armed group is not committing a hostile act, their status as an enemy provides nonetheless a valid reason to harm them as does their future capacity or potential to commit hostile acts. Moreover, the article resorts to absence or suspension of active participation as the condition for protection rather than commission of a hostile act. A better expression might indicate incapacity or unequivocal commitment not to commit hostile acts as the basis for protection as *hors de combat*.

4. Common Article 3 and the conduct of hostilities

Reiterating and expanding on an earlier observation respecting the subject matter of common Article 3, the comment notes, "some authors support the view that common Article 3 contains some regulation of the conduct of hostilities." ¶ 575 (citing James Bond, 'Application of the Law of War to Internal Conflict', *Georgia Journal of International and Comparative Law*, Vol. 3, No. 2, 1973, p. 348; William H. Boothby, *The Law of Targeting*, 2012, p. 433; Antonio Cassese, 'The Geneva Protocols of 1977 on the Humanitarian law of Armed Conflict and Customary International Law', *UCLA Pacific Basin Law Journal*, Vol. 3, 1984, p. 107; and A.P.V. Rogers, *Law on the Battlefield*, 3rd edition, 2012. p. 301). The comment then identifies what it terms "a more intermediate position" as well. ¶ 575 (citing Michael Bothe, Karl Josef Partsch, and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 1982, p. 667, fn. 1). But the comment ultimately concludes otherwise. It emphasizes the plain meaning of the term "murder" as excluding targeting undertaken in accordance with rules of the *ius in bello*. ¶ 575. "In the view of the ICRC, it follows from the context of the 1949 Geneva Conventions in which common Article 3 is placed, however, that it was not intended to govern the conduct of hostilities." ¶ 576. The comment cites the respect and protect theme of the 1949 Geneva Conventions generally in this regard. ¶ 576.

This is helpful to consider but the International Committee of the Red Cross view is not entirely persuasive. The murder-targeting distinction is not particularly sound. Murder may indeed take place from afar and without the control anticipated in the respect and protect tradition of regulation. The updated *Commentary* footnotes indicate international criminal tribunals have concluded as much. Moreover, murder might indeed be the correct term for a killing carried out inconsistently with *ius in bello* limits such as the general prohibition on targeting civilians. In any event, the term "violence to life and person" certainly seems broad enough to encompass acts undertaken in combat or as targeting operations in hostilities. The comment itself reminds readers common Article 3 does not require a person be in the hands of an enemy power or enemy nationals to benefit from protection. ¶ 579. This point may undermine the above conclusion that common Article 3 does not regulate the conduct of hostilities.

F. Subparagraph (1): Fundamental obligations under common Article 3

The comment then turns to the substantive content of obligations under the article and observes generally,

> The meaning of humane treatment is context-specific and has to be considered in the concrete circumstances of each case, taking into account both objective and subjective elements, such as the environment, the physical and mental condition of the person, as well as their age, social, cultural religious or political background and past experiences. ¶ 587.

This seems a reasonable interpretation of an obviously broad and flexible term adopted by the States Parties. Surprisingly, the comment does not interpret the term "murder" in a similarly broad fashion. *See* ¶ 576. The comment helpfully recalls, however, the article includes specifically prohibited acts as well. ¶ 588.

Footnotes 309–317 include an extensive survey of State military manuals. Such helpful work might be featured in more sections of the updated *Commentary* and promoted to the text of comments. Military manuals likely do not often offer the level of detail or elaborations the updated *Commentary* is looking for. At the same time, the updated *Commentary* could give effect to these differences in detail or lack thereof in its interpretations and especially in its refinements of the Convention.

Turning to conditions of detention, the comment notes common Article 3, unlike 1977 Additional Protocol II, does not address outside contact with detained persons. Nonetheless, the comment concludes, "it has become customary international law that the personal details of persons deprived of their liberty must be recorded and that they must be allowed to correspond with their families." ¶ 593.

But this is not clearly an aspect of common Article 3. Nor is it clearly established by State practice and *opinio iuris*. The International Committee of the Red Cross's *Customary International Humanitarian Law Study* is the only source of support offered. Additionally, whether limits on the nature of outside contact with detained persons are, as the comment expresses them, unqualified obligations seems open to question as well. It seems 1977 Additional Protocol II provided States an adequate opportunity to codify and adopt such an obligation applicable to non-international armed conflict, yet they did not.

The comment addresses next the phrase "in all circumstances" as it appears in common Article 3. The comment observes, "The obligation of humane treatment in common Article 3 is not subject to any explicit qualification based on military necessity. Military necessity arguments therefore do not justify acts or omissions inconsistent with the requirement of humane treatment." ¶ 597. In this case, rejecting a role for military necessity may be justified. States appear to have similarly concluded inhumane treatment is not a feature of the lawful conduct of hostilities. The comment attributes a nonreciprocal meaning to the term "in all circumstances" as well. ¶ 598. It continues, "As discussed in section B, early drafts of this article required reciprocity in order for humanitarian law to be applicable between the Parties to a non-international armed conflict. However, the reciprocity requirement was dropped from the text and the opposite was expressed through the 'in all circumstances' formula." ¶ 598.

This comment offers an interesting basis for interpretive comparison. Here, abandonment of draft text is given significant legal effect. Recall earlier, however, the same phenomenon was dismissed and given no legal effect. *See, for example,* ¶ 503 (dropping "or more" in the clause "territory of one of the High Contracting Parties"). There the comment justified the choice not to give legal effect in light of the deletion's "unspecified reasons." Accepting for purposes of argument the comment's interpretive method, in this case a sufficient reason for deletion was not clearly provided to justify an interpretive departure.

Continuing its examination of the "in all circumstances" passage of common Article 3, the comment notes,

> In the context of non-international armed conflict, international law contains no rules on the resort to force in the sense of jus ad bellum. The phrase "in all circumstances" reaffirms that the lawfulness of one's own resort to force or the unlawfulness of an opponent's use of force do not justify violations of the law governing the way in which such use of force is conducted. ¶ 599.

This is a common observation with respect to the term "in all circumstances" which also appears in common Article 1. But with reference to common Article 3, this observation is curious. The *ius ad bellum* usually has little to offer the context of non-international use of force or armed attack. The comment makes that point in the first quoted sentence here. But is the International Committee of the Red Cross willing to concede the point further with respect to general or human rights law restrictions on States resorting to force against their own populations on their own territory? That is, would the International Committee of the Red Cross concede human rights law does not amount to an *ius ad bellum*-like limit on resorting to force within a State's own territory against an organized armed group?

The comment suggests an answer in the negative several paragraphs later. It observes, "Common Article 3 is strictly humanitarian in character. It does not limit a State's right to suppress a non-international armed conflict or to penalize involvement in such a conflict. It is focused exclusively on ensuring that every person not or no longer actively participating in the hostilities is treated humanely." ¶ 608. This comment seems to clarify the point raised previously only nine paragraphs later in a separate sub-topical section. Given its length, many readers will likely partially consult the updated *Commentary*. Batching related ideas and concepts more tightly seems important in this respect. As an aside, the comment indicates common Article 3 "does not prohibit non-adverse distinctions, i.e. distinctions that are justified by the substantively different situations and needs of persons protected under common Article 3." ¶ 611.

Examining the phrase "violence to life and person," the comment refers to international and regional human rights treaties' guarantees of rights to life and integrity of the person, noting absence of derogation. ¶ 624. The value of this reference to the meaning of the common Article 3 terms is

unclear. Presumably, the comment intends to suggest shared meaning or legal effect between these distinct bodies of law, but the comment does not explicitly make this point. The comment thus hangs uneasily, leaving too much room for selective citation or interpolation.

The comment also offers an element-based definition of prohibited murder. ¶ 635. The supporting citations include extensive references to cases from the International Criminal Tribunal for the former Yugoslavia. Resort to a criminal law term like murder by the adopting States may justify turning to criminal judgments. But these sources do not clearly indicate States have adopted them as "elements . . . under common Article 3." Rather than characterizing or identifying elements, the comment might simply have noted the practice of international criminal courts in the context of criminal enforcement against individuals.

Similar mention of international and regional human rights treaties and standards appears in reference to cruel treatment, though as indicated *supra* (*See* ¶ 624) no clear suggestion is made as to a basis for relevance or whether such understandings are authoritative as a matter of law applicable to non-international armed conflict under common Article 3. ¶ 648. The comment indicates "the terms 'cruel' and 'inhuman' treatment can be used interchangeably." ¶ 653. This reading seems a mild though clear violation of an interpretive convention that all terms of a treaty be given distinct legal effect. The comment provides examples of cruel treatment gleaned from human rights bodies, though again, without explaining the legal basis for departing from the law of war. ¶ 657.

The comment continues, "the difference between torture and cruel treatment is that for torture there is a higher threshold of pain or suffering, which must be 'severe' rather than 'serious', and the infliction of pain or suffering must be the result of a specific purpose or motivation." ¶ 664. The comment offers an exhaustive survey of elaborations on the meaning of torture exploring fine points between "serious" and "severe" pain or suffering. It adopts selective elements identified by *inter alia* elements of crimes within the jurisdiction of the International Criminal Court and rejects others on the basis of a supposed logic of common Article 3 and the context of non-international armed conflict. ¶¶ 665–681. But the comment does not clearly offer elements any more authoritative than those agreed to for use by the International Criminal Court. Fuller citations to State practice would permit a sounder evaluation of these logical deductions by the International Committee of the Red Cross, a task States' military legal advisors and legal policymakers will no doubt wish to undertake.

In a surprising bit of history, the comment identifies relative tolerance for hostage-taking prior to the Second World War. ¶ 682 (citing Military Court at Nuremberg, *Hostages case*, Judgment, 1948, pp. 1249–1251). The comment also delves into the 1979 International Convention Against the Taking of Hostages to define hostage-taking. ¶ 683. Again, disparate treatment of subjects between separate treaties seems more clearly an occasion for contrast than for connection. The comment offers an element-by-element definition of common Article 3 hostage-taking. ¶ 686. Succeeding paragraphs elaborate on each element with illustrative examples. ¶¶ 684–698.

The comment features still another resort to human rights treaties with respect to "outrages upon personal dignity, in particular humiliating and degrading treatment." ¶ 699. If the point is simply to create awareness, the practice is not particularly objectionable. But it seems more likely the comment is suggesting practitioners should resort to these instruments to understand common Article 3, which is a reverse application of the *lex specialis* doctrine in its use of a body of general application to inform a regime of special application. *See* discussion *supra* in analysis of the updated *Commentary* Introduction. As with respect to the term "cruel and inhuman treatment," the comment observes, "While common Article 3 uses both terms [humiliating and degrading] in juxtaposition, suggesting that they could refer to different concepts, their ordinary meaning is nearly identical." ¶ 706. Again, this reading is not without some disregard for the practice of giving effect to each term in a treaty.

Overall, the updated *Commentary*'s treatment of the specific prohibitions of common Article 3 seeks to add clarity to their very general expression. The comment's approach involves identifying constitutive elements reminiscent of, and indeed drawn from, criminal codes and human rights law. Yet one wonders whether this effort goes too far and sacrifices the Parties' intent to agree to only general terms and to permit leeway in their interpretation and application.

To be sure, many States later consented to instruments using an elements-based approach. But they did so in reduced numbers and for context-specific purposes seeking to guide application of the Convention and common Article 3 by other bodies against themselves or their agents as with criminal tribunals. As evidence, compare these States' adoption of or consent to international criminal law standards and the often comparatively general guidance provided to their armed forces in military legal manuals. Few of the latter match the elaborations of the former. States seem more eager to instruct, and therefore to restrict or hem in, tribunals than their own armed forces. The generality of common Article 3 is not an invitation

to fill in its spaces but more likely a sign of State reluctance to commit the issues included to the international legal system at all.

5. Requirement of a regularly constituted court affording all the indispensable judicial guarantees

As with treatment of other specific prohibitions in common Article 3, the comment approaches the judicial guarantees provisions by resorting to similar guarantees in other international instruments. ¶¶ 714–715. Similar concerns arise respecting terms appearing in instruments devised in and for other contexts. The comment concedes, "A proposal to refer to the judicial guarantees of the Conventions, including Article 105 of the Third Convention, was not retained." ¶ 719. "The delegates did not, however, leave the interpretation entirely open since the sentence provides that the guarantees must be 'recognized as indispensable by civilized peoples.'" ¶ 719. Here is a further example of explicit reference to and seeming incorporation of outside standards. Only those that are indispensable are incorporated but the approach of incorporation is seized to lend a fuller range and degree of protection than the text of the common article initially suggests. It may be a useful exercise for States to review the specific incorporations suggested by the comment, particularly considering the great disparities in judicial guarantees that persist among the numerous Parties to the Convention.

7. Non-refoulement under common Article 3

Turning its attention to the question of transfers of persons under control of Parties to non-international armed conflict, the comment observes, "Because of the fundamental rights it protects, common Article 3 should be understood as also prohibiting Parties to the conflict from transferring persons in their power to another authority when those persons would be in danger of suffering a violation of those fundamental rights upon transfer." ¶ 744. The comment immediately acknowledges, however, "the arguments in favour of reading a *non-refoulement* obligation into humanitarian law applicable in non-international armed conflict have been said to be 'extremely tenuous.'" ¶ 746 (citing Françoise J. Hampson, 'The Scope of the Obligation Not to Return Fighters under the Law of Armed Conflict', in David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law*, Brill Nijhoff, Leiden, 2014, pp. 373–385, at 385).

Yet the comment is undeterred and incorporates into the article a duty not to return or transfer persons to situations of danger. The comment cites

transfer prohibitions and regulations in other articles to support the logic of implying such a prohibition in common Article 3. ¶ 746. It also cites common Article 1 as a source of *non-refoulement* obligation in common Article 3 or non-international armed conflicts. ¶ 748. This claim runs afoul of clear evidence common Article 1 does not extend to common Article 3. *See, for example,* Pictet Commentary, p. 34. The logic of the claim is also flawed. The comment does not demonstrate how transfer to a non-Party to a non-international armed conflict would result in violations of common Article 3 by a State not Party to a conflict. That is, even assuming common Article 1 includes an external obligation on the part of the transferring State, how that State could fail to ensure respect for common Article 3 by a State not involved in a conflict not of an international character is unclear.

The comment attempts to further bolster its case, identifying a "*non-refoulement* principle." ¶¶ 750, 751. The reason the *non-refoulement* rule must be characterized as a principle is unclear, perhaps until a subsequent passage extends *non-refoulement* also to non-State Parties who are not traditional subjects of human rights law obligations. ¶ 750. The traditional source of the non-refoulement obligation is international human rights law which many concede does not create rights owed by private actors. The effort seems a great interpretive stretch but is surely an insight into the comment's vigorous attempt to read the *non-refoulement* obligation into common Article 3. Practitioners should approach the comment with great caution in this respect and confirm their State's legal position on this question. States should also evaluate and weigh in on the comment's claim.

Further concern arises from the approach the comment takes to the doctrine of *lex specialis* with respect to human rights *non-refoulement* and law of war obligations under common Article 3. Generally, the *lex specialis* doctrine counsels laws of general application yield to laws specifically addressed to circumstances. On occasion, the latter have been used to inform the meaning of the former. For instance, as noted previously, the International Court of Justice looked to the *lex specialis* of the law of war to fill out the meaning of a general human right to life in its *Nuclear Weapons Advisory Opinion*.

Although the updated *Commentary* in this instance purports to perform the same work of reconciling and finding complementary effect in protections of the law of war and human rights law, it does so in a fundamentally different manner than did the International Court of Justice. The comment resorts to a generally applicable provision of international law (*lex generalis*), in this case a right to *non-refoulement*, to understand the

content of an article adopted for a specific situation (*lex specialis*), in this case protections during non-international armed conflict. The effect is to substantially expand the reach of the *lex specialis* rather than to identify complementary effect. The comment is essentially a reverse-flow of the *lex specialis* practice.

Finally with regard to transfers, the comment indicates some States have entered supplemental agreements to monitor conditions of control after transfer during non-international armed conflict. ¶ 753 (noting, "During the ICRC consultations, '[s]ome [State experts] considered [post-transfer monitoring] a legal obligation, while others considered it solely as a good practice.") (citing International Committee of the Red Cross, *Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty, Synthesis Report from Regional Consultations of Government Experts*, ICRC, Geneva, November 2013, p. 26. For examples of agreements putting in place post-transfer monitoring mechanisms, see Gisel, pp. 128–130, text in relation to fns 60–78)).

Here is an interesting interpretive issue, namely, what should be made of supplemental agreements to the Third Convention. The comment buttresses its claim that common Article 3 includes a *non-refoulement* obligation by resort to subsequent and supplemental agreements. Treaty interpretation does admit subsequent agreements to modify the meaning of a treaty as evidence of altered meaning. But in these cases, the need for formal agreements, which on their face do not purport to alter but rather to supplement the meaning of common Article 3, seems more clearly to speak to a void in the original common Article 3 rather than to an altered meaning. The comment does not clarify how a supplemental agreement or even several supplemental agreements between select Parties can mature into an obligation with respect to every other Party to common Article 3.

H. Detention outside a criminal process

Pivoting to the question of preventive detention in non-international armed conflict, the comment observes, "the question of which standards and safeguards are required in non-international armed conflict to prevent arbitrariness is still subject to debate and needs further clarification, in part linked to unresolved issues on the interplay between international humanitarian law and international human rights law." ¶ 756. Here the comment concedes ambiguity on the question of review and determinations to detain but the comment's decision not to permit that ambiguity to rest is immediately clear. The comment soon claims,

> The ICRC has relied on "imperative reasons of security" as the minimum legal standard that should inform internment decisions in non-international armed conflict. This standard was chosen because it emphasizes the exceptional nature of internment and is already in wide use if States resort to non-criminal detention for security reasons. It seems also to be appropriate in non-international armed conflict with an extraterritorial element, in which a foreign force, or forces, are detaining non-nationals outside their own territory, as the wording is based on the internment standard applicable in occupied territories under the Fourth Convention. ¶ 759.

The comment seems intended to incorporate another International Committee of the Red Cross product, *Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence*. ¶¶ 760–762. The comment provides no citation of support other than the determination of the International Committee of the Red Cross itself.

Here we find both an implied obligation and elaborate attendant procedures and safeguards exceeding in length and detail the entire common article itself. Still, the comment admirably acknowledges debate concerning the law of war as a source of authority to detain. It identifies a view that legal bases to detain must be explicit and are lacking. However, it also articulates and adopts a view that customary and treaty law include an "inherent power to detain in non-international armed conflict." ¶ 765. Although the comment laudably lays out the lines of debate, it does not seize the opportunity to suggest what may be the correct answer, which is the law of war does not involve itself with authorizing functions. The authority to detain is more likely an inherent aspect of sovereignty. The role of the law of war with respect to detention has been to subtract from, condition, or limit that authority rather than to give rise to it.

The comment next emphasizes common Article 3 includes an obligation to collect and care for the wounded. ¶ 766. This is irrefutable from the text of the article. However, the comment's conclusion that this obligation is "comprehensive" is less persuasive in light of the brevity of the text, particularly by comparison with how other articles of the Geneva Conventions address obligations concerning the wounded and sick on the battlefield. It appears the updated *Commentary* seeks to incorporate in significant part the 1949 First Geneva Convention into non-international

armed conflict treaty law. Although perhaps laudable from a humanitarian perspective, such an interpretation would run counter to the baseline compromise common Article 3 struck in 1949, a compromise the comment earlier cites to justify a broad application of the article. *See* ¶¶ 410–416, 419.

The comment indicates the obligation to collect and care for the wounded and sick follows from the humane treatment obligation. ¶ 768. But that obligation derives from control whereas the implied collection obligation amounts to a separate and preceding obligation to gain the control that gives rise to the humane treatment obligation. Surely the better source is the text of the article which provides, "The wounded and sick shall be collected and cared for." The comment further identifies an obligation to respect and protect "medical personnel, facilities and transports." ¶ 768. Again, the comment appears to incorporate into common Article 3 nearly the entire First Geneva Convention by nothing more than humanitarian logic. The comment notes 1977 Additional Protocol II explicitly includes a provision on the wounded and sick and protection of medical personnel. ¶ 769. Yet if these obligations were already so clearly implied in common Article 3, as the comment concludes, the reason they were added explicitly to the 1977 instrument is unclear.

The comment indicates, "most military manuals make no distinction in regard to the protection of the wounded and sick based on the nature of a conflict." ¶ 772. This may be true in some cases but is it not more likely the obligations, if properly understood to be international *legal* obligations, derive from customary international law or from national policy rather than from common Article 3 itself? The comment also asserts a broad meaning of "wounded and sick" including all illness and all persons. ¶¶ 774–85. This does not appear to be the soundest reading of the text. Earlier the common article refers specifically to members of the armed forces who are *hors de combat* by virtue of wounds or sickness. The reference to members of the armed forces is therefore clear. The term *hors de combat* may reinforce the limited scope in that persons rendered out of combat would usually include only persons who formerly were in combat. Still, the common article's reference simply to "[p]ersons taking no active part in the hostilities" perhaps leaves room for the broader reading. States' own views seem important on this issue.

The comment asserts a similarly expansive meaning when it concludes "the word 'collect' must be interpreted broadly and includes an obligation to search for the wounded and sick and to evacuate them to a more secure location." ¶ 787. The obligation to interpret broadly deflects somewhat from the more fundamental issue, which is the term is not elaborated in the common article.

The comment buttresses its broad reading by resort to purpose. It claims, "The aim of the provision is to remove the wounded and sick from the immediate danger zone and to enable them to receive the necessary medical treatment as rapidly as possible and under better and more secure conditions." ¶ 787. Finally, the comment adds a "corollary obligation" to permit evacuations on the explicit obligation to collect. ¶ 794. It identifies implied and elaborate obligations, nearly on par with the First Geneva Convention itself, to respect medical personnel. ¶¶ 805–821. Again, though praiseworthy in humanitarian terms, incorporation of this sort runs contrary to the basic bargain struck with respect to regulating non-international armed conflict broadly though through only select and rudimentary rules.

J. Paragraph 2: Offer of services by an impartial humanitarian body such as the ICRC

Addressing the subject of its own activities—offers of humanitarian services—the International Committee of the Red Cross observes, "Since 1949, international law has developed to the point where the consent may not be arbitrarily withheld by any of the Parties to a non-international armed conflict." ¶ 817. The comment then elaborates on the meaning of humanitarian services broadly. ¶¶ 844–850.

This is a tenuous claim with respect to international armed conflict; more so for non-international armed conflict. *See infra*, analysis of comments to GC III, Article 9. For now, it may suffice to emphasize the textual distinction between the Article 9 provisions on humanitarian relief applicable to international armed conflict with the brief passage of common Article 3 applicable to non-international armed conflict. Where the former indicates, "The provisions of the Convention constitute no obstacle to the humanitarian activities of . . . impartial humanitarian organization[s]," the latter simply states a humanitarian organization "may offer its services." The textual difference is stark. To equate these provisions without doing violence to the drafters' choice of language, and the bargain struck by common Article 3 between broad application and detail of regulation, would seem to require an extraordinary and thorough showing of subsequent practice by and agreement among States. The comment musters nothing of the sort.

The comment offers a far more sound and defensible understanding of the passage later when it simply observes,

> When an offer of services is made, it may be regarded neither as an unfriendly act nor as an unlawful interference in a State's

> domestic affairs in general or in the conflict in particular. Nor may it be regarded as recognition of or support to a Party to the conflict. Therefore, an offer of services and its implementation may not be prohibited or criminalized, by virtue of legislative or other regulatory acts. ¶ 841.

This passage appears to capture and vindicate far better the meaning of the common Article 3 guarantee of offers of humanitarian relief than the comment's more expansive effort to achieve protective parity between international and non-international armed conflict through common Article 3.

The comment also includes a definition of the term "protection." ¶ 851 et seq. According to the comment, "In its ordinary meaning, to 'protect' means to 'keep safe from harm or injury'. For its part, humanitarian law has as one of its core objectives to 'protect' people in situations of armed conflict against abuses of power by the Parties to the conflict." ¶ 851. The same observation and interpretive practice by the International Committee of the Red Cross is made with respect to the terms "relief" and "assistance." ¶¶ 858–860. Here it seems again the updated *Commentary* works quite hard to interpret terms not appearing in the common article.

The comment concedes consent to humanitarian assistance must "in principle" be secured from a State. ¶ 867. Yet it insists,

> Since 1949, international law in general and humanitarian law in particular have evolved considerably to the extent that a Party to a non-international armed conflict, whether a High Contracting Party or a non-State armed group to which an offer of services is made by an impartial humanitarian body, is not at complete liberty to decide how it responds to such an offer. It has now become accepted that there are circumstances in which a Party to a non-international armed conflict is obliged, as a matter of international law, to grant its consent to an offer of services by an impartial humanitarian organization. ¶ 872.

The comment purports to ground the conclusion in "subsequent State practice." ¶ 873 (citing International Committee of the Red Cross, *Customary International Humanitarian Law Study*, a single statement by Germany during the 1977 Additional Protocol I negotiations, and a UN

Security Council Resolution concerning Yemen). ¶ 873, n. 811. None of these sources is subsequent State agreement in the context of the Vienna Convention on the Law of Treaties Article 31. Nor is the German statement reflective of the deliberations or conclusions on this point.

Last, with respect to humanitarian relief in non-international armed conflict, the comment asserts, "Military necessity is no valid ground under humanitarian law to turn down a valid offer of services or to deny in their entirety the humanitarian activities proposed by impartial humanitarian organizations." ¶ 877. This is a baffling claim. In fact, military necessity seems the *only* ground to withhold consent to an otherwise valid offer of humanitarian assistance. Military necessity seems precisely why States did not express humanitarian assistance as an unconditional obligation except in the extraordinary circumstance of belligerent occupation and with respect to limited victims of conflict in other places in the Conventions. Perhaps it would have been more correct to observe denial of aid to victims of war is not itself a military necessity in any case.

K. Paragraph 3: Special agreements

The comment begins its consideration of the special agreements provision of common Article 3 safely. It observes, "this paragraph reflects the rather rudimentary character of treaty-based humanitarian law applicable in such conflicts." ¶ 880. This is an important and undoubtedly correct observation. Yet the extent to which the comment honors that rudimentary character is in doubt. As with so many preceding turns, the comment works to refine common Article 3 from a rudimentary or minimum yardstick into a fuller, more complete regulation of armed conflict. Indeed, in its next breath, the comment reminds readers, "it is important to recall in this regard that customary international humanitarian law applies even in the absence of a special agreement between the Parties to a non-international armed conflict." ¶ 880. This is surely true as well but worth qualifying. It seems unlikely States put so much work into forging consensus through the lowest-common-denominator provisions of common Article 3, only to betray that bargain through a drastically different customary bargain of universal character. Additionally, if custom fills so many perceived gaps in common Article 3, the point of special agreements is undermined somewhat. Codification might lend a degree of clarity. But the special agreements clause seems an indirect comment on the incomplete or rudimentary character of both common Article 3 and of customary international law applicable to non-international armed conflict.

Further buttressing its claim for the role of custom, the comment observes,

> Moreover, such agreements cannot derogate from applicable humanitarian law so as to lessen the protection of that law. This conclusion flows from a plain reading of the text of common Article 3, which states that 'each Party to the conflict shall be bound to apply, as a minimum' the provisions of the article.' ¶ 893.

The textual point seems well-made. But the comment avoids the possibility of suspension or withdrawal from the Convention to the same effect. Overall, the comment does not seem to capture the greater significance of the common Article 3 special agreements clause. As much as a reflection of the opportunity and potential to rely on international law to humanize armed conflict, the special agreements clause also reflects the limits of consensus that formed common Article 3. The special agreements clause is evidence that States were aware of the incompleteness of their work and they had not fully vindicated the humanitarian logical limits of regulating non-international armed conflict. But they reserved the chance to realize that potential on a case-by-case basis. They likely understood the character of non-international armed conflict and especially the qualities of the armed groups they would face would vary enormously as would their susceptibility to international regulation.

L. Paragraph 4: Legal status of the Parties to the conflict

The final paragraph of common Article 3 states, "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict." The comment simply evaluates the legal status clause of common Article 3 as "essential." ¶ 900. It correctly indicates States would not have consented to common Article 3 without it. ¶ 901.

M. Criminal aspects and compliance

Turning to the issue of enforcement, the comment notes, "Common Article 3 lacks compliance mechanisms that were included in the Conventions for international armed conflicts, such as the Protecting Powers, the conciliation procedure and the enquiry procedure." ¶ 909. Yet it does not take long for the comment to cure this perceived shortcoming. It notes, "both treaty and customary international law have evolved significantly over the past decades and filled some of these lacunae." ¶ 909. The comment concedes

States rejected a proposal to consider violations of common Article 3 as war crimes. ¶ 910 (citing a view expressed by an Italian delegate in *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 4). The comment alleges the same applies with respect to the negotiating history of common Article 3 and the grave breaches regime. ¶ 910 (citing the Fourth Report drawn up by the Special Committee of the Joint Committee, indicating the grave breaches regime is only applicable to the gravest violations in international armed conflicts; *ibid*. pp. 114–118).

All the same, the comment cites the formation of the International Criminal Tribunal for the former Yugoslavia by the UN Security Council as reflecting a change in view by States. ¶ 911–913. This is not clearly the true legal effect of that effort. Neither the International Criminal Tribunal for the former Yugoslavia, nor the International Criminal Tribunal for Rwanda for that matter, was a true exercise of the grave breaches clauses of the Conventions. They were more clearly exercises of the compulsory powers of the UN Security Council and of UN member States acting in that capacity. Thus, the International Committee of the Red Cross view offers an interesting compromise on the question of grave breaches and common Article 3. It asserts,

> The grave breaches regime has not been extended to serious violations of common Article 3. Thus, States are not obliged, on the basis of the Geneva Conventions, to search for alleged perpetrators of these serious violations, regardless of their nationality, and to bring them before their own courts. However, it is accepted in customary law that States have a right to vest universal jurisdiction over war crimes, including serious violations of common Article 3, in their domestic courts. ¶ 917.

This view is not clearly consistent with the International Committee of the Red Cross position on the common Article 1 "ensure respect" obligation. That view asserts all States are obliged to take all feasible measures to enforce compliance with all provisions of the Conventions including common Article 3. The comment includes a brief survey of State practice indicating "As at 2015, there seem to have been only 17 reported cases over the previous 60 years where domestic courts or tribunals have exercised universal jurisdiction over perpetrators of war crimes." ¶ 919 (citing International Committee of the Red Cross, *Preventing and Repressing International Crimes*, Vol. II, pp. 123–131, and International Committee of

the Red Cross, *National Implementation of IHL Database*, *https://www.icrc.org/ihl-nat*). These underwhelming data may to some eyes undermine the International Committee of the Red Cross position on the common Article 1 "ensure respect" obligation. They are hardly evidence of consistent and near-universal implementation by States of the Convention as envisioned by the International Committee of the Red Cross view.

5. Preventive measures and monitoring compliance

With respect to States' obligations between themselves to ensure compliance with common Article 3, the comment observes,

> Common Article 1 calls on States to respect and ensure respect for the Geneva Conventions in all circumstances. This wording covers the provisions applicable to both international and non-international armed conflicts. Measures to 'ensure respect' for common Article 3 might include diplomatic pressure exerted by third States on Parties which violate common Article 3, the public denunciation of violations of common Article 3, and the taking of any other measures designed to ensure compliance with common Article 3. ¶ 937.

This claim is at odds with both the conclusion of the original Pictet Commentary and a raft of subsequent State practice. *See* Schmitt & Watts, 'Common Article 1', *International Law Studies* (2020).

6. The concept of belligerent reprisals in non-international armed conflicts

Finally, the comment observes, "Both common Article 3 and Additional Protocol II are silent on the issue of belligerent reprisals in non-international armed conflicts. In the view of the ICRC, there is insufficient evidence that the concept of belligerent reprisals in non-international armed conflicts ever materialized in international law." ¶ 944. This is a strange claim and a misapplication of the standards of proof for prohibitions in international law. These provisions' silence on a subject would not in ordinary circumstances call for a prohibitive conclusion. The claim is certainly worth investigation and comment by States.

ARTICLE 4

PRISONERS OF WAR

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military

aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the

> *conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.*
>
> *C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.*

B. Historical background

The comment to Article 4 first notes early law of war exclusions from the class of prisoner of war. It indicates the Lieber Code, issued to the Union Army during the American Civil War, expressly excluded persons who fought "without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war." ¶ 952 (citing Art. LXXXII). Although the comment does not mention it, this notion carried forward in the "forming part of" and "belonging to" criteria of the Third Geneva Convention, Articles 4A (1) and (2) respectively. With the temporally narrow exception of the Article 4A(6) category of *levée en masse* all prisoners of war must be affiliated with a Party to the conflict.

The comment also recounts debates at the conference that produced the 1874 Brussels Declaration concerning irregular forces. That conference ultimately recognized the *levée en masse* inhabitants responding spontaneously to invasion, as eligible for prisoner of war status. ¶ 955–56. It further notes the 1899 Hague Conference largely adopted the Brussels Declaration's *levée en masse* definition and protections during detention. Later, the 1907 Hague Conference added a requirement for *levées en masse* to carry arms openly. ¶ 956. Underscoring the incompleteness of early standing regimes of protection, the comment notes a First World War practice of concluding special agreements to add classes of prisoners of war and as well as additional safeguards. ¶ 956 (citing Agreement between France and Germany concerning Prisoners of war (1918), Articles 55–56, and Agreement between the United States of America and Germany

concerning Prisoners of war, Sanitary Personnel and Civilians (1918), Article 139).

The comment indicates at the 1949 Diplomatic Conference of Geneva, "Some delegates considered that irregular armed forces should have to fulfil even stricter conditions than the four specified in the Hague Regulations in order to benefit from the protection of the new Convention." ¶ 957. This is an interesting observation because the Hague Regulations do not actually enumerate the four conditions with reference to regular armed forces ("armies"). They do so only with respect to "militia and volunteer corps." *See* 1907 Hague Convention IV, Regulations, art. 1. Thus, the latter fighting organizations were already subject to treaty-based conditions not applicable to regular armed forces as such.

C. Paragraph 4A: Persons who have fallen into the power of the enemy

Turning to qualifications for prisoner of war status more specifically, the 1899 and 1907 Hague Regulations referred to "capture." Some had considered surrender and capitulation were not included as captures. ¶ 960. The comment usefully indicates the Convention occasionally refers to "capture" but for the most part refers instead to persons having "fallen into the power of" and "fallen into the hands of" a Detaining Power. ¶¶ 962, 963. The latter terms are thought to be broader in that they more clearly encompass conditions involving voluntary surrender.

The comment helpfully notes State practice presents "diverging interpretations" of the significance of friendly nationality for purposes of prisoner of war classification. ¶ 964. Canada, Chile, and the Netherlands maintain nationality is irrelevant to prisoner of war status. ¶ 967. Whereas Belgium, Nigeria, the United States, and Japan indicate should their own nationals fall into their hands as enemies, these persons will not enjoy prisoner of war status. ¶ 967. The United Kingdom indicates the relevance of nationality is unclear. ¶ 967. The comment also relates conflicting case law, including the *Territo* case, in which a US Court of Appeal held a captured person was a prisoner of war of the United States notwithstanding the fact he was a US citizen. ¶ 968 (citing In re Territo, 156 F.2d 142 (9th Cir. 1946) (citing Ex Parte Quirin, 317 US 1 (1942)). The comment notes, to the contrary, the United Kingdom Privy Council denied prisoner of war status to a United Kingdom national on the basis of citizenship. ¶ 968 (citing United Kingdom, Privy Council, Koi case, Judgment, 1967, pp. 856–858).

The comment wisely concludes nationality "should not be a factor." ¶ 970. On purely textual, interpretive merits this is the better

conclusion. As the comment notes, nationality is not an enumerated condition. By comparison, both Articles 87 and 100 of the Third Convention mention nationality. ¶ 971. The comment also notes treason and other prosecutions remain available as measures against prisoners of war who are nationals of the Detaining Power. ¶ 972. However, in light of mixed State practice this may be an instance in which the updated *Commentary* could have conceded the matter was unclear—a *non liquet*.

D. Subparagraph 4A(1): Members of the armed forces of a Party to the conflict

1. The armed forces

Addressing the first and historically most common category of prisoner of war, the comment notes the phrase "[a]rmed forces," appearing in Article 4A(1), replaced the term "armies," used by the 1899 and 1907 Hague Regulations. ¶ 976. The comment indicates the specific requirements for membership in armed forces are reserved for the Parties' domestic law. International law, including the Convention, does not prescribe membership criteria for armed forces. ¶ 977. The comment also recalls the noncombatant classes of the armed forces (medical and religious personnel) are retained personnel, not prisoners of war. ¶ 978. The comment addresses later the question of whether the prisoner of war status of members of armed forces depends on any further criteria or conditions not mentioned in Article 4A(1). *See* ¶¶ 1039–1040.

2. Militias or volunteer corps forming part of the armed forces

The comment helpfully recalls Article 4A(1) also covers militia and volunteer corps incorporated into the armed forces. That is, not all militia and volunteer corps fall under the rather eye-catching provision of Article 4A(2). Only militia and volunteer corps not "forming part of" the armed forces fall under Article 4A(2). ¶ 980. Like armed forces membership, Article 4A(1) militias and volunteer corps are organized and comprised through national or domestic legislation. ¶ 979. International law offers no criteria or conditions for their composition.

The comment indicates Article 4A(1) militia and volunteer corps may include paramilitary and police forces incorporated into armed forces (for example, gendarmerie). ¶ 981. It suggests, however, a State may wish to alter the appearance of these organizations to facilitate their recognition as armed forces and more clearly give effect to their incorporation. ¶ 981. Although

not required, notifying adversaries of the incorporation of such organizations into the armed forces is also a good practice. ¶ 981. Such notice is *required* under 1977 Additional Protocol I, Article 43(3). ¶ 981. Here, the updated *Commentary* adroitly indicates a best practice without overstating it as a legal requirement. Generally, the updated *Commentary* effectively and consistently distinguishes 1977 Additional Protocol I obligations concerning prisoners of war from 1949 Third Convention obligations.

3. Obligation to distinguish

The comment indicates under customary international law, combatants forfeit prisoner of war status by failure to distinguish themselves from civilians "during military operations." ¶ 983. The comment notes nonstandard uniform wear, whatever the reason, risks loss of prisoner of war status. ¶ 985. As indicated, the International Committee of the Red Cross does not draw these conclusions from the Convention itself but rather from custom. Practitioners should carefully review their national military legal doctrine on this point. The more obvious consequences of failure to distinguish by uniform wear may be exposure to passive distinction, treachery, or perfidy charges while remaining a prisoner of war. But the logic of divesting prisoner of war status is unclear. Such persons still find themselves in the hands of their nation's enemy where the humanitarian benefits of treatment obligations under the Convention are so valuable. Additionally, distinction, as a requirement for prisoner of war status, is specifically enumerated only for Article 4A(2) groups and not for members of armed forces and groups forming part of them under Article 4A(1). It seems in this instance, the International Committee of the Red Cross has incorporated the distinctive insignia requirement against Article 4A(1) armed forces personnel as a requirement of prisoner of war status, though later it rejects such a view. *See* ¶¶ 1039–1040.

4. Spies and saboteurs

The comment notes Article 4 of the Convention does not address spies and saboteurs; however, it maintains customary international law and the 1907 Hague Regulations exclude spies from prisoner of war status. A spy is one who "engage[s] in espionage while wearing civilian attire or the uniform of the adversary but excludes combatants who are gathering information while wearing their own uniforms." ¶ 988. "Saboteurs are generally understood to be persons who are acting clandestinely or under false pretences behind enemy lines to commit acts of destruction or damage against the objects and material belonging to the enemy." ¶ 990. The comment helpfully

adds, however, spies and saboteurs may be protected by the 1949 Fourth Convention Relative to the Protection of Civilian Persons in Time of War and by 1977 Additional Protocol I, Art. 75. ¶ 991.

5. Deserters

The Third Convention also does not address the status of deserters. ¶ 992. The comment helpfully indicates desertion usually does not terminate membership in the armed forces from the perspective of States' national laws. ¶ 993. It also reminds it may be unsafe to detain deserters with other prisoners of war. ¶ 994. The comment acknowledges a view that distinguishes a defector who indicates desire to serve in enemy armed forces prior to capture. ¶ 995. Under this view, such persons, if accepted, need not be treated as prisoners of war while serving in enemy armed forces. If they defect after capture, however, the comment correctly maintains these persons remain prisoners of war because of the Convention's prohibition on renunciation of prisoner of war status. ¶ 995.

6. Mercenaries

Finally, with respect to Article 4A(1) prisoner of war status, the comment notes the Convention does not address mercenaries. The comment indicates, however, 1977 Additional Protocol I and customary international law exclude mercenaries from holding prisoner of war status. The comment also cites "numerous military manuals" to make this point. ¶ 998.

The comment does not explore in significant depth the notion of mercenary status. Greater exploration of the concept would aid implementation of Article 4A(1), particularly in light of disagreement over constituent elements of mercenary status. For instance, the possibility of a mercenary organization as a militia forming part of the armed forces under Article 4A(1) might have been mentioned by the comment. It helpfully reminds, however, mercenaries may be accorded prisoner of war status as a matter of policy and are likely protected by 1977 Additional Protocol I, Article 75 or its customary international law incarnation.

E. Subparagraph 4A(2): Members of other militias or other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict

The comment importantly characterizes Article 4A(2) as an innovation of the Convention. ¶ 999. It provides in-depth, phrase-by-phrase analysis of its most relevant provisions.

1. The requirement of "belonging to"

The comment helpfully characterizes Article 4A(2) as covering groups not incorporated into armed forces described in 4A(1) but that "otherwise belong to the Party." ¶ 1001. It emphasizes for purposes of Article 4A(2), "belonging to" indicates a *de facto* relationship. ¶ 1004 (citing the Jean Pictet, *Commentary* (1960)). The comment offers,

> For a group to belong to a Party to a conflict for the purpose of Article 4A(2), two things are required. First, the group must in fact fight on behalf of that Party. Second, that Party must accept both the fighting role of the group and the fact that the fighting is done on its behalf. ¶ 1005.

It notes the 1977 Additional Protocol I framework is different. That instrument does not differentiate armed forces from militia. Instead, it broadens the notion of armed forces to include, "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates." ¶ 1009 (quoting 1977 Additional Protocol I, Art. 43).

2. The four conditions

b. The individual or collective character of the requirement of compliance with the four conditions

The comment emphasizes all four enumerated conditions of Article 4A(2) must be fulfilled collectively by the group, as well as the "belonging to" requirement. The latter requirement, buried in the *chapeau* of 4A(2), often evades attention. The comment notes compliance only by select members of an organization does not entitle those members to prisoner of war status. ¶ 1011. However, the comment maintains the second and third conditions (display of distinctive insignia and carrying arms openly) must be fulfilled individually as well as collectively. ¶ 1012. The source of the latter, individual requirement is unclear. Presumably the requirement is drawn from an evaluation of customary international law requirements of uniform wear implied in Article 4A(1) and mentioned previously. *See* ¶ 983. The comment may also be derived from an incorporation of the 1977 Additional Protocol I regime. As with Article 4A(1), the better approach may simply be to acknowledge prosecutions for violations of passive distinction, treachery, or perfidy provisions are available but otherwise qualified persons should retain prisoner of war status.

The comment observes, "If members of militias or volunteer corps are in vehicles that otherwise have the appearance of civilian vehicles, they must also ensure that these bear a distinctive sign." ¶ 1020. Article 4 does not actually address this question. The logic of the principle of distinction certainly seems to support it, though again, rather than deny prisoner of war status, the approach of charging failure of passive distinction, treachery, or perfidy seems more appropriate than deprival of prisoner of war status. In this respect, the comment notes "*individuals* who violate the laws and customs of war in the context of overall compliance by the group retain prisoner-of-war status, although they may be prosecuted for war crimes." ¶ 1026 (emphasis in original).

F. The significance of the four conditions for personnel covered by subparagraph 4A(1)

The comment acknowledges a range of views on the question of whether the four conditions enumerated in Article 4A(2) apply to personnel otherwise qualifying for prisoner of war status under Article 4A(1). ¶¶ 1028–35. Ultimately, the International Committee of the Red Cross does not consider the four 4A(2) conditions to be prerequisites to 4A(1) status. ¶ 1039. It applies the same conclusion to Article 4A(3) prisoners of war. ¶ 1040. This understanding seems the soundest view. *See* Sean Watts, 'Who Is a Prisoner of War?', *in The 1949 Geneva Conventions: A Commentary* (Andrew Clapham et al., eds 2015). Again, however, considering the range of colorable views on the subject and apparent disagreement among States Parties to the Convention, it seems a declaration of *non liquet* would have been appropriate.

G. Subparagraph 4A(3): Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power

The comment on members of an armed force belonging to an entity not recognized by enemy forces observes,

> The Second World War . . . saw the denial of prisoner-of-war status to certain groups on the basis that the authorities or governments to whom those armed forces pledged allegiance were not recognized by the enemy State. To avoid a repetition of this abusive interpretation, it was suggested by the ICRC and ultimately accepted that it be expressly stated that all members of regular armed forces were owed prisoner-of-war status,

> irrespective of whether the enemy recognized the legitimacy of their government or other relevant authority. ¶ 1041.

To be sure, Article 4A(3) represents a significant though underappreciated improvement to the prisoner of war qualification regimes of preceding treaties. This article is acutely tuned to the likely diplomatic realities of international armed conflict. However, it seems this provision may not have operated as intended during the armed conflict in Afghanistan from 2001 to 2002 with respect to the Taliban regime and its fighters. An exploration of the situation would be a welcome treatment of prominent and recent State practice. The comment adds Article 4A(3) also applies to forces fighting occupation where the Detaining Power has recognized another government. ¶ 1042.

H. Subparagraphs 4A(4) and (5): Civilian prisoners of war

The comment next addresses two categories of prisoners of war not considered to be combatants. ¶ 1045. The significance of the civilian status of these prisoners of war seems more pertinent to targeting than to detention. However, their civilian status may prove relevant to immunity for lawful warlike acts of such persons undertaken prior to falling into the hands of the Detaining Power. The comment concedes some provisions of the Convention do not apply easily to civilian prisoners of war. It thus concludes the Detaining Power must act in good faith to protect civilian prisoners of war. ¶ 1046. For instance, the comment notes,

> There is disagreement among experts whether persons who are entitled to prisoner-of-war status by virtue of Article 4A(4) would lose their entitlement to that status if they were to participate directly in hostilities. As a matter of logic, as they are civilians, they do not have a right to participate directly in hostilities with immunity from prosecution for such acts. ¶ 1048.

It seems the correct answer is these persons retain their prisoner of war status but may be prosecuted for participation in hostilities if national law permits. The relevance or usefulness of "direct participation" in such cases is not clear. Most often, direct participation concerns whether a person is susceptible to lethal targeting rather than their status during or eligibility for security detention. Article 5 of the Third Convention refers instead to "having committed a belligerent act" as relevant to prisoner of war status

determination proceedings. The comment may have offered a more helpful observation in this respect.

The comment maintains membership and therefore civilian prisoner of war status under Articles 4A(4) and (5) are contingent on authorization to accompany armed forces. ¶ 1050. Civilians who merely follow, tag along, or are momentarily comingled with armed forces are not prisoners of war under either provision. The comment indicates identification cards are the usual indicator of Article 4A(4) and (5) status, but *de facto* circumstances may also suffice to demonstrate authority to accompany. ¶ 1050. The *de facto* circumstance does not seem supported by the text of the Convention, yet as the comment indicates, because cards may be lost or destroyed in combat, the conclusion seems reasonable. The soundest reading may be the identification card is expressed more so as an obligation on the part of States under the Convention than as an absolute condition for status applicable to an individual.

I. Subparagraph 4A(6): Levée en masse

The comment notes the *levée en masse* is "a unique category, as it is the only group of persons recognized under Article 4A with full autonomy from the State." ¶ 1062. Although the comment does not elaborate in this respect, the exclusivity of the category may be relevant to other organizations' claims to prisoner of war status for their members. That is, by specifically enumerating a class of prisoners of war unconnected to a State, any other such class might be excluded from prisoner of war status.

The comment helpfully emphasizes the temporally restricted nature of *levée en masse* as prisoners of war. A spontaneous, and therefore brief, window presents the possibility for prisoner of war status under Article 4A(6). The comment concludes, "If the resistance continues after this window, when the inhabitants have had time to organize into regular armed units, Article 4A(6) loses its relevance." ¶ 1064. The comment might have elaborated further on the notion of spontaneity to the extent State practice supports such work. In particular, whether an individual who is afforded an opportunity to but declines to affiliate with or integrate into the armed forces or a militia may be said to operate spontaneously is an important interpretive question. Further, whether brief interactions between the purported *levée en masse* and the government, such as through weapons issue, logistical deliveries, or tactical coordination, extinguish the spontaneity of the class would benefit from analysis. In that respect, the extent of encounters or opportunities to affiliate may be more relevant to spontaneity determinations than the passage of time.

The comment also notes members of a *levée en masse* must carry arms openly though they bear no requirement for distinctive insignia. ¶ 1067. They must, however, comply with the law of war. ¶ 1068. The comment does not dwell on the question of whether the qualifying conditions on *levées en masse* apply to groups or individuals. The comment refers to "persons," suggesting the latter. The Convention also refers to "inhabitants," suggesting the latter. Also, the circumstances of spontaneity and reaction to invasion suggest, as distinct from the 4A(2) conditions, the 4A(6) conditions apply at an individual level. Indeed, the unplanned circumstances in which *levées en masse* arise seem to preclude organizational design or undertakings. As soon as those opportunities present themselves, the *levée en masse* class seems unavailable and the qualifications of Articles 4A(1), (2), and (3) apply.

2. Subparagraph 4B(2): Internment by neutral Powers

Turning to prisoners of war present in neutral territory, the comment notes,

> This subparagraph only applies when the neutral Power has an obligation, as a matter of international law, to intern them. The relevant rule and legal justification for the neutral Power in this regard is Article 11(1) of the 1907 Hague Convention (V), which provides that '[a] neutral Power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war. ¶ 1079.

Here, the updated *Commentary* might have done a bit more work. For instance, the question remains of what State practice respecting internment of belligerents' armed forces on neutral territory reveals. Identifying when Article 4B(2) operates in this respect is important. Though preserving the article and indicating it applies when States apply the article is a clever dodge on the part of the International Committee of the Red Cross. The comment notes States have not reexamined this law since 1907. ¶ 1079.

Aside from the question of desuetude, the Third Geneva Convention and the 1907 Hague Convention V respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land interact in a complex manner. The updated *Commentary* indicates Article 4B(2) of the Third Convention only applies to persons covered by Article 11(1) of the 1907 Hague Convention V. A bit more explanation may be in order.

Article 11 refers to "troops belonging to the belligerent armies." The

article indicates a neutral Power that receives such troops "shall intern them." Later, however, the Hague Convention V speaks to "escaped prisoners of war" at Article 13. Although many, but not all, escaped prisoners of war would seem also to qualify as Article 11 "troops belonging to the belligerent armies" and thus be subject to mandatory internment, Article 13 indicates the neutral State "shall leave them at liberty." In this way, Article 13 creates a class of persons distinct from the general population of belligerent troops to which a distinct treatment regime applies. Returning to the Third Convention, Article 4B(2) refers only to those who "have been received by neutral or non-belligerent Powers *and whom these Powers are required to intern under international law* . . . ." Because escaped prisoners of war received on neutral territory may not be interned, it seems they are also not covered by Third Convention, Article 4B(2).

d. Neutral or non-belligerent Powers

On a related point, the comment indicates neither the Convention nor the 1907 Hague Convention V defines the term "neutral Powers." ¶ 1082. It concludes, "As a matter of customary international law, 'neutral Power' refers to a State which is not a Party to an international armed conflict with the State in question." ¶ 1082. Thus, according to the International Committee of the Red Cross, the term "non-belligerent Powers" is to be considered substantively identical to that of "neutral Powers." ¶ 1084. This is an unusual approach to interpretation and some usage suggests the terms may be distinct. A broader survey of State practice seems to be in order.

ARTICLE 5

BEGINNING AND END OF APPLICATION

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

The comment to Article 5 notes, like the Convention's common Article 2, Article 5 determines application of the Convention based on the facts rather than the Parties' legal characterizations. ¶ 1093. Also, like common Article 2, Article 5(2) was a new provision at the time States adopted the Convention; the 1929 Geneva Convention Relating to the Treatment of Prisoners of war includes no such provision.¶ 1099.

The comment indicates,

> An option that was considered was to create two categories of provisions: the first category would consist of the fundamental principles of the Convention, which would be applicable immediately upon capture; the second would consist of provisions that would become applicable as soon as circumstances allowed, which some participants thought should correspond to the moment when prisoners were registered in a camp. ¶ 1100 (citing Report of the Conference of Government Experts of 1947, p. 114).

The comment notes ultimately States decided to apply the entire Convention from the moment of capture. ¶ 1100. Although true, the report cited offers a more nuanced view than the comment relates.

It indicates the Third Convention often could not be applied in full form at the moment of capture. Many of its provisions would only be workable at later stages of internment. Instead, the report indicates agreement "on the whole, the convention should apply in principle as soon as prisoners of war fall into enemy hands, but that in practice, the Detaining Power might experience some difficulty in applying the Convention in all its details from the outset." *Report of the Conference of Government Experts of 1947*, p. 113. These views manifested in the final Third Convention. Articles 20(4) and 24 address transit or screening camps where conditions are acknowledged to depart somewhat from long-term internment camps. A much later comment concedes as much, indicating Part III, Section II of the Convention applies only to places of "permanent internment." ¶ 1907.

4. Effect of reclassification of an international armed conflict to a non-international armed conflict

Related to common Article 2 and to conflict classification, the comment notes the possibility of an international armed conflict, owing to changes in the legal status of Parties to the conflict, transforming into a non-international armed conflict. It concedes this possibility was not envisioned at the drafting of the Convention. ¶ 1109. The comment notes, however, the logic for detention, namely preventing enemy forces from rejoining a conflict, still applies.

But the comment also notes "Questions thus arise regarding the legal basis for the possible continued internment of the prisoners and for their treatment." The comment concludes, "Different interpretations are possible." ¶ 1110. It indicates by one view the Convention applies, but not Article 118 repatriation in light of the continued rationale for detention. ¶ 1112. By another view, the entire legal regime of detention changes with the change of conflict character. ¶ 1113.

It seems the comment does not collect sources of these views or express its own. The comment's approach is admirable in not resolving ambiguity without a clear sense of States' expressions of *opinio iuris*. The question of whether a basis for detention survives conflict transformation seems less relevant to the operation of the Convention than applicable treatment obligations. Surprisingly, the comment does not offer a stronger opinion on the latter.

D. Paragraph 2: Determination of status by a competent tribunal

1. When is determination by a competent tribunal required?

a. 'Having committed a belligerent act'

The comment to Article 5 helpfully emphasizes, "Article 5(2) explicitly applies only to persons who have committed a belligerent act." ¶ 1116. Yet it immediately advises, "Committing a belligerent act, however, is not a precondition for prisoner-of-war status." ¶ 1117. It notes, "in practice, some States have employed tribunals to resolve the status of persons who have not committed belligerent acts." ¶ 1118 (citing United States, *Operational Law Handbook*, 2017, pp. 17–18).

b. "Should any doubt arise"

The comment then turns to a further important question of scope respecting Article 5. It observes,

> Doubt may arise when it is not clear whether the person in fact belongs to any of the categories enumerated in Article 4. Examples include persons who accompany the armed forces and have lost their identity cards; persons engaged in belligerent acts without wearing a uniform or fixed distinctive sign in zones of active hostilities; persons suspected of being spies; persons working as private contractors; and persons suspected of being mercenaries. ¶ 1119.

The comment continues, "Questions relating to the fulfilment of the criteria of Article 4A(2) for irregular armed forces can also be a source of doubt." ¶ 1119. That the International Committee of the Red Cross views the criteria as applicable to groups rather than to individuals is worth recalling. *See* ¶ 1011 (with the exceptions perhaps of conditions (2) & (3) respecting insignia and carrying arms openly). The reason why all four conditions are relevant to a hearing to resolve doubt about "a person" is unclear. Fulfilment of the conditions is a question concerning the collective actions of the group. If the International Committee of the Red Cross views conditions (2) and (3) as both group and individual criteria, the comment might clarify the point by referring only to conditions (2) and (3) rather than to "fulfilment of the criteria of Article 4A(2) . . . ."

The comment continues,

> For the [doubt] provision to be effective, the question whether doubt exists should not be interpreted narrowly and does not depend solely on the subjective belief of the Detaining Power. . . . This would render Article 5(2) meaningless and without effect. Rather, a determination must be made on a case-by-case basis with a proper assessment of the facts and in good faith. ¶ 1120.

Although logical, the textual basis for this interpretation is not otherwise entirely clear. A mere claim of prisoner of war status made with respect to a group that does not qualify surely does not require a hearing from a competent tribunal convened by a State Party to the Convention.

The comment also concludes,

> A person who asserts that they do not fall under any of the categories of Article 4 and who has not committed a belligerent act prior to falling into enemy hands may thus seek to contest their prisoner-of-war status and concomitant internment. A competent tribunal should assess such a claim in the same way as it would a claim to prisoner-of-war status. ¶ 1121.

This conclusion is not particularly clear from Article 5. Moreover, whether a person has or has not committed a belligerent act, a prerequisite to application of Article 5, seems outside the scope prescribed by Article 5. That is, whether a belligerent act has been committed is relevant to whether an Article 5 tribunal is appropriate in a case of doubt as to status, but is not otherwise relevant to prisoner of war status.

2. "The protection of the present Convention"

The comment reminds readers protection applies "until a status determination is made." ¶ 1122. It also asserts, "in this context, it is important to note that the protection referred to includes immunity for lawful acts of war." ¶ 1122. This is an odd observation in that combatant immunity is not included in the "present Convention." Immunity for lawful warlike acts was not added to the Geneva Conventions regime until 1977 Additional Protocol I, Article 43 provided it and then, it only applies as a matter of conventional law for the Protocol's States Parties. A

customary rule of immunity likely applies to combatants' lawful acts, but that custom is not part "of the present Convention." To say then Article 5 requires that immunity as a matter of treaty law is not correct. The point might have been better phrased as an interaction of the treaty (Article 5(2)) and the customary international laws of war.

3. A competent tribunal

The comment states, "One delegation [at the 1949 Diplomatic Conference of Geneva] argued against the notion that military tribunals could decide the status of individuals, primarily out of concern that they may lack impartiality. This view was not adopted; the agreed term 'competent tribunal' was considered to include 'military tribunals.'" ¶ 1123 (citing *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 270–272). Examining State practice, a footnote indicates, "The Russian Federation's *Regulations on the Application of IHL*, 2001, p. 6, requires that the status be clarified by a court of justice." ¶ 1123, n. 53. The comment observes, "The requirement that a competent tribunal make the determination was intended to rule out the possibility of 'arbitrary decisions [being made] by a local commander, who may be of a very low rank.'" ¶ 1124.

Concerning due process at Article 5 tribunals, the comment observes, "The procedural guarantees applicable to status-determination proceedings are not regulated by international humanitarian law but are a matter of domestic law or regulations." ¶ 1127. It indicates, "The flexibility built into Article 5 recognizes the challenges that may exist when making decisions in or near a combat zone, immediately after capture." ¶ 1128. However, the comment later qualifies the conclusion, observing, "It should be noted that, for Parties to Additional Protocol I, Article 45(2) of the Protocol provides that any person in the power of the enemy who is not held as a prisoner of war and is to be tried for an offence arising from the hostilities has the right to assert their entitlement to prisoner-of-war status before a judicial tribunal and have the matter freshly decided." ¶ 1131.

ARTICLE 6

SPECIAL AGREEMENTS

In addition to the agreements expressly provided for in Articles 10, 23, 28, 33, 60, 65, 66, 67, 72, 73, 75, 109, 110, 118, 119, 122 and 132, the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of prisoners of war, as defined by the present Convention, nor restrict the rights which it confers upon them.

Prisoners of war shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict.

This comment indicates for purposes of Article 6, special agreements include ceasefires and peace treaties, as well as agreements related to additional protections for prisoners of war. It notes Parties may want "to develop more specific rules to govern particular situations. Special agreements can be a means of adapting certain provisions of the Conventions and Protocols to specific situations, in the light of prevailing circumstances and modern technology, a feature that was foreseen and provided for in the Conventions themselves." ¶ 1132. The comment recalls a similar provision appears in common Article 3 with respect to non-international armed conflict. ¶ 1134.

Both the article and the comment speak to the incomplete nature of the Convention with respect to both international and especially non-international armed conflict. Article 6 makes clear other articles of the Convention also include States envisioning use of separate agreements to supplement the regime of international legal protections for prisoners of war. Seventeen other articles of the Convention envision Parties will

occasionally resort to separate agreements to fill out protections and other arrangements.

The comment relates a similar provision appears in the 1906 and 1929 Geneva Conventions as well. ¶ 1136. It notes with disapproval some agreements in the Second World War reduced protections for prisoners of war. ¶ 1137 (citing Catherine Rey-Schyrr, *De Yalta à Dien Bien Phu : Histoire du Comité international de la Croix-Rouge 1945–1955*, ICRC/Georg, Geneva, 2007, pp. 165–167; François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, 2003, pp. 436–437). Examining more recent practice, the comment indicates many special agreements relate to repatriation of prisoners. ¶ 1138 (citing Françoise Perret and François Bugnion, *De Budapest à Saigon: Histoire du Comité international de la Croix-Rouge*, 2009, p. 93). It should be noted, however, agreements relating to repatriation seem better examples of the agreements expressly anticipated by Article 118 than agreements under Article 6. Recall, Article 6 describes agreements "In addition to" those expressly mentioned in other articles of the Convention.

The comment includes a helpful list of subjects addressed by special agreements. But the comment gathers the subjects of agreements already anticipated by *other* articles of the Convention rather than by Article 6 itself which, again, envisions agreements "in addition to" these. Thus, none of those listed is technically an Article 6 additional agreement.

a. appointment of an impartial organization as a substitute for a Protecting Power (Article 10(1));

b. marking of prisoner-of-war camps (Article 23(4));

c. credit balance of profits made by camp canteens after a camp is closed down (Article 28(3));

d. relief of retained medical personnel and chaplains (Article 33(3));

e. amounts of advances of pay due to prisoners of war (Article 60(2));

f. notification of the amount of the accounts of prisoners of war (Article 65(4));

g. winding up of accounts of prisoners of war (Article 66(2));

h. adjustments between Parties in respect of advances of pay, money transfers and compensation to prisoners of war (Article 67);

i. sending of individual parcels or collective relief shipments (Article 72(4));

j. receipt and distribution of collective relief shipments (Article 73);

k. transport of capture cards, correspondence, relief shipments, legal documents, correspondence, lists and reports exchanged between the Central Tracing Agency and the national information bureaux, and correspondence and reports relating to prisoners of war (Article 75(3));

l. direct repatriation or internment in a neutral country of 'able-bodied' prisoners of war who have undergone a long period of captivity (Article 109(2));

m. fixing of conditions for repatriation and of status of prisoners of war accommodated in a neutral country (Article 110(3));

n. equitable apportionment of costs of repatriation of prisoners of war between the frontier or port of embarkation of the Detaining Power and the territory of the Power on which the prisoners depend (Article 118(4)(b));

o. forwarding of personal effects of repatriated prisoners of war (Article 119(4));

p. establishment of commissions to search for dispersed prisoners of war and to ensure their repatriation (Article 119(7));

q. transmission of personal effects, other than personal valuables, of prisoners of war who have been repatriated or released, or who have escaped or died (Article 122(9));

r. establishment of an enquiry procedure concerning any alleged violation of the Convention (Article 132(2)).

A comment on the interpretive effect of special agreements would have been useful. The Convention anticipates special agreements might be needed to guarantee fuller protection of prisoners of war. This anticipation seems to warrant a cautious approach to supplementing the Convention's protections by other means, such as subsequent practice lacking clear indicia of agreement among relevant Parties or through expansive interpretation.

The comment indicates "the term 'agreement' encompasses a wide range of possibilities. It can refer to purely local or provisional agreements." ¶ 1144. It continues, "Ideally, in order to ensure that different perspectives are identified and addressed in the agreements, negotiations should include persons of different genders and backgrounds." ¶ 1148. This admonition has no clear source, but is expressed as a hortatory "should" rather than a mandatory "shall."

The comment also contends "The second sentence of Article 6(1) effectively confirms the 'non-derogability' of the rights enshrined in the Geneva Conventions." ¶ 1160. It notes, "This 'non-derogability' of international humanitarian law is nowadays widely accepted and may be seen as an indication of the *jus cogens* character of its rules." ¶ 1160. The comment reiterates a *ius cogens* status for the law of war immediately after. ¶ 1161.

The comment seems to overreach with respect to *ius cogens*. Nor was the observation necessary to the comment's point of non-derogability. Non-derogability, meaning a State may not suspend an applicable provision of international law, is distinct from withdrawal. A State might certainly withdraw from a non-derogable law of war instrument. Yet to ascribe *ius cogens* status is to deny withdrawal, or even persistent objection, as a means of rejecting an international law rule or provision. The law of war is too broad and too diverse to make this broad assertion and, as the footnote to this provision concedes, sometimes the law of war is expressly derogable (*See, for example,* 1949 Fourth Convention, Art. 5).

Moreover, the *ius cogens* characterization is strange in light of the Convention's Article 142 denunciation provisions. Article 142 provides

in relevant part, "Each of the High Contracting Parties shall be at liberty to denounce the present Convention." If, as the comment asserts, the Conventions' obligations reflect law that preempts all other legal obligations—even subsequent attempts at denunciation, withdrawal, abandonment, or disavowal—then the Conventions' own provisions for such denunciation are reduced to surplusage. The observation seems to overreach and is certainly unnecessary to even the most thorough explanation of Article 6 special agreements. (*See, for example,* Sean Watts, 'The Updated First Geneva Convention Commentary, DOD's Law of War Manual, and a More Perfect Law of War, Part I', *Just Security*, 5 July 2016).

ARTICLE 7

NON-RENUNCIATION OF RIGHTS

> *Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.*

This comment characterizes Article 7 as a "cornerstone of the regime . . . ." ¶ 1169. It emphasizes prisoners of war may not renounce or surrender "the rights secured to them by the present Convention." ¶ 1169. The comment continues, "Common Article 7 embodies the presumption that in most cases the statuses, rights and mechanisms established by the Conventions, properly applied, afford the best protection for protected persons in situations of armed conflict." ¶ 1170.

The last point is well-taken but may not land with all audiences as intended by the comment. In one respect, the observation emphasizes the Convention's elaborate and at times onerous scheme of protection is well-suited to its task and therefore cannot be cast aside lightly. Yet in another respect, the observations might be taken to indicate the Convention reflects States' careful judgment and experience as to the best protections they could provide. Thus, just as waiver or forfeit of the Convention's protections should not be accepted, neither should alterations, amendments, augmentations, or supplements be undertaken lightly and without firm evidence of States' clear intent to do so. The Convention's carefully balanced protective regime avoids introducing infeasible practices that undermine respect for the Convention. It preserves the Convention as a crucial, if minimal, and even incomplete, common ground between belligerent Parties.

Exploring the nature of Article 7 protection, the comment observes,

> In acknowledging that individuals have rights, but not the right to renounce those rights, this provision displays a degree of tension. It is best understood as a mechanism to ensure

> the inviolability of rights even in the extreme circumstances of armed conflict, when the exercise of 'free choice' can be severely compromised. ¶ 1171.

Although a helpful acknowledgment of tension, the comment might have also indicated the term "rights" is something of a misnomer. The treatment obligations of the Convention are not accompanied by many of the enforcement provisions that usually accompany individual rights. The strict beneficiary of the Third Convention in a legal sense is the State Party on which the prisoner of war depends. The Protecting Powers regime supports this characterization to ensure respect for the obligations owed to the Parties on whom prisoners of war depend; the Protecting Power, and today the International Committee of the Red Cross itself, stands in the place of that Party. As the Third Convention states, "Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict . . . ." Art 8. In this respect, there may be a better explanation of Article 7. That is, prisoners of war cannot waive the "rights" of the Convention because they are not their rights to waive or renounce; they are obligations owed to the Power on which the prisoner of war depends.

The comment helpfully adds, although prisoners of war may not waive the protections of the Convention, the Convention affords them choices in some circumstances. For instance, prisoners of war may exercise choice with respect to conditions of parole, dangerous labor, and repatriation if wounded or sick. ¶ 1175.

The comment also addresses the question of prisoners of war who attempt to join the armed forces of a Detaining Power. It observes, "Some interpret Article 7 of the Third Convention to mean that a Detaining Power may not accept the voluntary enlistment of any of the prisoners of war it detains into its armed forces or forces affiliated to it." ¶ 1177. The comment indicates International Committee of the Red Cross practice has instead been to confirm this wish with the individual prisoner of war.

The latter view seems eminently reasonable and entirely consistent with the plain meaning of Article 7. Note, however, Article 130 of the Convention only classifies *compelling* service in enemy armed forces as a grave breach. The best view—and seemingly that taken by the comment—may be that the Convention is simply unclear—an admission of *non liquet* might be in order. States may wish to examine and make clear their views on this question.

The comment helpfully notes an important exception to Article 7 that might otherwise go underappreciated. It observes,

> There is nonetheless one exception to an 'absolutist' application of the rule, which is in relation to the right of prisoners of war to be repatriated at the end of hostilities (Article 118 of the Third Convention). Indeed, Articles 7 and 118 of the Third Convention, if interpreted and applied according to the letter, could mean that a prisoner of war may not refuse to be repatriated.' ¶ 1181.

It continues, "However, prisoners of war must be permitted to make an individual decision as to whether they wish to be repatriated, an exception which has existed for as long as the Third Convention has been in force and which is intrinsically linked with the principle of *non-refoulement*." ¶ 1181. The integrity of the *non-refoulement* rationale for the exception depends to some degree on its source. *Non-refoulement* is problematic in at least two respects if traced to human rights law as a source. First, the extent to which and how human rights law applies in armed conflict is the subject of debate. Second, if the human rights law notion of *non-refoulement* is applicable, should it not yield to or be informed by the more specific rule of mandatory repatriation during armed conflict? Even then, human rights *non-refoulement* is limited to conditions where harm is likely to result. In this view, a prisoner of war who simply prefers to remain in the territory of the Detaining Power should still be repatriated. On the other hand, if *non-refoulement* is not a human rights-specific notion but a broader principle or even an aspect of humanity in the law of war itself, then the question concerns State practice more clearly. Some State practice on this question from the Korean War exists, as noted by the comments on Article 118. *See* ¶¶ 4467–4469.

Turning to the notion of rights under the Convention, the comment notes, "In 1929, the word 'right' appeared in several provisions of the Geneva Convention on Prisoners of war, but it was with the adoption of the 1949 Conventions that the existence of rights conferred on protected persons was confirmed." ¶ 1182 (citing *Report of the Preliminary Conference of National Societies of 1946*, p. 71 "Indeed, the National Red Cross Societies had unanimously recommended in 1946 to confer upon the rights recognized by the Conventions 'a personal and intangible character' that would enable the beneficiaries 'to claim them irrespective of the attitude adopted by their home country.") ¶ 1182, n.29. The comment continues, "The term 'rights' refers to the entire system of protection under the Conventions and not only 'fundamental rights.'" ¶ 1183.

To be sure, insisting on rights in some cases and treatment obligations in others risks implicating a hierarchy in the protections of the Convention. The impulse to level the field, so to speak, and to regard the entire Convention as an articulation of individual rights is understandable. But this view is inconsistent with the language of the Convention. Where the Convention characterizes some obligations as rights, many, indeed most, are not. Principled interpretation requires accounting for this distinction.

Appreciating many provisions of the 1949 Convention remain or operate as rights in name only is equally important. Additionally, all the views cited outside the *travaux* are scholarly rather than governmental. The support for this comment's observation concerning rights includes almost no State practice. Meanwhile, contrary practice has emerged in national legislation. The United States Military Commissions Act of 2006 rejects the Geneva Conventions as a source of individual causes of action in US federal courts. At a minimum, the comment lends the question a more settled character than it seems to warrant.

ARTICLE 8

PROTECTING POWERS

The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties.

This comment identifies the purpose of Article 8 as setting the "role and functioning" of Protecting Powers, reminding the article is common to all four 1949 Conventions. ¶ 1185. In that respect, the comment notes the 1949 Diplomatic Conference of Geneva made the Protecting Powers system "the lynchpin of the system for monitoring compliance." ¶ 1186. This is a peculiar observation to showcase at the outset of the comment in at least two respects. First, as the comment later concedes, the Protecting Powers regime has proved perhaps *the* signal failure of the 1949 Conventions. It has never performed its intended function with anything resembling regularity. Second, if Article 8 is indeed the lynchpin of the Convention, it seems conceptions of its protections should orient toward an obligations-based rather than a rights-based system.

As explained *supra*, Protecting Powers were envisioned to guard the

interests of the States Parties to the Convention and not of prisoners of war. To showcase the Protecting Powers regime as a lynchpin emphasizes the beneficiaries of the Conventions in a legal sense are the States Parties themselves. If the Convention were a regime based in and consisting of individual rights, one would expect a much different system of monitoring and enforcement. Even the quite thorough grave breaches regime, which on the failure of the Protecting Powers scheme seems the *de facto* lynchpin of supervision and enforcement, is not an individual rights-oriented regime. Individuals have no role in initiating proceedings, no individual complaint procedures are in place, nor are individual recoveries part of the grave breaches provisions of the Convention.

Explaining the temporal scope of Article 8, the comment indicates, "In peacetime, it is up to diplomatic and consular missions to keep their government informed of how the receiving State is observing its commitments vis-à-vis the sending State. In the event of a failure to fulfil those obligations, the sending State may use diplomatic channels to assert its rights." ¶ 1187. Considering States' widespread failure to implement the Protecting Powers regime during armed conflict, when need for its functions seems most pressing, the likelihood States will resort to the regime in peacetime seems greatly reduced. The comment offers no State practice to confirm its temporal understanding in this respect.

But the comment helpfully observes later,

> Common Article 8 (Article 9 in the Fourth Convention) is based on the assumption, largely supported by State practice at the time of the 1949 Diplomatic Conference, in particular during the two world wars, that war implies the breaking off of both diplomatic and consular relations. Nowadays, this assumption is not always valid as there have been instances where Parties to an international armed conflict have maintained such relations. ¶ 1188.

Although this observation is not supported by a citation, later, at paragraphs 1220–1222, the updated *Commentary* elaborates. Readers researching the Protecting Powers regime may wish to skip to those paragraphs.

As indicated above, the comment concedes,

> Practice since 1949 has not developed in the direction envisioned by the drafters of the Geneva Conventions: the

> appointment of Protecting Powers in case of an international armed conflict has been the exception rather than the rule. Seemingly, practice since 1949 has evolved to the point of considering the appointment of Protecting Powers as optional in nature. This does not preclude, however, that Protecting Powers may still be appointed in future international armed conflicts on the basis of Article 8. ¶ 1196.

This is a reasonable conclusion. The comment might have determined desuetude (loss of legal force owing to disuse) attached at least with respect to the compulsory character of Article 8. But because the Article still offers the possibility of operating in substantial part (absent the "shall") if belligerents agree between themselves, to conclude desuetude would be too extreme is certainly possible. The comment notes the 1929 Geneva Convention Relating to the Treatment of Prisoners of War, Article 86 made Protecting Powers activities a "possibility." ¶ 1202. It remarks, during the Second World War, "Switzerland protected the interests of 35 States, including most of the major Powers: the British Empire (in relation to 11 States or territories), France (17), United States (12), Germany (15), Japan (15) and Italy (14). Sweden protected the interests of 28 States, including the USSR. And the United States, prior to joining the war, represented a dozen States." ¶ 1203. States now appear to have reverted in their practices to the optional approach taken by the 1929 Convention.

The comment advises Protecting Powers' activities are regulated by both the law of war and general diplomatic law, including the 1969 Convention on Special Missions, the 1961 Vienna Convention on Diplomatic Relations, and the 1963 Vienna Convention on Consular Relations. ¶ 1216. In this sense, the Convention anticipates diplomatic officials will perform Protecting Powers' functions. The comment indicates, "On this basis, a distinction is usually made between the 'Geneva mandate,' which sets out the duties of the Protecting Powers under humanitarian law, and the 'Vienna mandate', which sets out the activities arising more specifically from diplomatic and consular law and practice." ¶ 1217.

To support the distinction, the comment cites Article 4B(2) of the Third Convention. That article permits the Power on which prisoners of war held in neutral or nonbelligerent territory depend to perform the functions of a Protecting Power as well as the functions it would normally perform in diplomatic relations with the neutral or nonbelligerent State. The provision is reasonable considering the likely ongoing diplomatic relations between

that Power and the territorially neutral or nonbelligerent State.

Although the above observation is true concerning Article 4B(2), the extent to which the so-called Vienna mandate operates outside the narrow context of internment in neutral or nonbelligerent territory is questionable. This is so chiefly because the text of Article 8(3) seems to prohibit a Protecting Power from any function beyond those enumerated by the Convention. It states, "The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention." The article's resort to clearly compulsory language unequivocally indicates the functions of the Protecting Power derive entirely and exclusively from the Convention. Article 8(3) seems to preclude the Vienna mandate altogether with the exception of Article 4B(2) situations.

The comment surveys State practice to test the Article 8 assumption that belligerents will not enjoy diplomatic relations. It observes, "In practice since 1949, while it has happened that States maintained diplomatic relations despite their being adversaries in an international armed conflict, such relations have been broken off at the outset of, or during, a number of other such conflicts." ¶ 1220 (citing Jean Salmon, *Manuel de droit diplomatique*, 1994, p. 498, (listing international armed conflicts in which the States involved broke off their diplomatic relations, and international armed conflicts in which the States involved maintained them); ¶ 1220, n. 39). For instance, a note to an earlier paragraph indicates Ethiopia and Eritrea did not sever diplomatic relations during their armed conflict. ¶ 1219, n. 35.

Turning again to the question of whether the Article 8 Protecting Powers regime remains compulsory, the comment emphasizes the term "shall" appears in Article 8(1) not as an optional provision. ¶ 1226. It observes the same with respect to the 1977 Additional Protocol I, Article 5 Protecting Powers provision. ¶ 1226. However, the comment later concedes States Parties to the Convention "have come to a different understanding of this provision." ¶ 1227.

Respecting appointments of Protecting Powers, the comment advises,

> the receiving State may refuse the services of the Protecting Power appointed by the adverse Party; it may not, however, act in such a way that the interests and nationals of another State are left without protection. In international armed conflict, such an attitude would clearly run counter to Article 8. ¶ 1237.

The updated *Commentary* offers a similar conclusion at ¶ 1240. The comment's advice seems in tension with its earlier conclusion that Article 8 is no longer compulsory but rather optional. *See supra* ¶ 1227. The comment may mean to indicate the receiving Party must accept the International Committee of the Red Cross as a substitute under Article 10, though that is not clearly stated or suggested by any citation.

E. Paragraph 1: Duties of the Protecting Powers under the Geneva Conventions

The comment notes the Convention envisions an intermediary role for Protecting Powers. It advises, "The Protecting Power is supposed to provide a channel for communication between the Power of Origin and the receiving State. The Geneva Conventions contain several provisions stipulating information about prisoners of war and about civilians protected by the Fourth Convention should be transmitted via the Protecting Power." ¶ 1247.

The comment further indicates "cooperation" and "scrutiny" as they appear in Article 8 imply a degree of access and an opportunity to provide feedback. But, as the preparatory work makes clear, they do not confer upon Protecting Powers any right to control or direct detention operations by the Detaining Power. ¶ 1252–1255. The comment insists, "To scrutinize the implementation of the Third Convention, the Protecting Power's representatives may go to all places where prisoners of war may be, particularly to places of internment, imprisonment and work; they are also allowed to interview the prisoners, and in particular the prisoners' representatives, without witnesses (Article 126)." ¶ 1261.

The comment helpfully highlights a little-appreciated textual difference between the 1949 Conventions' otherwise common articles on Protecting Powers. The comment distinguishes the wording of common Articles 8/8 of the First and Second Conventions from that of common Articles 8/9 of the Third and Fourth Conventions. ¶ 1295. Where the former two articles indicate a Protecting Power's activities may be "restricted" by "imperative military necessities" of the receiving State, the latter two articles only instruct the Protecting Power to "take account" of "imperative necessities of security." Therefore, the comment observes, "a Party to a conflict may not invoke the 'imperative military necessities' it claims to be facing in order to restrict the activities of the Protecting Power in relation to prisoners of war or civilians protected by the Fourth Convention and thereby prevent the Protecting Power from carrying out its duties as enshrined in the Third and Fourth Conventions." ¶ 1295. This is an interesting and probably not

widely appreciated distinction. Yet the reading registers as a highly formalist departure from the looser, more functionalist readings of the Convention employed by other comments. States may wish to evaluate and express their own views on this question.

H. Developments since 1949

The comment concludes with a helpful survey of practice with respect to Article 8. It notes,

> Since the 1949 Conventions were adopted, Protecting Powers are only known to have been appointed in five conflicts:
> - the Suez conflict (1956) between Egypt on one side and France and the United Kingdom on the other;
> - the conflict (July 1961) between France and Tunisia over Bizerte;
> - the Goa crisis (1961) between India and Portugal;
> - the conflict (December 1971) between India and Pakistan;
> - the Falkland/Malvinas Islands conflict (1982) between Argentina and the United Kingdom ¶ 1297.

The comment catalogs reasons Parties to conflicts have offered for declining to appoint Protecting Powers have included:

> whether the procedure for appointing Protecting Powers was fit for purpose or overly cumbersome. They highlighted the supposedly optional nature of appointing Protecting Powers, the difficulty of agreeing on a neutral State acceptable to both Parties, the maintaining of diplomatic relations between adversaries, and the financial burden that the activities of the Protecting Power could place on the State calling upon its services. ¶ 1299.

The comment indicates the more likely reason is political, especially fear a Protecting Power will lend legitimacy to an opposing belligerent. ¶ 1300.

ARTICLE 9

ACTIVITIES OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND OTHER IMPARTIAL HUMANITARIAN ORGANIZATIONS

> *The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of prisoners of war and for their relief.*

This comment observes, "Article 9 grants impartial humanitarian organizations the right to offer . . . to undertake humanitarian activities." ¶ 1303. Of course, the article does not actually articulate the right to offer humanitarian services. The comment's focus on offers reflects the text of common Article 3 better than that of Article 9. Still, the requirement that humanitarian organizations secure the Parties' consent seems to imply an offer and acceptance precede a humanitarian operation. That is, the opportunity for the International Committee of the Red Cross and other impartial humanitarian organizations to propose humanitarian activities is incident to the article's instruction not to regard the Convention as an obstacle to such work to which the Parties to the conflict have agreed. Relatedly, the article makes no mention of any right in this respect, probably consistent with the Convention's approach to rights generally.

Showcasing the updated *Commentary*'s general view of the Convention as a living document, the comment concedes a narrow original understanding of Article 9 but then observes,

> Since 1949, however, international law in general, and international humanitarian law in particular, has evolved to the extent that a Party to an armed conflict is not completely at liberty to decide how it responds to an offer of services made by an impartial humanitarian organization

> to undertake humanitarian activities. Rather, at all times, the Party must assess the offer in good faith and in line with its international legal obligations with regard to humanitarian needs. Thus, where a Party is unable or unwilling to address the humanitarian needs of such persons, international law requires it to respond positively to an offer by an impartial humanitarian organization to do so in its place. If the humanitarian needs cannot be met otherwise, the refusal of such an offer would be considered arbitrary, and therefore inconsistent with international law. ¶ 1304.

The comment later continues,

> The treaty-based right of impartial humanitarian organizations to offer, to the Parties to an armed conflict, to undertake humanitarian activities is often referred to as the right to offer services. In respect of international armed conflict, it has been enshrined in all four Geneva Conventions as common Article 9 (Article 10 in the Fourth Convention). ¶ 1305.

Again, although common Article 3 clearly provides a treaty-based opportunity for offers of humanitarian assistance, common Article 9 does not. The updated *Commentary* should explain the interpretation that gives rise to the opportunity to offer. The interpretation is not difficult to understand but an explanation is important in a work so dedicated to the careful language of the Convention. Logical and lexicological leaps like these undermine confidence in other sections of the comment.

Turning to how the 1949 Conventions address humanitarian access elsewhere, the comment notes, "In addition to its Article 10, which relates to international armed conflict in general, the Fourth Convention deals with this topic more specifically, and more forcefully, in the context of an occupation." ¶ 1306. Here is a mention of the Parties' unequivocal obligation to accept humanitarian assistance in situations of belligerent occupation. But rather than account for the clear textual difference, the comment here equates the Third Convention's Article 9 with the Fourth Convention's Articles 59 and 63. Admittedly the comment indicates the Fourth Convention obligation is more forceful, but the comment's interpretation of Article 9 fails to account for that textual difference clearly

or persuasively. The comment does not explain how the Third Convention's Article 9 obligation is *less* forceful nor does it give legal effect to that phenomenon.

Turning to a later treaty's provision on humanitarian access, the comment notes, "Additional Protocol I further expands upon the right to offer services in international armed conflict." ¶ 1306. Again, if the 1977 Additional Protocol I, like the Fourth Convention with respect to occupied territory, expands on or provides a more forceful obligation, then it seems the Article 9 baseline should be less extensive rather than equivalent to or coextensive with 1977 Additional Protocol I, Articles 72 and 81. The comment defends its approach noting, "This broad legal foundation is unsurprising, and merely reflects the axiom that, irrespective of its legal characterization, every armed conflict generates needs for humanitarian assistance and protection. States have thus recognized that, as a matter of international law." ¶ 1306.

This passage reveals the crux of the comment's approach. Rather than analyze each obligation with respect to humanitarian assistance in its context, the updated *Commentary* aggregates the obligations into a "broad legal foundation" of general support for offers of assistance. As with other comments, the claim with respect to State recognition of an altered or evolved meaning is not substantially supported as envisioned by Vienna Convention on the Law of Treaties, Article 31 and subsequent State practice and agreement.

1. "The provisions of the present Convention constitute no obstacle"

Having set the stage for its approach, the comment turns to the details of interpretation. It asserts,

> Article 9 confers on the ICRC or any other impartial humanitarian organization the right to offer its services even in the absence of any prior approach or request made by the Party to the conflict concerned. When an offer of services is made, it may be regarded neither as an unfriendly act, nor as an unlawful interference in a State's domestic affairs in general or in the conflict in particular. ¶ 1317.

Again, the grounding of a "right to offer" is implied rather than enumerated in Article 9. Neither a "right" nor an "offer" is mentioned explicitly. The passage seems better explained as simply a specialized rule of

interpretation applicable to the Convention—an agreed-upon way to read the Convention—that precludes certain interpretations that would impede humanitarian assistance agreed to by the Parties. The idea of an offer or even a right to offer seems better implied from the term "undertake" in conjunction with the "consent" from the Parties. Ultimately, the clearest opportunity the article guarantees to humanitarian organizations is that of undertaking *approved* relief efforts.

4. "subject to the consent of the Parties to the conflict concerned"

The comment here evaluates the question of belligerent Parties' consent to humanitarian operations. It judges State consent is, "[s]ince the adoption of the 1949 Geneva Conventions . . . the most debated aspect of the legal framework applicable to humanitarian activities in armed conflict." ¶ 1348.

This characterization is difficult to accept. First, at least from 1949–1960, the period leading up the original *Commentary*, there seemed to be no such issue. The 1960 Pictet *Commentary* makes no note of such debate. Dr. Pictet's work clearly states consent is absolutely required. Second, the supporting note recites no such debate between States Parties themselves, in reported cases, or even in academic discourse during that period. This makes the passage seem like an effort to introduce an artificial interpretive uncertainty. Other recent work uses the same tactic of straining to identify interpretive uncertainty with respect to consent to humanitarian operations. *See Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict* (2016) (asserting ambiguity with respect to consent). *But see* Sean Watts, *International Law Studies* (2019) (detailing efforts to cloud an otherwise clear understanding of humanitarian relief provisions).

The comment indicates only the consent of a "concerned" Party is required. The comment reads "concerned" narrowly such that an opposing Party need not be consulted for purposes of Article 9, only a territorial or controlling State, even if the relief column will transit the opposing Party's political territory. The comment notes, however, the consent of a transit or territorial State may be required as a matter of general international law. ¶ 1349. This is a novel interpretation. The 1960 Pictet *Commentary* interprets the term "concerned" and the consent requirement broadly. Dr. Pictet's comment notes,

> [W]hen relief consignments are forwarded, it is necessary to obtain the consent not only of the State to which they are being sent, but also of the State from which they come, of the

> countries sent through which they pass in transit and, if they have to pass through a blockade, of the Powers which control that blockade. p. 109.

The comment provides no notice to readers of its departure from the 1960 Pictet *Commentary*. Nor does the comment offer an authoritative source of international law, including subsequent practice of States as evidence of agreement, as a rationale. This narrow reading is not surprising, however, in light of the position the updated *Commentary* later takes concerning consent. The intention of narrowing the understanding appears to be to minimize the opportunities for States to obstruct or restrain humanitarian operations.

The comment identifies an obligation both on the part of Parties and on the part of other States "to allow and facilitate relief schemes." ¶ 1351. This is a remarkable reading of Article 9. This reading is also, at first blush, difficult to reconcile with the interpretation of "concerned" above. According to the comment, it seems the impartial humanitarian organization need not consult a State not Party to the conflict, but the latter must nonetheless consent to a relief operation. The 1960 Pictet *Commentary* does not mention this interpretation.

b. Consent may not be arbitrarily withheld

Concerning whether States may withhold consent to offers of humanitarian relief, the comment first observes, "The Geneva Conventions provide no guidance as to whether there are circumstances in which a Party to the conflict may lawfully refuse its consent to an offer to undertake humanitarian activities . . . ." ¶ 1353. This is a strange way to characterize the consent requirement. To indicate the Conventions do not explicitly identify conditions in which consent may be withheld implies or in logical terms is "begging the question" whether conditions or limitations exist in the first place.

A more conventional observation would have simply noted the consent requirement as a baseline requirement of the article. Rather than simply concluding the unqualified consent requirement results in an unqualified power to withhold consent, the comment appears to suggest the absence of enumerated conditions in which consent may be withheld restrains conditions under which a State may object to a humanitarian operation in territory it otherwise controls.

Meanwhile, the comment helpfully and correctly distinguishes a situation of belligerent occupation where consent is required in light

of the occupying Power's control and responsibility over the territory and population in question, from a condition of international armed conflict. ¶ 1354. However, as stated *supra*, the comment does not fully showcase the textually distinct approach to consent taken by the 1949 Conventions' provisions on belligerent occupation. *See supra* analysis of ¶ 1306. Where Article 9 prominently features unqualified consent as a prerequisite to humanitarian operations, Fourth Convention, Article 59 clearly compels occupying Powers to agree to humanitarian relief schemes when territory is inadequately supplied.

To distinguish the situation at the adoption of Article 9 from present times, the comment characterizes sovereignty in 1949 as "nearly unfettered" and therefore consent was a matter of "full discretion" of the State. ¶ 1355. This is not entirely true. States were certainly under any number of international law obligations at that time as cataloged in innumerable treaties and treatises of the period. The comment seems to offer this incorrect characterization to support its interpretive aim concerning an "evolved" understanding of Article 9 rather than an objective description of law in 1949.

Indeed, the comment then asserts, "Since 1949, international law in general, and humanitarian law in particular, has evolved to the extent that a Party to an international armed conflict to which an offer of services is made by an impartial humanitarian body is not at complete liberty to decide how to respond to such an offer." ¶ 1356. This is, of course, true in a sense. States have undertaken additional obligations under international law since 1949. In a quantitative sense, perhaps their sovereignty is somewhat more "fettered." But how these developments influence the term "consent" is unclear and the argument that a general accumulation of unrelated obligations fetters discretion on another matter seems disingenuous.

The comment continues, "In particular, humanitarian law, as informed by subsequent State practice, has evolved to the point where one can conclude that consent may not be refused on arbitrary grounds." ¶ 1357. Although the comment promises State practice, the supporting citation offers no such thing. The citation is chiefly to the International Committee of the Red Cross *Customary International Humanitarian Law Study* and to a passage of that work not addressing Article 9 at all but another obligation. The citation's other significant source is preparatory work on the 1977 Additional Protocol I rather than subsequent application of the 1949 Convention itself.

Most troublingly, the comment then concludes, "Military necessity is no valid ground under humanitarian law to turn down a valid offer of services or to deny in their entirety the humanitarian activities proposed

by an impartial humanitarian organization." ¶ 1361. The sentiment is clear. The comment wishes to characterize its understanding of an obligation to consent to humanitarian operations as not subject to derogation or suspension for reasons of military necessity.

The desire to deny the *kreigsraison* mentality to interrupt humanitarian relief is compelling from a human perspective. However, Article 9 is not expressed as the sort of law of war rule exempt from military necessity determinations. In fact, the consent requirement most clearly provides States an opportunity to consider military necessity in their decisions to withhold consent. In a sense, military necessity might be *exactly* why a Party to a conflict would not consent to an offer of humanitarian relief. This comment is in danger of misapplication. It should be explained in far more careful detail and States should weigh it carefully and respond publicly.

In closing guidance on this comment, recalling the comments of the original 1960 Pictet *Commentary* on Article 9 is helpful:

> All these humanitarian activities are subject to one final condition—the consent of the Parties to the conflict concerned. This condition is harsh but inevitable. The belligerent Powers do not have to give a reason for their refusal. But being bound to apply the Convention, they alone must bear the responsibility if they refuse to help in carrying out their commitments. p. 109.

The updated *Commentary*'s drastic departure from this view with respect to both consent and a duty to defend refusals surely warrants highlighting, careful explanation, and clear or perhaps even overwhelming evidence in support of the new view. One would expect a substantial showing of subsequent practice to justify such a departure from the original understanding of the article.

ARTICLE 10

SUBSTITUTES FOR PROTECTING POWERS

The High Contracting Parties may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.

When prisoners of war do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organization provided for in the first paragraph above, the Detaining Power shall request a neutral State, or such an organization, to undertake the functions performed under the present Convention by a Protecting Power designated by the Parties to a conflict.

If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.

Any neutral Power or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially.

No derogation from the preceding provisions shall be made by special agreements between Powers one of which is restricted, even temporarily, in its freedom to negotiate with the other Power or its allies by reason of military events, more

particularly where the whole, or a substantial part, of the territory of the said Power is occupied.

Whenever in the present Convention mention is made of a Protecting Power, such mention applies to substitute organizations in the sense of the present Article.

This comment first notes Warsaw Pact States had filed reservations to this common article's provision, which permits a Detaining Power to appoint a neutral substitute in the absence of agreement with the Power on which prisoners of war depend. *See* Art. 10, chapeau comment. About half those States have now withdrawn those reservations.

The comment reiterates an earlier observation that the Protecting Powers scheme was a "lynchpin of the system of monitoring and compliance with the Geneva Conventions." ¶ 1365; *see* ¶ 1186. As noted *supra*, this is an odd observation to sustain, considering States' scant record of implementing that scheme since 1949. *See supra* guidance on ¶ 1186. The comment notes common Article 10 was originally envisioned for situations in which a Protecting Power was drawn into an existing armed conflict unexpectedly, suggesting a narrow application. This was apparently the case with respect to the United States during the First and Second World Wars. ¶ 1367.

The comment helpfully emphasizes the Protecting Powers scheme is only applicable in international armed conflict. ¶ 1370. It recounts a post-First World War impasse in repatriation of German and Russian prisoners of war. The latter were held for suspected Bolshevik sympathies and failure of allies to recognize the Soviet regime impeded negotiations. The International Committee of the Red Cross served as an intermediary "*de facto* Protecting Power" to facilitate repatriation. ¶ 1372. The comment notes the 1929 Conventions did not recognize the International Committee of the Red Cross as a Protecting Power substitute. ¶ 1375. Nevertheless, it performed the function *de facto* in the Second World War, particularly between the Free French government and Germany and for the latter after its capitulation. ¶ 1378–79. The comment indicates "Almost 70 per cent of the prisoners of war captured during the Second World War were denied the assistance of a Protecting Power for some or all of their time in captivity." ¶ 1382.

E. Paragraph 2: Unilateral appointment of a substitute by the Detaining Power

The comment highlights unilateral appointment of a neutral State as a Protecting Power substitute was a somewhat surprising outcome at the 1949 Diplomatic Conference of Geneva. ¶ 1402. It reiterates the provision provoked treaty reservations from the Warsaw Pact States. ¶¶ 1404–05.

F. Paragraph 3: Replacement of the Protecting Power by a humanitarian organization such as the ICRC

Turning to the mechanics of the text, the comment indicates common Article 10 operates when neither a Protecting Power by agreement nor unilateral appointment of a neutral State by a Detaining Power can be achieved. ¶ 1409. It emphasizes "nothing prevents an impartial humanitarian organization other than the International Committee of the Red Cross from making an offer of services in the sense of paragraph 3." ¶ 1410. It also indicates, "Where paragraph 3 applies, the Detaining Power is bound to accept an offer of services from the [International Committee of the Red Cross] to undertake the humanitarian tasks of a Protecting Power. That obligation emerges from the wording of the article itself ('shall accept')." ¶ 1411.

Relating its own policies toward serving as a Protecting Power, the International Committee of the Red Cross helpfully indicates,

> it would be unable to offer its services unless it was certain of the agreement of the Parties to the conflict. This position, which is a return to the basically consensual nature of the institution of Protecting Powers, makes the ICRC's appointment subject to the consent of the belligerents, whereas paragraph 3 was intended precisely to avoid such a state of affairs.' ¶ 1413 . . . In a memorandum in 1951 the ICRC set out which tasks it was prepared to perform while acting as a substitute for a Protecting Power, and the conditions under which it would do so. It ruled out most of the work of scrutinizing the implementation of the Geneva Conventions, in the belief that such an activity was incompatible with the purpose, the nature and the limits of the ICRC's work as a 'quasi-substitute'. ¶ 1417 . . . '[T]he ICRC reviewed its position and stated categorically at the 1971 Conference of Government Experts that it was prepared to undertake all

> the tasks incumbent on Protecting Powers under the Geneva Conventions' ¶ 1419.

J. Developments since 1949

Last, the comment notes, "[S]ince 1949 it appears that the interpretation of Article 10 as being compulsory is no longer in line with States' current understanding of this provision, nor with the ICRC's operational practice." ¶ 1434. As with common Article 8, disuse by States presented the possibility of determining common Article 10 had fallen into desuetude (loss of legal effect through disuse). Although the comment does not conclude a situation of desuetude applies to the entire common article, it effectively concludes as much with respect to the common article's compulsory components.

ARTICLE 11

CONCILIATION PROCEDURE

In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for prisoners of war, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict a person belonging to a neutral Power, or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

This comment indicates common Article 11 is referred to as a "conciliation procedure" but notes the term does not appear in the actual Convention. ¶ 1441. The phrase appears only in the article's title which the treaty depositary added for convenience of reference after the Convention's adoption. The comment advises readers "The purpose of Article 11 is to determine the conditions for establishing a dialogue between Parties to an international armed conflict." ¶ 1443. This purpose may be differentiated from traditional conciliation as a means of dispute settlement. The article is thus more reminiscent of a "good offices" provision.

Importantly, the comment notes, "In practice, the 'conciliation procedure', as established under Article 11, *has never been used*. The main reason for this is that the system of Protecting Powers has almost never

been activated since 1949." ¶¶ 1447, 1487 (emphasis added). Disuse by States again raises the question of desuetude. *See also* Articles 8, 10. The comment declines to conclude desuetude applies. This determination is supportable as the common article is laced with hortatory terms such that disuse by States does not equate to breach or disregard of any legal obligation. Common Article 11 remains available to States on an optional basis. The 1960 Pictet *Commentary* observes, "The Parties to the conflict are bound to give effect to the proposals for a meeting made to them by the Protecting Powers." p. 125. The updated *Commentary* leaves the reader to wonder whether this view is still valid considering the absence of subsequent State practice. On one hand, no States have honored Dr. Pictet's view, and it could be interpreted as having fallen out of practice and obligation. On the other hand, the meetings envisioned by Article 11 have not been proposed because States have not regularly appointed Protecting Powers. Still, the International Committee of the Red Cross has fulfilled many of the Protecting Power functions and all the same no conciliation procedure practice is worth citing.

The comment emphasizes common Article 11 as a facet of the Conventions' Protecting Powers scheme. ¶ 1454. It indicates reference to Protecting Powers in the plural does not mean they must act in concert; they may propose conciliation procedures individually and *sua sponte*. ¶ 1455. This conclusion seems reasonable considering the purpose and tasks envisioned for Protecting Powers and the Convention's repeated use of the plural form.

The comment understands "protected persons" as it appears in common Article 11 to include both Third Convention, Article 4 personnel and retained personnel, such as enemy medical and religious personnel, and persons undergoing an Article 5 status review. ¶ 1459. Although the phrase "protected persons" is usually understood as a term of art—in the case of the Third Convention, a reference to prisoners of war—the comment's interpretation seems reasonably inferred from the Protecting Power scheme and Protecting Powers' role in overseeing and facilitating observation of Detaining Powers' Third Convention obligations.

Later paragraphs offer quite extensive comments on the types of situations that may be addressed through common Article 11 and on the meaning of good offices. ¶ 1461–69. Although helpful, the examples are somehow peculiar in light of the comment admitting no State appears to have ever resorted to common Article 11 procedures. The situations and meanings offered by the comment cannot be taken as evidence of

subsequent practice. Instead, they must be understood simply as potential examples. The comment suggests a determination to offer interpretive views regardless of subsequent developments or even lack thereof.

The comment notes, "[E]ach of the Protecting Powers may propose a meeting "at the invitation of one Party."' ¶ 1471. Although the text of common Article 11 is not entirely clear on this point, the comment concludes "the historical background of the provision indicates that this wording refers to a Party 'to the conflict' rather than to a Party 'to the Convention.'" ¶ 1471.

While reasonable, the comment may introduce tension with the earlier claimed *erga omnes* nature of the Conventions identified in the updated *Commentary*'s comment on common Article 1. *See* ¶ 152. The observation at paragraph 1471 seems correct. The best argument may be that the phrase "High Contracting Parties" refers to all States that have ratified the Convention. *See* updated *Commentary* ¶ 1471. But the paragraph 1471 interpretation would not clearly be correct if the Convention's obligations were, as the updated *Commentary* claims, owed *erga omnes*. The conception captured in common Article 11 and the historical background support an obligation owed to another belligerent Party rather than to the international community as a whole.

The comment notes no form, timing, or specific measures and designation of who attends are specified for the meetings envisioned in common Article 11. ¶¶ 1473–77. This is an admirable concession on the part of the updated *Commentary* to what the Convention does not say. It seems States have reserved for themselves broad discretion in each of these respects.

5. Obligation to "give effect" to the proposal of a meeting

Turning to the common article's obligation to give effect to meeting proposals, the comment concludes, "This means that the Parties are not allowed to ignore the proposal; they have a legal obligation (they 'shall be bound') to respond. This also supposes that they must at least accept to participate in the meeting." ¶ 1479. This seems a sound textual interpretation, but it seems disuse should have undermined the obligatory components of the article. Again, the case is not that States have received invitations to conciliation procedures and as a matter of practice ignored them out of a sense of *opinio iuris*. But the scale and consistency of disuse of the Protecting Powers scheme more generally must have some effect on the obligatory nature of this provision. The

comment clarifies, however, the obligation to attend is not an obligation to accept any determination made by other attendees. ¶ 1480.

PART II

GENERAL PROTECTION OF PRISONERS OF WAR

A chapeau comment indicates Part II of the Third Convention sets forth "fundamental principles" for protection of prisoners of war. It asserts these principles "serve as a reference for the understanding and application of the more technical provisions of Parts III and IV." ¶ 1495. The latter statement seems an insight, previously lacking, on the updated *Commentary*'s conception of the role of principles in the Convention. In this instance, the updated *Commentary* does not impart to principles the binding effect of enforceable and binding rules of conduct or result. Rather, this comment envisions principles as aids to interpretation and implementation rather than as obligations for States to implement directly.

The comment includes one exception in this respect, however. It identifies Article 13 as a hybrid provision, noting it includes a principle of humane treatment and "complimentary obligations, both positive and negative." ¶ 1498. It may be worth considering clearer delineations of principles and obligations of conduct or result in other law of war treaties and instruments.

ARTICLE 12

RESPONSIBILITY FOR THE TREATMENT OF PRISONERS AND CONDITIONS FOR THEIR TRANSFER TO ANOTHER POWER

Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.

Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.

Nevertheless if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.

This comment initially notes Warsaw Pact States had filed reservations to Article 12. Many revoked these reservations later. Other States made declarations respecting the article.

As discussed in the Part II chapeau comment *supra*, the comment notes Article 12 includes a passage that reflects a principle of the Convention more so than a rule. *See also* discussion *supra* ¶ 1495. Article 12(1) clarifies prisoners of war are in the hands of the Detaining Power rather than in the hands of the individuals or military organizations that capture them. This declaration does not itself amount to any obligation of conduct or result.

Rather it seems intended to frame or to characterize the relationship between prisoners of war and members of the armed forces of the Detaining Power. Article 12(1) also assigns the responsibility for applying the Convention to the Detaining Power. Articles 12(2) & (3) however, read more clearly as rules than as principles.

The comment distinguishes Article 12 transfers of prisoners of war from Article 118 repatriation. ¶ 1503. The distinction is helpful as a guide to the separate obligations that attach to transfer and repatriation respectively. Still, it seems the principle concerning sovereign custody rather than the principles of individual or organizational custody enumerated in Article 12(1) would apply to Article 118 repatriation operations as well.

The comment records disagreement during diplomatic negotiations that formed the Convention over the issue of responsibility during transfers of prisoners of war from a Detaining Power to another Party. One camp advocated joint responsibility between the initial Detaining Power and the receiving Party. Another camp urged only the Party actually holding the prisoners of war in question should be responsible. Although the former view held at an early Conference of Government Experts, States ultimately rejected that view in favor of the latter view. ¶¶ 1506–07. The disagreement continued after the 1949 Diplomatic Conference of Geneva and resulted in the Warsaw Pact States making reservations to Article 12. ¶ 1508.

This is a particularly helpful recounting of procedural history. Specifically, excluding arguments that advocate a joint responsibility regime on the basis of humanitarian or other interpretive considerations is useful. Resolution of the issue of responsibility may bear on the scope of responsibilities associated with common Article 1 as well. Although some views attribute a universal duty to enforce the Convention, Article 12 and its negotiating history suggest a more specific allocation of responsibility in this respect. Article 12 and its negotiating history make clear States opted to fix responsibility in a far narrower though clearer and more focused sense.

The comment reiterates the Convention's broad notion of a Detaining Power's control over and responsibility for prisoners of war. ¶ 1510–13. This section might have more clearly emphasized the character of Article 12(1) as a principle having broader application understanding the rest of the Convention (that is, the function of principle in 12(1) as opposed to rules of 12(2) & (3)). Sketching out more specific aspects of responsibility, the comment notes,

> Article 12(1) should nowadays be interpreted in light of the International Law Commission's 2001 Draft Articles on State Responsibility. This means that the Detaining Power is responsible 'for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law.' ¶ 1514.

This seems a colorable incorporation of a subsequent development of public international law. An interesting consideration is the extent to which the aspects of State responsibility internal to the law of war as *lex specialis* have been modified or even displaced by this subsequent and more developed system of State responsibility, though arguably some of it may have existed as custom even at the time of the adoption of the 1949 Geneva Conventions. States should consider the question and publish views to this effect.

The comment indicates multilateral operations require identifying a responsible power,

> because several provisions of the Convention are based on the principle of assimilation. According to this principle, the standard of treatment to which prisoners of war are entitled is in the first instance determined by reference to the domestic standards and law applicable to members of the armed forces of the Detaining Power. ¶ 1520.

This is true with respect to criminal prosecution procedures. But precisely how the Convention's provisions that resort to assimilation—standards of treatment based on obligations applicable to the Detaining Power's armed forces or population—related to transfers requires further elaboration.

The comment indicates State members of alliances or fighting coalitions will always be responsible for prisoners of war in their hands, despite agreements or arrangements otherwise. ¶ 1521. It may have been helpful to emphasize or clarify *de facto* custody is relevant regardless of *de iure* arrangements otherwise. For instance, even if a coalition indicates one member will hold prisoners of war and conduct detention operations, the capturing Power is not absolved of responsibility while prisoners of war are under its *de facto* control.

The comment observes a transfer of responsibility requires a transfer in accordance with Article 12(2) and (3). ¶ 1522. The comment might have

elaborated this observation to cover situations of informal transfers made during intra-theater operations or even in a larger detention facility or camp with distinct sections or zones. This is especially so considering the Article 12(2) emphasis on transfers to *territory* of a cobelligerent. Transfers may not always involve movement across political borders.

D. Paragraph 2: Transfer of prisoners of war to another Power

The comment emphasizes a Party's responsibility for prisoners of war attaches at the "moment they fall into its power." ¶ 1524. However, by its terms, Article 12(2) applies only to transfers to the territory of a cobelligerent State. The comment concludes nonetheless Article 12(2) applies also to transfers not involving belligerent territory. Moreover, the comment contends transfers need not even involve a prisoner's movement, for instance in the case of cobelligerents transferring command of a camp. ¶ 1525. These interpretations seem consistent with the principle of responsibility stated in Article 12(1), though examples of or citations to State practice would reinforce their persuasiveness.

The comment identifies in the Convention no limit on the reasons for transfers. ¶ 1526. This is an instance of the updated *Commentary* noting and giving effect to the Convention's effort to reserve discretion for State decision making with respect to prisoners of war. Still, the comment notes a Detaining Power may only transfer prisoners of war to another Party to the Conventions. ¶ 1527. It notes transfer to neutral Powers is permitted. ¶ 1528. The comment helpfully reminds, in that case, Article 4B(2) concerning prisoner of war status applies. ¶ 1529.

In what is certain to be among the more controversial passages of the updated *Commentary*, the comment addresses transfers of prisoners of war to non-State entities. The comment endorses transfers of prisoners of war to non-State armed groups under the "overall control" of a State Party to the Convention. ¶ 1530. Although clearly inconsistent with a literal reading of Article 12, the comment reasons the relationship of overall control renders the relevant State responsible for the treatment of the transferred prisoners of war, therefore satisfying the article according to the International Committee of the Red Cross.

The comment elicits several serious concerns. First, as the comment itself acknowledges, its interpretation presents significant tension with the plain text and meaning of the article. The Convention could not be clearer in its requirement that prisoners of war be transferred only to Parties to the Convention. The purpose of the requirement seems clear

as well. The drafters and States that adopted the Convention obviously judged only other States that have committed to the Convention can be entrusted with the lives and welfare of prisoners of war. Paramilitary and non-military organizations that are organs of the State may present comparatively few problems. However, including "non-State armed groups" is by the very term itself a plain violation of the article, whatever the receiving organization's functional relationship to the State. The comment concludes as much previously at paragraph 1527. The fact of overall control by a State Party provides, in theory, remedial recourse for the Power on which prisoners of war depend to hold a State Party to the Convention practically responsible for breaches, though full legal responsibility would require a showing of effective control. However, the text of the article seems to reflect the judgment of States that direct rather than vicarious responsibility for the treatment of prisoners by a State best ensures their safety and well-being.

Second, and related to relationships between States and non-State actors, it should be recalled the overall control standard involves a relatively low degree of oversight and connection between a State and non-State entity. Overall control does not require involvement in specific decisions or courses of action required by the effective control standard used to attribute acts for purposes of State responsibility. The former standard is satisfied simply by evidence of a general relationship of support and significant capacity to influence. These are insufficient connections to guarantee *ex ante* prisoners of war will be treated in accordance with the Convention's elaborate and onerous obligations of respect and protection.

Third, the comment's interpretation is in tension with other articles of the Convention. Most notably, Article 39 requires "Every prisoner of war camp shall be put under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power." Non-State armed groups do not qualify as such and therefore cannot command prisoner of war camps. (*But see* ¶ 2483 incorrectly concluding commanders and leaders of organizations other than armed forces, under the overall control of a State, may command camps.)

Finally, even accepting the comment's interpretation, the passage lacks sufficient advice concerning safeguards for prisoners of war transferred to non-State armed groups. Non-State armed groups have generally proved materially distinct from regular armed forces in their commitment and capacity to conduct operations consistently with the laws of war.

The comment also endorses transfers of prisoners of war to international organizations such as the UN, notwithstanding that international organizations cannot be Parties to the Convention. ¶ 1531. The comment is a further example of the updated *Commentary* rejecting a plain reading of the Convention. The comment's justification appears to be that international organizations are bound, as a matter of customary international law, to the Convention. This is not entirely persuasive. Although the case might be made that the customs binding international organizations reflect many of the Convention's provisions, that fact does not convert those organizations into Parties to the Convention.

Moreover, the opportunities for a State to enforce the Convention against an international organization are not equivalent to those available *vis-à-vis* a State. The Convention is not designed for implementation by international organizations. For instance, the Convention resorts to assimilation—incorporation of standards applicable to a Detaining Power's own armed forces or population—to regulate prisoner of war treatment. How the Convention's assimilation provisions would operate with respect to an international organization is unclear. Additionally, what system of criminal procedure would apply is not clear and most armed forces committed to an international organization do not cede criminal jurisdiction to those organizations.

In a similar vein, the updated *Commentary* approves of transfers of prisoners of war to international criminal tribunals. It observes,

> Legal developments subsequent to the adoption of the Third Convention in 1949 imply that a Detaining Power could today be required – whether pursuant to a UN Security Council resolution or a treaty commitment – to cooperate with an international criminal court or tribunal and to comply with arrest and transfer orders issued by it. ¶ 1532.

This is a somewhat surprising conclusion as well. The comment offers no limiting principle to the type or composition of the tribunal other than a guarantee that protection will not be compromised. Again, the Convention's assimilative provisions seem problematic. The question of transfers to tribunals seems better resolved by the agreement of the Parties than by interpretation. The comment indicates a State is to resolve competing legal obligations in such a case. This seems doubtful as well. Agreement between the Parties to the Convention seems a far preferable basis for resolving transfers to tribunals.

The comment also attempts to tackle an apparent conflict between the simultaneously official English and French versions of the article. The English language version refers to an obligation for a transferring State "to satisfy itself" the receiving State will apply the Convention. Meanwhile, the French language version requires the Detaining Power "*s'est assure*" the receiving Power will apply the Convention. The English version can be equated to a relatively simple judgment based on consideration of information or an impression already at hand. The comment maintains, however, the French version carries an obligation to "seek confirmation of something; verify." ¶ 1534. The comment then concludes the English version must be understood to carry the same confirmation and supplemental verification efforts involved in the French expression. ¶ 1534.

Reconciliation of a difference in meaning between official languages ordinarily calls for application of Vienna Convention on the Law of Treaties Article 33(1) and (4), or its customary incarnation. The comment has not clearly reconciled the different meanings of the official texts. Instead, it seems to have defaulted toward the more onerous or burdensome of two obligations. That Vienna Convention on the Law of Treaties Article 33(4) permits resort to an object and purpose for such reconciliations is worth noting. The comment makes no explicit effort in this respect. States should review and clarify their own views on this important interpretive question.

Having resolved, at least to its own satisfaction, the apparent difference in meaning between official language versions of Article 12, the comment concludes a Detaining Power's obligation to "satisf[y] itself" that the transferee Power will apply the Convention involves an incidental and implied requirement to "make [an] affirmative inquiry." ¶ 1535. This interpretation runs contrary to the preparatory work which, as the comment indicates, rejected further clarification of the "has satisfied itself" requirement.

Of course, an initially attractive humanitarian logic is at work, but perhaps such gap filling also poses a danger. Indeed, the comment indicates failure to undertake the "affirmative inquiry" is itself a breach of the Convention—no small allegation. A better approach may have been to indicate a best practice with respect to investigating capacity to apply the Convention. The conclusion appeared in the 1960 Pictet *Commentary* as well. *See* p 136. But it seems that publication provided States sufficient opportunity through practice or publication to adopt the recommendation explicitly. Their failure to do so widely must have legal significance.

The comment further alleges merely concluding agreements to the effect of applying the Convention in cases of transfer "will generally not be

sufficient of itself." ¶ 1537. Although perhaps indicating a best practice, a legal obligation in this respect is difficult to support, particularly in light of the comment indicating such agreements are "One way in which States have approached this matter . . . ." Here, the updated *Commentary* appears to deride rather than describe State practice based on an interpretive implication. The comment is a curious contrast to other approaches the updated *Commentary* takes to scattered State practice, particularly in light of the absence of widespread, near-universal State practice supporting the comment's view.

Finally, the comment adds an individual criminal enforcement provision to its obligation to affirmatively collect information on the willingness and ability of a receiving State to apply the Convention as well. The comment invokes criminal liability for a war crime if an official, without "verifying the willingness and ability of the receiving Power to apply the Convention," transfers prisoners of war to another Power. ¶ 1544. This conclusion is unsupported by the terms of the Convention. Nor is failure to investigate the ability and willingness of a transferee Power enumerated as a grave breach. Neither do the constituting instruments of major international criminal tribunals identify such an offense. States should consider evaluating the comment's claim and respond publicly.

E. Paragraph 3: Requirement to take effective measures to ensure treatment in conformity with the Convention

Addressing the conditions through which the Convention assigns responsibilities to former Detaining Powers, the comment observes,

> If prisoners of war are transferred through several Powers, the question might arise as to whether all of the Powers that transferred the prisoners are responsible under paragraph 3 in case of a failure by the last receiving Power to carry out the Convention in any important respect. The text of the provision indicates that it only regulates the relationship between the receiving State and the State that immediately transferred the prisoners to that State; it does not create joint responsibility for all transferring States in the event of one receiving Power failing to comply with the Convention. ¶ 1552.

The comment is an example of helpful issue anticipation on the part of the updated *Commentary* and a reasonable resolution consistent with the text and design of the article in question.

The comment adds,

> Paragraph 3 conditions the responsibility of the transferring Power to take action on a failure by the receiving State to carry out the provisions of the Convention in 'any important respect'. The Convention does not explain the meaning of this phrase. One benchmark for determining whether a breach is 'important' is whether it violates the general obligation of humane treatment as articulated in Article 13. ¶ 1553.

It was likely difficult, particularly for a humanitarian organization such as the International Committee of the Red Cross, to identify an "unimportant respect" of the Third Convention that would not activate a former Detaining Power's obligations under Article 12(3). However, the Convention itself may already have done so through the grave breach system. That is, the grave breaches regime may identify breaches of the Convention in the "important respect" envisioned by Article 12(3).

ARTICLE 13

HUMANE TREATMENT OF PRISONERS

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

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

Measures of reprisal against prisoners of war are prohibited.

The comment to Article 13 indicates humane treatment is the "cornerstone" of prisoner of war protection. ¶ 1562. It emphasizes, in addition to the general obligation of humane treatment, Article 13(1) includes several "specific prohibitions." ¶ 1562. The comment also concludes humane treatment is reflected in the treatment provisions of the entire Convention. ¶ 1562. In this sense, the comment may be identifying a further principle or overarching notion of the Convention.

The comment helpfully offers a useful cross-reference between the obligations of Article 13 and the Article 121 obligation to conduct an inquiry into death or serious injury of prisoners of war. ¶ 1564. Spread so broadly across the Convention, these inexorably linked obligations might otherwise escape correlation by practitioners.

The comment notes the language of Article 13 tracks closely that of the 1929 Geneva Convention Relating to the Treatment of Prisoners of War. ¶ 1568. The comment does not address the question directly but the

article's direct lineage to a preceding treaty highlights States' decision not to alter its terms significantly, even after the experience of the Second World War. It appears, rather than abandon the term or fill out its meaning directly, States chose to supplement the obligation of humane treatment with specific prohibitions and treatment obligations throughout the Convention. The extent to which that choice should restrict or at least inform the meaning of humane treatment is not entirely clear, though it seems some account of the choice must be made.

Elaborating on the meaning of humane treatment, the comment suggests "The type of treatment required is context-specific and dependent on a wide range of factors, including the prisoner's cultural, social or religious background, gender and age." ¶ 1573. To the extent the comment indicates differential obligations are required with respect to the demographics of prisoners of war, it introduces tension with the updated *Commentary*'s proffer of assimilation (equivalence with the armed forces of the Detaining Power) as a principle of the Convention. *See* ¶ 30. Assimilation, by its nature, generalizes and employs equivalencies. By assimilation, prisoners of war are selectively made equivalent to members of the armed forces or the population of the Detaining Power by the Third Convention. The extent to which assimilation can be reconciled with differentiated treatment obligations seems limited or this reconciliation is at least challenging for the forces of a Detaining Power.

Relatedly, if the comment is correct that humane treatment requires context-specific and even prisoner-specific assessments, to refer to assimilation as a principle—an overarching theme—seems a misnomer with respect to the Convention. This comment also introduces the possibility of differential obligations of treatment among or between prisoners of war. To be sure, the Convention itself includes many differentiations among prisoners of war (for example, officer, noncommissioned officer, and private soldier), but these differentiations are products of the considered and collective attention of the States Parties convened at the 1949 Diplomatic Conference of Geneva rather than the sort of *ad hoc* assessments the comment appears to commend.

The comment helpfully advises Article 13(1)'s resort to the phrase "in particular" indicates its prohibitions are not exhaustive. ¶ 1577. This observation is likely correct but concerning Article 13, the phrase "in particular" might refer to the broader collection of protections *within the Convention itself*, rather than to an unlimited or open-ended notion of what is humane. The point is important to the extent Article 13 is understood as

an invitation to incorporate standards from other international instruments or disciplines of law or not.

The comment specifically and unapologetically adds a prohibition on "sexual violence" to Article 13(1). ¶ 1578. This interpretation is based on unimpeachable humanitarian logic. But again, it seems a bare amendment without much traditional interpretive support. The cited support includes only the work of criminal tribunals and scholars, which are subsidiary rather than primary means of treaty interpretation. State practice and agreement in their more traditional forms would have been a stronger source of support.

The comment concludes the Article 13(1) phrase "at all times" indicates the nonreciprocal nature of its obligations. ¶ 1580. This approach is preferable to the usual argument that nonreciprocal observance is required by the Vienna Convention on the Law of Treaties, Article 60(5), which is explicitly nonretroactive and greatly postdates the 1949 Convention. Moreover, because Article 13 lies behind the prisoner of war classification threshold, it does not fall prey to the veiled reciprocity conditions of Article 4 of the Third Convention, which in some instances conditions prisoner of war status on an organization having capacity to apply the laws and customs of war.

The comment concludes the article's obligation respecting health applies to mental as well as physical health. ¶ 1581. Again, this is an eminently reasonable and humanitarian interpretation, but the sources of support are the work of an international organization and select judgments of tribunals, both subsidiary sources. Support in the form of State practice would have been preferable and more persuasive.

Turning its attention to emerging practices of prisoner identification, the comment asserts,

> DNA samples may be taken and analysed only with the prisoner's informed consent, except where an overriding public interest dictates otherwise. An overriding public interest should be limited to criminal investigations or public security and, in case of death, to the identification of remains. The specific purpose should only be direct individual identification. ¶ 1609.

Worth noting is the citations for this stance are exclusively International Committee of the Red Cross sources including other *Commentaries* and an International Committee of the Red Cross *Guide to Best Practices*. Although substitutes for identification such as retinal scanning may prove available

and less concerning in terms of privacy, DNA has proved an extraordinarily reliable and easily collected form of identification. A survey of State practice on the question would have been most helpful.

The comment notes Article 13(2) expresses a "correlative" obligation for a Detaining Power to protect against "violence, intimidation, insults and public curiosity." ¶ 1610. The comment interprets protection as an obligation of "conduct" and of "due diligence." ¶ 1611. It concludes resort by the Convention to the phrase "in particular" indicates a nonexclusive list of incidents from which prisoners of war must be protected. ¶ 1612. Again, though reasonable, the interpretation raises the question whether any residual protections are to be drawn exclusively from the Convention or from outside legal sources.

The comment extends the prohibition on exposure to public curiosity to images of deceased prisoners of war. ¶ 1629. Although colorable, the extension sits in peculiar contrast to the comment's previous exclusion of the bodies of prisoners of war from the mutilation prohibition at ¶ 1600.

E. Paragraph 3: Prohibition of reprisals

At its outset, the comment correctly acknowledges the continued vitality and legality of belligerent reprisals generally. ¶ 1635. The comment notes, however, "It is widely recognized that reprisal action must be proportionate to the violation it aims to stop." ¶ 1636. It adds, "Case law from the Second World War and the ICTY rejected the claim that clearly disproportionate actions in response to the original violation could amount to lawful reprisals." ¶ 1636. To the extent the comment resolves to address reprisals somewhat generally, it may have improved its utility by clarifying proportionality refers not to the preceding violation but to what is necessary to achieve cessation by the offending State or Party.

The comment adds, somewhat surprisingly, "Belligerent reprisals have constituted the most important means of coercion available to States, in particular in the conduct of hostilities." ¶ 1637. It relates the genesis of the prohibitions on reprisals against protected persons at the 1947 Conference of Government Experts, explaining "The Conference decided to outlaw the taking of reprisals against certain categories of persons and property and at the same time to provide for alternative methods of compliance, such as the institution of Protecting Powers, the conciliation procedure, the obligation to punish persons responsible for grave breaches, and the enquiry procedure." ¶ 1640. Although the comment does not do so, interestingly, three of the four mentioned

"alternative methods of compliance" have been either practically or fully nonfunctioning since adoption of the Convention. This might in ordinary circumstances call for a reexamination of the prohibition.

ARTICLE 14

RESPECT FOR THE PERSONS AND HONOUR OF PRISONERS

Prisoners of war are entitled in all circumstances to respect for their persons and their honour.

Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men.

Prisoners of war shall retain the full civil capacity which they enjoyed at the time of their capture. The Detaining Power may not restrict the exercise, either within or without its own territory, of the rights such capacity confers except in so far as the captivity requires.

This comment notes Article 14, "reinforces the requirement of humane treatment laid down in Article 13. It further concludes Article 14 informs the rules for the treatment of prisoners of war set down in Parts III and IV of the Convention." ¶ 1651. In this respect, the comment appears to attribute to Article 14 the role of a principle, understanding it performs a reinforcing function as States implement specific rules of the Convention. Further, the comment explores the extent to which the article itself simultaneously constitutes a source of specific rules of conduct. The extent to which States Parties have chosen or will choose to instruct their armed forces in this respect is uncertain.

The comment's introductory passages also emphasize Article 14 ensures prisoners of war retain their civil capacity during internment. ¶ 1653. Of course, this function must be understood in the context of their captivity and in light of the Detaining Power's compelling need to prevent prisoners of war from rejoining hostilities.

The comment notes, "Honour is a personal concept that may also be linked to a person's reputation, age and standing in their community

or peer group." ¶ 1658. As the Convention makes clear, honor carries special importance to prisoners of war, particularly as most are members of a profession of arms that has historically placed high value on honor. However, the comment provokes concern with respect to practicalities involved in identifying and carrying out differentiated standards of honor between prisoners.

The comment concludes, "There are two distinct aspects of the notion of respect for the person: physical integrity and moral integrity." ¶ 1661. This comment seems in keeping with the updated *Commentary*'s effort to inject clearer protection for the mental health of prisoners of war. The text of the Convention seems broad enough to accommodate that expanded understanding. Still, clear support in the form of State practice and agreement subsequent to adoption of the Convention would strengthen the comment.

The comment connects the physical integrity of prisoners of war to protections of other provisions of the Third Convention. ¶ 1662. This sort of cross-reference is helpful. But in examining Article 14(1), an interpretive question arises. Namely, are the cross-referenced provisions an exclusive enumeration of protections of physical integrity? The tenor of the comment suggests not. What then are the limiting principles of the baseline protection of Article 14(1)? The comment might have surveyed how States have implemented or instructed their armed forces on Article 14 in this respect. Have States simply resorted to the Convention's enumerated physical protections of prisoners of war to implement Article 14? Or have they instead understood those protections as nonexclusive and employed Article 14 itself to discern additional, though unenumerated, physical protections?

The remainder of the comment suggests a mixed approach by the updated *Commentary* to converting the relatively lofty language of Article 14 into practice. Regulation of searches of prisoners of war presents a case in point. Although the Third Convention does not contain any explicit provision regulating searches of prisoners, the comment asserts searches should be conducted by a person of the same gender, whenever possible, to mitigate the risk of humiliating the prisoner being searched. ¶ 1667. The comment's resort to the hortatory "should" suggests a firm rule of conduct to this effect is not supported.

The comment also relates limits on exposing prisoners of war to propaganda to preserving moral integrity under Article 14(1). ¶ 1668. The 1960 Pictet *Commentary* makes the same connection to propaganda. The

updated *Commentary* continues, "Although propaganda is generally not prohibited under international humanitarian law, special considerations apply in the context of captivity, where it may be difficult or impossible for prisoners to elude attempts by the Detaining Power to influence or manipulate their opinions and beliefs." ¶ 1670.

The comment advises, "Limited, well-regulated and well-managed video surveillance in prisoner-of-war camps should not in principle be considered as prohibited under Article 14(1) and may be an appropriate measure of surveillance in certain places and at certain times to prevent or deter escape attempts." ¶ 1676. The comment seems a reasonable treatment of a technology not widely available at the time States adopted the Convention.

The comment identifies further connections between Article 14 and the Convention's rules of conduct. It usefully observes,

> The obligation contained in Article 14(2) is elaborated on in other provisions of the Third Convention. Women are to be accommodated in separate dormitories from men and provided with separate sanitary facilities. If undergoing penal or disciplinary punishment, they are to be held in quarters separate from men and under the immediate supervision of women. ¶ 1686.

E. Paragraph 3: Civil capacity of prisoners of war

Elaborating on its earlier observation concerning the civil capacity of prisoners of war, the comment adds, "While Article 14(3) itself does not contain a definition of civil capacity, the term is understood to involve both the existence of and the ability to exercise one's civil rights." ¶ 1693. The comment helpfully identifies and cross-references other recitations of civil capacity in Articles 54, 68, 77, and 120. ¶ 1694. It also notes the article's prohibition on restricting exercises of civil capacity, "beyond those restrictions that are necessitated by captivity." ¶ 1696. The final qualification is important, particularly considering the relatively unqualified or unequivocal commitment to capacity in the text of the article itself. This is perhaps a good illustration of the principle of military necessity performing an interpretive function, implying limits related to military efficacy.

The comment offers a further idea of civil capacity, observing, "even though war captivity results in prisoners being unable to conduct commercial activities in general, their business interests in their country of nationality, origin or domicile may be safeguarded by the prisoners

themselves, acting through a proxy, by correspondence or through the appointment of guardians." ¶ 1699. It then indicates, "The principle of retention of a prisoner's civil capacity during captivity can only be fully implemented if both the Power on which the prisoner depends and the Detaining Power facilitate this." ¶ 1700. Although this purported principle undoubtedly reflects the sentiment of Article 14, few States or practitioners acquainted with the law of war will recognize it as such. What its characterization as a principle of the Convention achieves is furthermore unclear.

Finally, the comment identifies a historical misunderstanding. It notes,

> During the Second World War, the broad statement in Article 3 of the 1929 Convention that prisoners of war retained their full civil capacity led prisoners to believe that they enjoyed full civil rights in the territory of the Detaining Power and that they would be placed on a par with 'any ordinary resident'. This was not the case, however . . . . ¶ 1704.

The comment recalls Detaining Powers have long imposed limits on prisoner of war civil capacity in their own territories, such as prohibiting marriage to nationals of the Detaining Power. ¶ 1704. It states,

> The language that was finally agreed upon, however, leaves some ambiguity, as the wording 'may not restrict the exercise, either within or without its own territory' could be understood as obliging the Detaining Power to allow prisoners of war to exercise civil rights in its territory. The discussions during the 1949 Diplomatic Conference, however, clearly show that there was agreement among the delegates that, in the territory of the Detaining Power, prisoners of war may exercise only those civil rights that the Detaining Power chooses to afford them. ¶ 1705.

This is a helpful clarification; however, it may undermine somewhat the updated *Commentary*'s stance with respect to a principle of assimilation, as well as purported human rights obligations attendant to that principle. *See supra* ¶¶ 30–31 and analysis.

Finally, a brief survey of the comment's bibliography illustrates the extent

to which academic work, particularly by authors from the International Committee of the Red Cross or with International Committee of the Red Cross professional pedigrees, informed it.

ARTICLE 15

MAINTENANCE OF PRISONERS

The Power detaining prisoners of war shall be bound to provide free of charge for their maintenance and for the medical attention required by their state of health.

This comment characterizes Article 15 as an expression of fundamental principles related to protection, in this case funding of costs of "the more technical provisions in Parts II and IV of the Convention." ¶ 1711. Examining the historical roots of these principles, it notes, "In the 1874 Brussels Declaration, governments charged themselves with the maintenance of prisoners of war in their power." ¶ 1712. Although certainly evidence of some early origins of the law of war, it should be mentioned the Brussels Declaration never entered force in an international legal sense, though it clearly influenced later instruments such as the 1899 and 1907 Hague Regulations.

The comment endorses the Eritrea-Ethiopia Claims Commission finding that a Detaining Power's economic hardships do not mitigate or excuse the obligation to provide for maintenance and medical care of prisoners of war. ¶¶ 1719–20. On the standard of care applicable to prisoners of war, the comment offers a helpful cross-Convention reference. It notes, "Article 15 thus mirrors the standard of care owed to wounded, sick and shipwrecked persons under Article 12 of the First and Second Conventions." ¶ 1727. It continues, "Regarding the standard of medical care that the Detaining Power must provide to prisoners of war, it is generally accepted that it must be at least the same as that provided to the Detaining Power's own armed forces in similar circumstances." ¶ 1729. Here the comment notes a further application of the "principle of assimilation." The comment appears to resort to assimilation when the Convention itself does not. Also interesting in this case is to see a principle—that of assimilation—applied to a provision that is itself characterized by the updated *Commentary* as a principle of prisoner of war maintenance and costs being borne by the Detaining Power.

The comment concludes by noting a point of State practice. It observes, "States have taken divergent approaches to hunger-striking prisoners

in practice. Some explicitly allow for a person on a hunger strike to be administered enteral feeding under some form of restraint against their will if there is a serious danger to the person's life or health. Other States defer to the prisoner's autonomy, or to their prior written instruction relating to medical treatment." ¶ 1733.

The comment's decision to note divergent practice is an admirable nod to the Convention's deliberate ambiguity. However, the comment indicates an International Committee of the Red Cross view that wishes of hunger striking prisoners of war "must be respected." ¶ 1733 (citing 1977 Additional Protocol I, Article 11(5)). Exactly how the latter comment should be taken is unclear. The earlier recitation of competing views suggests legal flexibility and mention of the International Committee of the Red Cross holding that a hunger strike "must be respected" suggests a legal obligation on States pursuant to the Convention. Perhaps the citation to 1977 Additional Protocol I intends to indicate an obligation only with respect to States Parties to that instrument. States, particularly non-Parties to 1977 Additional Protocol I, should evaluate and weigh in on the comment's latter claim.

ARTICLE 16

EQUALITY OF TREATMENT OF PRISONERS

Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.

The comment to Article 16 identifies two further principles for consideration. The comment advises, "Part II of the Convention . . . identifies 'fundamental principles' for POW treatment." ¶ 1734. The comment concludes, Article 16 "is based on the overarching principles of humanity and humane treatment . . . ." ¶ 1734. Although these principles are expressed by other sources, they rarely appear together. Distinguishing humanity as distinct from requirements and implications of humane treatment could be difficult in many circumstances. The comment may mean to refer to a single principle by two names.

To frame Article 16 against the Convention more generally, the comment indicates though the Convention permits and even requires distinctions in some cases on the basis of sex or rank, distinction on the bases of "race, nationality, religious belief, political opinions or similar criteria" is prohibited. ¶ 1735. It notes, "Placed between references in Article 16 to permissible distinctions and the prohibition of adverse distinctions in the treatment of prisoners of war is a statement of the principle that the Detaining Power must treat all prisoners of war alike." ¶ 1740. Thus, the comment introduces a third principle of equal treatment. Part II of the Convention does some of the work of principles but the extent to which various notions are accorded the status of a principle should be reviewed carefully. Equality of treatment seems problematic as a principle of the Convention because, as the article itself acknowledges, the Third Convention requires some discrimination in treatment.

In that vein, the comment notes "Article 16 requires that all prisoners of war be treated alike by the Detaining Power. If a Detaining Power interns prisoners of war who depend on different Powers, they must all be afforded equal treatment." ¶ 1741. A citation supporting the comment acknowledges a contrary view but does not include any details.

The citation provokes the question, however, of whether the updated *Commentary* has invested enough work in precisely what sort of equality Article 16 requires. Recall, the article prohibits "adverse distinctions" rather than "distinctions." It seems favorable treatment could be provided somewhat selectively so long as no group is taken below the baseline of the Convention's treatment obligations. The comment later concedes as much with reference to special agreements concluded under Article 6 and favorable treatment. ¶ 1741. The earlier, seemingly overbroad, and facially incorrect baseline statement indicating "that all prisoners of war be treated alike" is thus of questionable utility and has potential to mislead or inspire misquotations.

However, the comment helpfully collects provisions of the Convention that require or permit distinctions on the basis of rank (Arts 44(1), 45(1), 39(2) & (3), 44(2), 49, 60, 89(2), 97(3), and 98(2)) and sex (Arts 25(4), 29(2), 49 (1) 88(2) & (3), 97(4) and 108(2)). ¶ 1746.

3. Non-adverse distinction

The comment appears to indicate reasoning or justification by a Detaining Power for favorable, or as the updated *Commentary* terms it, "non-adverse distinction," is required. It observes, "Without an objective and reasonable justification, the difference in treatment would be adverse and violate the obligation to treat all prisoners alike." ¶ 1750. It indicates health, age, and professional qualifications are permissible bases for non-adverse distinctions between prisoners of war. ¶¶ 1752–58.

The comment concludes by noting, "[N]ationals of the Detaining Power who are held as prisoners of war by their own country must be given the same treatment as other prisoners of war. Any differentiation in treatment of prisoners of war based on nationality during captivity would amount to adverse distinction." ¶ 1765. Although the updated *Commentary* earlier rejects Detaining Power nationality as a basis for denying prisoner of war status, that view should be acknowledged in this comment as in the comment to Article 4 of the Convention. *See* ¶ 970.

PART III

CAPTIVITY

Part III of the Convention includes six sections. The comment elaborates briefly on the organization of Part III and on its general protections.

Section I

Beginning of Captivity

Part III, Section I of the Convention deals chiefly with issues at the point of capture including identification, protection from coercion and threatening questioning, certain property confiscations, and evacuations. ¶¶ 1782–85.

ARTICLE 17

QUESTIONING OF PRISONERS

Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.

If he wilfully infringes this rule, he may render himself liable to a restriction of the privileges accorded to his rank or status.

Each Party to a conflict is required to furnish the persons under its jurisdiction who are liable to become prisoners of war, with an identity card showing the owner's surname, first names, rank, army, regimental, personal or serial number or equivalent information, and date of birth. The identity card may, furthermore, bear the signature or the fingerprints, or both, of the owner, and may bear, as well, any other information the Party to the conflict may wish to add concerning persons belonging to its armed forces. As far as possible the card shall measure 6.5 x 10 cm. and shall be issued in duplicate. The identity card shall be shown by the prisoner of war upon demand, but may in no case be taken away from him.

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.

Prisoners of war who, owing to their physical or mental condition, are unable to state their identity, shall be handed over to the medical service. The identity of such prisoners shall be established by all possible means, subject to the provisions of the preceding paragraph.

> *The questioning of prisoners of war shall be carried out in a language which they understand.*

The comment to Article 17 helpfully connects the article's requirement for prisoners of war to provide name, rank, date of birth, and regimental number or equivalent aids to identification to reporting requirements and to observance of other Articles such as 16, 44, 45, and 122(2). ¶¶ 1796–97.

The comment confirms the Detaining Power may impose restrictions on or withhold privileges from prisoners who refuse to provide identifying information. However, it notes the Third Convention limits restrictions to those available on the basis of rank or status. The comment concludes, "The only advantages which may be withdrawn are, therefore, those contained in the provisions concerning special privileges to be accorded to officers, non-commissioned officers or persons with similar status" or perhaps more accurately, only such *treatment obligations*, may be withheld. ¶ 1804. Worth noting is the 1960 Pictet *Commentary* includes a comprehensive table indicating the provisions of the Convention relevant to rank. *1960 Commentary*, p. 159–160.

The comment observes,

> Conversely, if during questioning prisoners claim a rank superior to their actual status and the Detaining Power subsequently finds out this was not the case, they may be deprived throughout their captivity not only of the privileges which until then had been accorded them, but also of all the privileges to which their actual rank would have entitled them. ¶ 1806 (emphasis added).

This is a surprising conclusion, although the supporting citation indicates the 1960 Pictet *Commentary* makes the same point. The measure has a slightly punitive air to the extent the deprival persists even after the true rank has been discovered. The extent to which State practice or military legal doctrine support the conclusion is not clear from the comment.

The comment adds issuance of identity cards is optimally carried out in peace. ¶ 1807. This is another helpful reminder that portions of the Convention operate outside common Article 2 conditions of international armed conflict. The comment further indicates the Article 17 card is distinct from the card mentioned in Article 4A(4) on civilians accompanying the armed forces. The comment concludes an "additional" card is required

from noncombatant members of the armed forces including medical and religious personnel. ¶ 1809.

Whether "additional" is the correct word is not entirely clear. Whether medical and religious personnel in the States' armed forces are issued two cards or merely a "distinct" card indicating their noncombatant status is worth investigating. The comment also notes identity cards are distinct from identity discs referred to in the First and Second Geneva Conventions. However, the comment clarifies identity discs are not required by the Conventions. ¶ 1810.

The comment also clarifies the article's requirement that the card be "issued in duplicate" does not actually refer to personal issuance. The article merely requires the issuing State to have a second copy of the card on file. ¶ 1815.

Turning to the questioning of prisoners of war, the comment concedes interrogations are permissible but correctly insists no torture or coercion may be involved. ¶ 1822. The comment notes, "The decisive factor in determining whether coercion has occurred or is occurring is whether the method used deprives or impairs the prisoner of the exercise of free will and autonomy." ¶ 1824. The comment includes recommendations, couched as measures that "should" be adopted, including use of "only" qualified interrogation personnel and "strong control mechanisms and oversight" including recording methods. ¶ 1831.

ARTICLE 18

PROPERTY OF PRISONERS

All effects and articles of personal use, except arms, horses, military equipment and military documents, shall remain in the possession of prisoners of war, likewise their metal helmets and gas masks and like articles issued for personal protection. Effects and articles used for their clothing or feeding shall likewise remain in their possession, even if such effects and articles belong to their regulation military equipment.

At no time should prisoners of war be without identity documents. The Detaining Power shall supply such documents to prisoners of war who possess none.

Badges of rank and nationality, decorations and articles having above all a personal or sentimental value may not be taken from prisoners of war.

Sums of money carried by prisoners of war may not be taken away from them except by order of an officer, and after the amount and particulars of the owner have been recorded in a special register and an itemized receipt has been given, legibly inscribed with the name, rank and unit of the person issuing the said receipt. Sums in the currency of the Detaining Power, or which are changed into such currency at the prisoner's request, shall be placed to the credit of the prisoner's account as provided in Article 64.

The Detaining Power may withdraw articles of value from prisoners of war only for reasons of security; when such articles are withdrawn, the procedure laid down for sums of money impounded shall apply.

Such objects, likewise the sums taken away in any currency other than that of the Detaining Power and the conversion of which has not been asked for by the owners, shall be kept in the custody of the Detaining Power and shall be returned in their initial shape to prisoners of war at the end of their captivity.

The comment to Article 18 begins by identifying a further principle. The comment concludes, "Article 18 reaffirms and strengthens a longstanding principle of international law: the right to capture war booty is limited to property of the enemy State to the exclusion of all private belongings of a prisoner of war." ¶ 1835. This principle, as such, may not be familiar to many international lawyers or even to law of war specialists and in this case, the comment purports to indicate a principle of international law rather than of the law of war or of the Convention itself. The negative characterization of the alleged principle is also interesting; in one sense, this characterization is consistent with an appreciation of international law as a limiting function on States. In another sense, an understanding that principles offer guiding notions rather than obligations of conduct might prefer the principle be expressed in positive rather than negative terms.

The comment characterizes booty subject to seizure by the Detaining Power as "any movable property belonging to the enemy State." ¶ 1836. The comment also helpfully reminds booty is the property of the seizing State rather than of individuals. ¶ 1837. The comment does not bring the point to immediate conclusion, however; the implication of the distinction appears to be war booty is not property protected by Article 18. The comment also distinguishes seizure from impoundment, which requires a receipt. ¶ 1840. The more common terms for the latter are confiscation and requisition.

The comment reminds prisoners' eating utensils must be retained by them. ¶ 1847. The provision is, of course, potentially problematic from a security perspective as two States' military legal manuals indicate, though these important misgivings are buried in the supporting citation. ¶ 1848, n.29.

The comment fleshes out details of the types of information that should be and that must be included in a receipt for withholding money from a prisoner. ¶ 1855. These seem reasonable details to read into the article. However, the comment includes no citation to any authority. It seems likely some State practice or legal doctrine is available, particularly in the International Committee of the Red Cross archives, to support these details.

Perhaps confirming details of property confiscation remain a matter committed to the discretion of States, the comment records the 1949 Diplomatic Conference of Geneva was unable to agree on a claims system for lost or unreturned property confiscated from prisoners of war. ¶ 1864. This history is perhaps further evidence that undermines the notion that

the Convention's protections are rights of prisoners of war rather than treatment obligations owed by States to one another.

ARTICLE 19

EVACUATION OF PRISONERS

Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger.

Only those prisoners of war who, owing to wounds or sickness, would run greater risks by being evacuated than by remaining where they are, may be temporarily kept back in a danger zone.

Prisoners of war shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone.

This comment opens by advising Article 19 must be read in conjunction with Article 20 regarding conditions of evacuation. ¶ 1867. Turning to the former's terminology, the comment notes,

> 'Combat zone' is the term used in paragraph 1, while paragraph 2 speaks of the 'danger zone' and paragraph 3 of the 'fighting zone'. The notions 'combat zone' and 'fighting zone' have the same meaning; they refer to the area where the prisoners of war have fallen into the power of the enemy and where hostilities are taking place. The term 'danger zone' is broader and could be everywhere. It covers the entire area in which dangers inherent to military operations present themselves. ¶ 1869.

Here, the updated *Commentary* departs from generally accepted canons of interpretation. Interpretive convention would normally counsel different terms carry different meanings within a legal instrument. When different terms are used within a single article, the interpretive convention may have even stronger relevance. Still, the updated *Commentary* ascribes the same meaning to two terms and only a slight difference to a third. Although a

supporting note cites to preparatory work, a more persuasive justification for departure from the interpretive canon would be subsequent practice of States, evidence of agreement between them, and accompanying consistency in their military legal doctrine.

The comment acknowledges, at the time of capture, status may be uncertain but concedes a competent tribunal often cannot be provided in accordance with Article 5 of the Convention. The comment instructs captors to treat captives as prisoners of war until evacuation is possible. ¶ 1871. This may be factually correct in some circumstances. It seems, however, military doctrine on capture is available for the comment to evaluate and consider.

The comment acknowledges again interrogation at capture is not prohibited although evacuation must take place as soon as possible. The comment also advises prisoners of war may not be held in forward areas or combat zones for the purpose of interrogation. ¶ 1873. It also reminds, under 1977 Additional Protocol I, Article 41(3), States Parties are required to release prisoners of war who cannot be rapidly evacuated owing to "unusual conditions of combat." ¶ 1876. Noting the extent to which 1977 Additional Protocol I modifies the Third Convention obligations of States Parties to the former is helpful for States Parties and for coalition partners not Party to the former treaty. The subsequent practice of States concerning 1977 Additional Protocol I might be featured more frequently in this respect. In particular, it would be helpful to know whether States have elaborated through practice on "unusual conditions of combat." Although such practice would relate to the Additional Protocol rather than to the Third Convention, it seems relevant in light of the updated *Commentary* mentioning the modification of obligations.

The comment notes evacuation of wounded may be delayed to avoid harm. It observes, "Article 12(5) of the First Convention requires that as far as military considerations permit, the Detaining Power must leave with them a part of its medical personnel and material to assist in their care." ¶ 1878. A survey of State practice or a cross-reference to a survey of such practice in the updated *Commentary to the First Convention* would be interesting here as well.

The comment leaves underexplored the article's final passage on exposure to danger while prisoners of war await evacuation. The article indicates prisoners of war may not be "unnecessarily exposed." The comment does not indicate as much, but the article appears to acknowledge some exposure to danger is inherent in the circumstances that surround capture prior to evacuation. In this respect, danger and even resulting harm to prisoners

of war does not amount to a breach of the article if justified by necessity of the circumstances. The comment's silence on this point may reflect humanitarian reluctance to concede as much or to highlight this facet of the Convention and of combat in humanitarian work.

ARTICLE 20

CONDITIONS OF EVACUATION OF PRISONERS

The evacuation of prisoners of war shall always be effected humanely and in conditions similar to those for the forces of the Detaining Power in their changes of station.

The Detaining Power shall supply prisoners of war who are being evacuated with sufficient food and potable water, and with the necessary clothing and medical attention. The Detaining Power shall take all suitable precautions to ensure their safety during evacuation, and shall establish as soon as possible a list of the prisoners of war who are evacuated.

If prisoners of war must, during evacuation, pass through transit camps, their stay in such camps shall be as brief as possible.

Several points concerning Article 20 from Dr. Jean Pictet's original *Commentary to the Third Convention* merit attention. The 1960 Pictet *Commentary* indicates the military assimilative approach of Article 20 is the result of "lengthy discussions" at the 1949 Diplomatic Conference of Geneva. p. 173. However, later, Dr. Pictet explains assimilation is not exactly what the article anticipates. "The determining factor is therefore the concept of humane treatment, which is briefly defined in Article 13 above: evacuation must not endanger the life or health of prisoners of war." p. 174. Debate at the 1949 Diplomatic Conference of Geneva suggests assimilation was a formula for compromise rather than a wider organizing formula. Essentially, military assimilation, or at least approximation to standards applicable to the Detaining Power's military forces, as the actual term Article 20 settles on is "similar," was a convenient approach and permitted drafters to identify conditions of treatment without actually enumerating them.

The 1960 Pictet *Commentary* also highlights the requirement to undertake "all suitable precautions" to ensure the safety of prisoners of war.

p. 175. It serves as an interesting early mention of precautions outside the context of attack in the conduct of hostilities.

The updated *Commentary* notes modern war often lacks established front lines and "evacuation of prisoners of war from the danger zone [may be] challenging." ¶ 1882. Returning to the notion of military assimilation, it indicates, "the conditions for prisoners of war must, as far are possible, be similar to those for the forces of the Detaining Power when they are moved." ¶ 1884. The phrase "as far are possible" may not be an ideal choice of terms. The phrase certainly reflects the sentiment of assimilation but seems off the mark of the language of the article. "Feasible and consistent with legitimate security conditions and obligations of humanity" seems a better description of the obligation.

Like its predecessor, the updated *Commentary* identifies in Article 20 an assimilative component, going so far as to identify operation of a principle of assimilation. However, consistent with the article's text, it indicates "that conditions of evacuation must be 'similar' . . . ." rather than identical to those of the Detaining Power's armed forces. ¶ 1888. It adds, "Where there is a conflict between the principle of assimilation and the humane treatment of prisoners of war, humane treatment must prevail." ¶ 1889. The comment advises, "Subject to the requirement of humane treatment, restraining prisoners' hands may be permitted if strictly required for security reasons and only for the time necessary." ¶ 1890. The question of restraining prisoners of war, and of sensory deprivation too, has been a subject of some dispute. The International Committee of the Red Cross does not clarify whether it limits its view on restraints to conditions of evacuation from areas of enemy contact or whether restraint is also accepted in transfers between camps or in other circumstances in its view.

2. Second sentence: Suitable precautions to ensure prisoners' safety and lists of evacuated prisoners

Finally, the comment considers the possibility of moving prisoners of war in vehicles that also carry ammunition and/or weapons where dedicated vehicles are unavailable. It concludes, "The Detaining Power must make an assessment as to whether it would be safer for the prisoners of war to be transported in such vehicles, to remain where they are and be evacuated as soon as possible in other vehicles, or to be evacuated by other means, such as walking." ¶ 1902. The comment is a good example of analysis that foresees a conflict of obligations and suggests a reasonable approach.

The comment adds vehicles moving prisoners of war may not bear

the "PW or PG" marking as that designation is limited to markings of camps. ¶ 1903. Although consistent with the language of the article, in practical terms the comment's interpretation is curious; an odd and seemingly arbitrary formalism for an updated *Commentary* that in other cases seems willing to abandon formalism in favor of functionalist approaches. *See, for example,* ¶ 2212 (respecting an obligation to provide baths and showers).

SECTION II

INTERNMENT OF PRISONERS OF WAR

The chapeau comment indicates Section II applies to "all places where prisoners of war are permanently held." ¶ 1907. Although the comment does not elaborate significantly, the distinction between places of permanent internment and temporary internment is a helpful concession to practicalities. Operations in forward areas or zones of hostilities will often prevent full application of the Convention to captures and preliminary detention operations. Although welcome, the comment may present tension with the earlier conclusion concerning Article 5, which states the Convention applies from the moment of capture. *See* ¶ 1100.

CHAPTER I

GENERAL OBSERVATIONS

ARTICLE 21

RESTRICTION OF LIBERTY OF MOVEMENT AND RELEASE ON PAROLE

The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter. Subject to the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary.

Prisoners of war may be partially or wholly released on parole or promise, in so far as is allowed by the laws of the Power on which they depend. Such measures shall be taken particularly in cases where this may contribute to the improvement of their state of health. No prisoner of war shall be compelled to accept liberty on parole or promise.

Upon the outbreak of hostilities, each Party to the conflict shall notify the adverse Party of the laws and regulations allowing or forbidding its own nationals to accept liberty on parole or promise. Prisoners of war who are paroled or who have given their promise in conformity with the laws and regulations so notified, are bound on their personal honour scrupulously to fulfil, both towards the Power on which they depend and towards the power which has captured them, the engagements of their paroles or promises. In such cases, the Power on which they depend is bound neither to require nor to accept from them any service incompatible with the parole or promise given.

Article 21 is unusual in some respects. Its first passage suggests the article is an authorization rather than a prohibition. This is atypical for

international law, for the law of war, and for the Third Convention. Most often States resort to law of war instruments to codify prohibitions or limits on their actions in armed conflict. Yet, read more closely and in context with the entire first paragraph, the seeming authorization operates as a traditional restraint. That is, Article 21 observes, "The Detaining Power may subject prisoners of war to internment." Yet internment is mentioned in contradistinction with the "close confinement" prohibited later in the paragraph. Thus, internment is cited as an acceptable means of restraint *notwithstanding* the prohibition on close confinement. The comment offers another explanation below. *See* ¶ 1929.

The comment characterizes authority to capture and prevent return to the battlefield as "longstanding custom." ¶ 1921. This is certainly true, but that authority should be understood as originating in sovereignty rather than as affirmatively granted from outside authority or from legal custom. For instance, the earliest multilateral regulations of prisoner of war treatment (for example, Hague 1899, Hague 1907) did not include any language of authorization. But undoubtedly, no question concerning the authority to detain and intern during war resulted. A United Kingdom trial court recently produced a fundamentally misguided inquiry into this question in the separate context of conflict not of an international character. *See Serdar Mohammed*, EWHC 1369 (QB) (2014).

Turning to the article's provision on parole, the comment includes an interesting and interpretively useful citation to a change in practice from the Hague Regulations' prisoner of war regime. Under the 1907 Hague IV Regulations Article 12, parole violations by prisoners of war resulted in the forfeit of prisoner of war status. The comment indicates the 1949 Diplomatic Conference of Geneva rejected this provision for inclusion in the Third Convention. ¶ 1928.

Returning to the article's text and the question of States' detention prerogative, the comment indicates the "may" in the initial clause signifies the optional character of internment. That is, a Detaining Power "may" but is not required to intern captured prisoners of war. ¶ 1929. Here is another interpretation of Article 21 that negates the apparent authorizing character of the article. According to the comment, "may" is not a granting of permission. Rather, it clarifies States are not prohibited from permitting prisoners of war to enjoy liberty.

However, the comment soon attributes an authorizing function when it recites, "restriction of movement, *expressly authorized by Article 21(1) . . . .*" ¶ 1931. (emphasis added). It continues, "The provision provides a Detaining

Power with a legal basis to intern prisoners of war . . . ." ¶ 1931. These views seem in tension with the earlier interpretation in paragraph 1929. This latter expression may have been better left unsaid by the updated *Commentary*. Like the *Serdar Mohammed* judgment, the comment adopts and reinforces a misguided notion that the law of war has an authorizing function. The error is clear from the supporting citation as well, which refers to the *Hassan v. United Kingdom* 2014, European Court of Human Rights judgment.

The comment repeats the view, declaring again, "Article 21 provides the Detaining Power the authority to intern captured military personnel." ¶ 193.6. Again, the error is understandable in light of the language of the article, yet more prominent considering the updated *Commentary* is not so tethered to literal or plain meaning in other cases.

The comment qualifies the authority supposedly granted by Article 21 with respect to civilian prisoners of war. It advocates a view that civilians accompanying armed forces, described by Article 4A(4) and (5) of the Convention, should be interned only as necessary in light of their "specific functions" and "potential security threat." ¶ 1937 (citing 1907 Hague IV Regulations, art. 13 term 'expedient'). This view is not clear from the text. But more importantly the comment seems to reconfirm the optional, rather than authorizing, character of the term "may" as it appears in Article 21(1). At this point the updated *Commentary* may seek to have it both ways; in the comment's view, "may" is both an indication of an option as well as a source of authority, absent which States may not resort to internment or restraints on liberty.

The comment indicates a preference that conditions of parole be reduced to writing. ¶ 1952. The comment does not conclude writing is required; however, such recommendations are a useful function of the updated *Commentary*. Interestingly, the comment envisions a role for "electronic monitoring systems" to assist in compliance with parole conditions. ¶ 1958. This is a somewhat surprising recommendation. It seems to warrant further consideration, but with limitations and conditions perhaps neglected by the updated *Commentary*. For instance, embedding devices into the bodies of prisoners of war seems grossly inconsistent with obligations with respect to medical procedures.

ARTICLE 22

PLACES AND CONDITIONS OF INTERNMENT

Prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness. Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in penitentiaries.

Prisoners of war interned in unhealthy areas, or where the climate is injurious for them, shall be removed as soon as possible to a more favourable climate.

The Detaining Power shall assemble prisoners of war in camps or camp compounds according to their nationality, language and customs, provided that such prisoners shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture, except with their consent.

Accounting for the article's requirement that camps be "located on land," the comment insists, "Internment on ships is prohibited." ¶ 1984. It quickly acknowledges, "However, there are cases where it is not prohibited to temporarily hold prisoners of war on ships." ¶ 1985. The comment illustrates the updated *Commentary*'s occasional departure from plain or literal meaning. A more complete collection of State practice and agreement on this practice would better justify the departure from the article's text.

The comment also notes, "The requirement to intern prisoners of war 'on land' also prohibits the potential internment of prisoners in outer space." ¶ 1987. An amusing observation at this point in technological developments, the effort to update the *Commentary* is clear and perhaps wise considering the increased militarization of space. However, the observation seems not to account fully for the likely mechanics of a capture or surrender undertaken initially in space. Elaboration on evacuation conditions might have been in order if the effort to update to account for armed conflict in space is genuine.

The comment observes, "Article 22(2) does not require the Detaining Power to intern prisoners of war in 'the most favourable' climate. The obligation is only triggered when an area is unhealthy or a climate injurious." ¶ 2002. This interpretation emphasizes the sufficiency of interning prisoners of war in lawful conditions. That is, the comment makes the helpful point that the "most lawful" outcome or course of conduct is not required. The provision and its interpretation stand in contrast to provisions that require all feasible or possible measures be undertaken. As a matter of drafting, the comment's approach seems preferable as a general matter for law of war treaties.

E. Paragraph 3: Assembling of prisoners of war

The comment notes, "Article 22(3) gives the Detaining Power an obligation to keep certain groups of prisoners together but does not require it to keep certain groups separate." ¶ 2005. It maintains, "provided that they are not separated from prisoners belonging to the same armed forces, prisoners must be assembled according to their nationality, language and customs." ¶ 2006.

ARTICLE 23

SECURITY OF PRISONERS

No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations.

Prisoners of war shall have shelters against air bombardment and other hazards of war, to the same extent as the local civilian population. With the exception of those engaged in the protection of their quarters against the aforesaid hazards, they may enter such shelters as soon as possible after the giving of the alarm. Any other protective measure taken in favour of the population shall also apply to them.

Detaining Powers shall give the Powers concerned, through the intermediary of the Protecting Powers, all useful information regarding the geographical location of prisoner of war camps.

Whenever military considerations permit, prisoner of war camps shall be indicated in the day-time by the letters PW or PG, placed so as to be clearly visible from the air. The Powers concerned may, however, agree upon any other system of marking. Only prisoner of war camps shall be marked as such.

Before analyzing the comment, a few words about Article 23 itself seem appropriate. The Convention in this instance uses starkly unequivocal and unconditional language that may not be applied literally in every situation. Note the article states, '*No* prisoner may at *any* time be . . . detained in areas where he *may* be exposed to the fire of a combat zone . . . .' (emphasis added). Combat may present forces of a Detaining Power conditions requiring precisely this, particularly on modern, geographically fluid battlefields.

Note also the second paragraph features a particular sort of assimilation,

that of equivalence to the *civilian population* rather than to the armed forces of the Detaining Power.

The comment indicates the US delegation to the 1949 Diplomatic Conference of Geneva dissuaded the Conference from using language that would have prohibited locating prisoner of war camps near military objectives. The US delegation felt the concept of military objectives, "with modern warfare was impossible to comprehensively define . . . ." ¶ 2016. The US observation is instructive of the prevailing outlook on military objectives in the immediate wake of the Second World War. By now, of course, both treaty-based and customary definitions of military objectives are well-established. *See, for example,* 1996 Amended Protocol II to the Convention on Conventional Weapons, art. 2(6).

The comment notes the Article 23(1) prohibition on sending prisoners of war to or detaining them in locations where they may be subject to fire must be read in conjunction with the Article 19(1) evacuation requirement. ¶ 2021. Here is another helpful indication when separate and separated provisions of the Convention are mutually reinforcing.

The comment indicates Article 23(1) is "absolute" and "categorical" but concedes Article 19 is qualified, requiring evacuation only "as soon as possible." ¶ 2022. It acknowledges the fluid nature of front lines in modern warfare but still maintains a duty to evacuate. The comment does little more to temper the absolute phrasing of the article, however. The comment elaborates the Detaining Power must "constantly assess whether a prisoner-of-war camp" is likely to be subject to fire and "to evacuate" prisoners of war to a safe location, cross-referencing to Article 47 respecting movement between camps. ¶ 2023. The more appropriate, and in terms of the Convention, accurate, term may be "transfer." Once a prisoner of war has been placed in a permanent camp, later relocations are referred to by the Convention as transfers rather than evacuations. *See* Articles 46–48 (addressing prisoner of war transfer, circumstances precluding transfer, and procedures for transfer respectively). The term "evacuation" is reserved by the Convention for relocation from the initial point of capture to a screening or permanent camp.

The comment identifies limits on the feasibility of evacuation to truly safe areas, particularly in light of the advent of mass aerial bombardment. It buries a concession to military realities, finally qualifying its "absolute" text by conceding prisoners of war must be "held in areas that are *as safe as possible* from exposure to fire of the combat zone." ¶ 2024 (emphasis added).

Why the updated *Commentary* stashes this important point regarding interpretation of text so late in the comment is unclear. The reading seems reasonable and an important concession to reality. But its placement long after the leading comments suggests an absolute and unqualified obligation likely to mislead some readers.

The comment indicates the Article 23(2) requirement with respect to shelters and protection from aerial bombardment is not absolute but requires protection comparable to that provided to the civilian population. ¶ 2039. But it notes, "An exception to this principle can be found in Article 25(3), which requires the Detaining Power to take all precautions against the danger of fire." ¶ 2039.

The reference to Article 25(3) is confusing. That article addresses living quarters for prisoners of war. Among other provisions, it requires quarters be lit, protected from damp, and indeed "all precautions be taken against the danger of fire." Yet the plainest reading of the Article 25 term "fire" refers to accidental building fires rather than to hostile fire in the form of attacks which appear to be the focus of protection under Article 23. Thus, the better view may be all precautions must be taken with respect to building fires whereas only reasonable precautions and those undertaken for the civilian population must be provided to prisoners of war with respect to aerial bombardment or enemy fire.

E. Paragraph 3: Notification of the location of prisoner-of-war camps

The comment informs, "it is the [International Committee of the Red Cross]'s view that 'all useful information' that the Detaining Power must provide to the Powers concerned includes the GPS coordinates of the camp." ¶ 2042. This is a quite specific interpretation of the very broad term "all useful information." Lack of supporting citations leaves unclear the extent to which the interpretation is grounded in subsequent State practice and agreement.

Further, whether States have provided this information in armed conflicts since adoption of the Convention is unclear. No supporting citation or footnote is provided for the claim. The interpretation is prefaced by a recitation of the "purpose of this provision." However, surely the purpose of the article might also account for an integration of military necessity to withhold some such information. The comment's broad interpretation also undermines a deliberate change from the 1929 Convention which required Detaining Powers to inform the "destination" of camp transfers, to a 1949 Article 48 requirement merely to provide a "*postal* address." See ¶ 2645 (emphasis added).

The comment includes a useful reminder that the prisoner of war camp marking requirement is subject to the qualification, "whenever military considerations permit." ¶ 2050. It includes a further reminder the requirement only applies in daytime. ¶ 2052. The comment adds, the phrase "whenever military considerations permit" is "less stringent than . . . military necessity." ¶ 2050. This seems a helpful reconciliation and a fine resort to interpretive convention that emphasizes the effectiveness of distinct language within a treaty.

3. Third sentence: Only prisoner-of-war camps may be marked as such

The comment suggests the meaning of the exclusive use passage with respect to marking prisoner of war camps with "PW" or "PG" is to exclude use of the marking for buildings or installations that do not include prisoners of war. ¶ 2055. This interpretation suggests use for convoys and other formations that include prisoners of war may not be excluded. Yet an earlier passage of the updated *Commentary* concludes the Convention prohibits such use of the PW/PG designation. *See* ¶ 1903.

ARTICLE 24

PERMANENT TRANSIT CAMPS

Transit or screening camps of a permanent kind shall be fitted out under conditions similar to those described in the present Section, and the prisoners therein shall have the same treatment as in other camps.

Article 24 is a further resort by the Third Convention to assimilation. In this case, the Convention assimilates conditions in transit and screening camps to those of permanent prisoner of war camps.

The comment indicates the Convention envisions two types of transit camps: 1) camps "under Article 20(4) [sic]"; and 2) permanent transit camps. ¶ 2060. The former reference seems to be made in error. Article 20 has no fourth subparagraph. But Article 20(3) refers to transit camps, as does Article 24. To which article the comment means to refer is unclear.

Whatever the case, transit camps are set up in "emergency conditions." The latter are set up "in advance" outside a combat zone. ¶ 2060. This is a useful delineation for purposes of doctrinal formation, although the distinction's grounding in the Convention is left unclear by the comment. The comment notes transit camps may be used as part of initial reception procedures and as part of operations to transfer prisoners of war to another Power. ¶ 2062. The comment adds, "While the camps regulated by Article 24 are of a permanent kind, the stay of prisoners of war in such camps must not be." ¶ 2062.

The comment allows for no difference in treatment between permanent transit camps and prisoner of war camps. It also maintains conditions "must not differ in any essential respect from conditions set forth in section II of the Convention." ¶ 2063. This conclusion does not seem entirely justified by the language of the article. The term "similar" appears to afford more variance than the comment does. To the extent the comment reflects an attempt to unmoor the term "similar" from its plain meaning, it offers no supporting State practice or agreement. The comment may be redeemed somewhat, however, by its reference only to conditions set forth in Section II

of the Convention (Arts 21–48). Perhaps conditions in permanent prisoner of war camps found elsewhere in the Convention need not be replicated in every "essential respect" as suggested by the comment. Still, these are not insubstantial conditions and the better reading of "similar" would seem to permit greater variance.

The comment suggests a difference between the notions of conditions and treatment; however, it gives little effect to or explanation of the difference. Both are, according to the updated *Commentary*, "the same" as in prisoner of war camps. ¶ 2064.

Later, as a permissible difference in conditions, the comment offers the possibility of centralized heating in a prisoner of war camp and a "different source" in permanent transit camps. ¶ 2065. This lands as a particularly trivial example (that is, forced air versus radiant heating). Surely the example does not illustrate the full extent of variance allowed by the article or experienced in State practice.

Last, the comment offers the interesting observation that some provisions of the Convention *expressly* indicate application to transit and screening camps (for example, Articles 70 and 126). However, the comment does not attribute or identify any interpretive significance to this feature of the Convention. ¶ 2066. This seems an interpretive omission. That is, express application of some treatment obligations seems to indicate their fully identical operation in transit and screening camps. Whereas provisions not expressly applied to such camps need merely be "similar" as Article 24 clearly states.

CHAPTER II:

QUARTERS, FOOD AND CLOTHING OF PRISONERS OF WAR

ARTICLE 25

QUARTERS

Prisoners of war shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area. The said conditions shall make allowance for the habits and customs of the prisoners and shall in no case be prejudicial to their health.

The foregoing provisions shall apply in particular to the dormitories of prisoners of war as regards both total surface and minimum cubic space, and the general installations, bedding and blankets.

The premises provided for the use of prisoners of war individually or collectively, shall be entirely protected from dampness and adequately heated and lighted, in particular between dusk and lights out. All precautions must be taken against the danger of fire.

In any camps in which women prisoners of war, as well as men, are accommodated, separate dormitories shall be provided for them.

Article 25 resorts to standards applied to forces of the Detaining Power, in this case with respect to quarters. Quarters for prisoners of war must compare favorably to those of the Detaining Power's forces. Article 25 immediately indicates, however, full military assimilation of prisoners of war to conditions applicable to armed forces is not appropriate and the Detaining Power is obligated to depart ("shall make allowance") from assimilation considering "habits and customs" of prisoners of war. Here is a case in which assimilation is not fully descriptive of the Convention's approach. Interestingly, the article is silent as to the rank at which favorable comparison is made. It may not be unreasonable to make Article 25 comparisons in quarters between the respective ranks of the Detaining Power and prisoners of war.

For its part, the comment to Article 25 indicates a 1947 Conference

of Government Experts concluded, "Pure, formal equality with the living conditions of the Detaining Power's armed forces as the sole standard was thus seen as potentially problematic." ¶ 2073 (citing *Report of the Conference of Government Experts of 1947*, pp. 134–138). This aspect of negotiating history explains well the Convention's departure from strict assimilation in this case.

Nonetheless, the comment reports Article 25 resorts to "the principle of assimilation." ¶ 2074. Here is an example of the updated *Commentary* ascribing assimilation too broadly. The comment illustrates the need to clarify what assimilation means and how it should be used to best understand and implement the Convention.

Turning to details, the comment asserts, "The starting point in assessing whether the quarters afforded to prisoners of war meet the required standards is to compare them with those of the forces of the detaining State billeted in the same area." ¶ 2076. The comment concedes, "Equality does not mean that the accommodation for prisoners of war must meet the standard of the best available to the armed forces of the Detaining Power." ¶ 2076. It speaks to the precise standard of the armed forces of the Detaining Power as those provided to "a significant number of its own forces" or "the accommodation provided to the camp's military guards." ¶ 2076.

With respect to the requirement to account for the customs and habits of prisoners of war, the updated *Commentary* observes, "It is the customs and habits of the prisoners of war in general that prevail, and not those of each prisoner." ¶ 2077.

The comment notes the Eritrea-Ethiopia Claims Commission examined conditions under Article 13 (not "seriously endangering health") rather than Article 25 (at least as favorable).

> This was ostensibly to avoid focusing on 'minor or transitory' violations. In light of the former, the Claims Commission required claimants to produce credible evidence that 'portrays a serious violation,' that 'is cumulative and is reinforced by the similarity of the critical allegations' and that 'shows that the violation existed over a period of time long enough to justify the conclusion that it seriously endangered the health of at least some of the [prisoners of war] in the camp. ¶ 2080. (quoting Eritrea-Ethiopia Claims Commission, Prisoners of War, Ethiopia's Claim, Partial Award, 2003, ¶ 90).

Still, the updated *Commentary* indicates "Even if judicial bodies focus on 'serious' violations, Article 25 requires Detaining Powers to accommodate prisoners of war in conditions that are not prejudicial or harmful to their health, and not only to avoid conditions that are life-threatening." ¶ 2080. This places the International Committee of the Red Cross in the position of accounting for subsequent practice, though not that of a State, that might have cast Article 25 in a different, less protective light. Not surprisingly, the comment resists reducing the obligation to address only "serious violations," but what justifies embracing some subsequent practice by international judicial bodies and tribunals and not others is unclear. A comparison to States' subsequent practice and agreement might form a strong basis for such work. In light of the split opinion between the Eritrea-Ethiopia Claims Commission and the International Committee of the Red Cross, States may wish to consider and publish their own views.

The comment later explains the "principle of assimilation" was deemed by the 1949 Diplomatic Conference of Geneva as "not fully adequate." ¶ 2082. Yet, the supporting citation isn't to the Record of the Diplomatic Conference of Geneva and is instead to the Draft Conventions submitted to the 1948 17th International Conference of the Red Cross in Stockholm. p. 69–70. The supporting citation observes, "The principle of assimilation concerning accommodation had been the accepted standard in Article 10 of the 1929 Convention." Art. 25 comment, n. 21. This oversight somewhat calls into question the trustworthiness of the comment.

The comment then notes, "However, in line with the Convention's approach of adopting a nuanced principle of assimilation, the fact that a Detaining Power's own forces make do with few blankets does not necessarily justify limiting prisoners of war to only that number." ¶ 2019. Here is the first reference to a "nuanced principle of assimilation." This may better articulate what the Convention is actually doing in most cases. But interestingly, here the principle is nuanced whereas in other places the principle is more strict or literal.

ARTICLE 26

FOOD

The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies. Account shall also be taken of the habitual diet of the prisoners.

The Detaining Power shall supply prisoners of war who work with such additional rations as are necessary for the labour on which they are employed.

Sufficient drinking water shall be supplied to prisoners of war. The use of tobacco shall be permitted.

Prisoners of war shall, as far as possible, be associated with the preparation of their meals; they may be employed for that purpose in the kitchens. Furthermore, they shall be given the means of preparing, themselves, the additional food in their possession.

Adequate premises shall be provided for messing.

Collective disciplinary measures affecting food are prohibited.

The comment notes, historically, "the principle of assimilation" had been used to regulate food for prisoners of war in the 1899 and 1907 Hague Conventions. The 1929 Geneva Convention Relating to the Treatment of Prisoners of War provided similarly, requiring rations "equivalent in quantity and quality to that of the depot troops." ¶¶ 2105, 2108. Here is an example where the principle of assimilation, as the updated *Commentary* itself indicates, has been abandoned by States. Rather than assimilation, the Third Convention imposes a results-based standard. Prisoners of war must be kept in good health, maintain weight, and not develop nutritional deficiencies. The updated *Commentary*, particularly the Introduction's earlier

treatment of assimilation, may be insufficiently sensitive to, or informative of, this development.

The comment advises Article 26 should be read in conjunction with the Article 31 requirement of monthly medical inspections. ¶ 2114. Here is another helpful cross-referencing of separated though related obligations under the Convention.

With respect to hunger strikes, the comment indicates making sufficient rations available satisfies the Article 26 obligation. ¶ 2118. The updated *Commentary*'s earlier observations concerning hunger strikes and forced feeding should be recalled. *See* ¶ 1733. In particular, that comment notes divergent State practice, yet forms nonetheless an International Committee of the Red Cross position that does not permit nonconsensual feeding. States may wish to consider and publish views on this question as it relates to feeding obligations under Article 26.

The comment seems to have encountered some difficulty with the obligation to permit tobacco use. It observes, "there is no obligation to supply tobacco to prisoners . . . ." ¶ 2131. This is a curious conclusion in light of the obligation to permit tobacco use. The latter obligation with respect to use seems somewhat empty absent an obligation to supply it. Perhaps the interpretation rests on scenarios in which tobacco is sent in a parcel of relief or provided by an outside source, in which case the obligation to permit use operates.

ARTICLE 27

CLOTHING

Clothing, underwear and footwear shall be supplied to prisoners of war in sufficient quantities by the Detaining Power, which shall make allowance for the climate of the region where the prisoners are detained. Uniforms of enemy armed forces captured by the Detaining Power should, if suitable for the climate, be made available to clothe prisoners of war.

The regular replacement and repair of the above articles shall be assured by the Detaining Power. In addition, prisoners of war who work shall receive appropriate clothing, wherever the nature of the work demands.

This comment notes Article 27 is a further provision that had historically been addressed through the "principle of assimilation." ¶ 2146. The 1899 and 1907 Hague Conventions regulate clothing "on the same footing as the troops of the Government." ¶ 2146 (quoting Hague Convention II (1899), Article 7, and Hague Regulations (1907), Article 7). Here the updated *Commentary* provides another example of States having abandoned assimilation. Although the comment does not emphasize the point explicitly, this recitation of States' drafting strategy helps to appreciate the role of assimilation in the Convention with greater nuance. Although identified as a principle, assimilation does not feature universally or uniformly in the Convention.

The comment interprets the obligation to provide clothing quite literally, meaning the Detaining Power itself must supply clothing. That is, even if prisoners of war receive clothing from other sources, the Detaining Power must itself provide clothing as well. ¶ 2147. This interpretation certainly has a textual integrity but whether an obligation of conduct rather than of result is really needed here, or whether subsequent State practice really validates this interpretation, is unclear.

ARTICLE 28

CANTEENS

Canteens shall be installed in all camps, where prisoners of war may procure foodstuffs, soap and tobacco and ordinary articles in daily use. The tariff shall never be in excess of local market prices.

The profits made by camp canteens shall be used for the benefit of the prisoners; a special fund shall be created for this purpose. The prisoners' representative shall have the right to collaborate in the management of the canteen and of this fund.

When a camp is closed down, the credit balance of the special fund shall be handed to an international welfare organization, to be employed for the benefit of prisoners of war of the same nationality as those who have contributed to the fund. In case of a general repatriation, such profits shall be kept by the Detaining Power, subject to any agreement to the contrary between the Powers concerned.

The comment to Article 28 concludes camp canteens are obligatory but short-duration conflicts may render the obligation "unnecessary or unreasonable." ¶ 2164. This is a somewhat surprising concession considering earlier comments indicate conditions in temporary camps "must not differ in any essential respect" from those in permanent camps. *See* ¶ 2063. States may wish to express views either to reconcile or choose between these views.

The comment adds "Four categories of items must be available for purchase in the canteen: 'foodstuffs, soap and tobacco and ordinary articles in daily use.'" ¶ 2165. The comment cites a State's military legal doctrine regarding stocking of canteens. ¶ 2169. This useful form of citation has been surprisingly rare in the updated *Commentary* to this point. The comment includes a further helpful citation to State military legal doctrine addressing canteen management. ¶ 2171.

CHAPTER III:

HYGIENE AND MEDICAL ATTENTION

ARTICLE 29

HYGIENE

The Detaining Power shall be bound to take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps and to prevent epidemics.

Prisoners of war shall have for their use, day and night, conveniences which conform to the rules of hygiene and are maintained in a constant state of cleanliness. In any camps in which women prisoners of war are accommodated, separate conveniences shall be provided for them.

Also, apart from the baths and showers with which the camps shall be furnished, prisoners of war shall be provided with sufficient water and soap for their personal toilet and for washing their personal laundry; the necessary installations, facilities and time shall be granted them for that purpose.

The comment to Article 29 relates Article 29 to the Article 13 and Article 15 obligations of maintenance of health and provision of medical attention. It also notes a parallel provision in Article 85 of the Fourth Geneva Convention. ¶ 2184. Here the updated *Commentary* helpfully points out an interrelationship among articles of the Third Geneva Convention as well as to an analogous provision of the Fourth Geneva Convention.

The comment indicates extreme circumstances of unsanitary conditions may require a Detaining Power to relocate prisoners of war. ¶ 2195. It adds willful omissions are not listed, however, as a grave breach under the Convention's enforcement scheme. But the comment notes consequent "great suffering or serious injury to body or heath" does amount to a grave breach. ¶ 2196.

The comment then offers two reasonable interpretive resolutions. First, it concludes "conveniences" can be primarily considered a reference to toilets and should not be interpreted as optional (that is, relating to mere

convenience). ¶¶ 2199, 2201. Here the updated *Commentary* provides a helpful modern translation of the drafters' outdated modesty. Second, the comment interprets the phrase "baths and showers" as disjunctive. Providing either one of these to prisoners of war is adequate in the opinion of the comment. ¶ 2212. Here is a seemingly reasonable, nonliteral interpretation of the Convention. But rather than the comment relying on subjective reasonableness, subsequent State practice and agreement would seem a better basis for interpretation.

ARTICLE 30

MEDICAL ATTENTION

Every camp shall have an adequate infirmary where prisoners of war may have the attention they require, as well as appropriate diet. Isolation wards shall, if necessary, be set aside for cases of contagious or mental disease.

Prisoners of war suffering from serious disease, or whose condition necessitates special treatment, a surgical operation or hospital care, must be admitted to any military or civilian medical unit where such treatment can be given, even if their repatriation is contemplated in the near future. Special facilities shall be afforded for the care to be given to the disabled, in particular to the blind, and for their rehabilitation, pending repatriation.

Prisoners of war shall have the attention, preferably, of medical personnel of the Power on which they depend and, if possible, of their nationality.

Prisoners of war may not be prevented from presenting themselves to the medical authorities for examination. The detaining authorities shall, upon request, issue to every prisoner who has undergone treatment, an official certificate indicating the nature of his illness or injury, and the duration and kind of treatment received. A duplicate of this certificate shall be forwarded to the Central Prisoners of War Agency.

The costs of treatment, including those of any apparatus necessary for the maintenance of prisoners of war in good health, particularly dentures and other artificial appliances, and spectacles, shall be borne by the Detaining Power.

Returning to the notion of assimilation in the Convention, the comment to Article 30 concludes, "As for the level of medical care that an infirmary

must be able to provide to be considered adequate, it is generally accepted that the Detaining Power should apply the same standards as it would to a similar infirmary for its own armed forces." ¶ 2231. Yet the comment stops short of full assimilation, being reluctant to endorse evacuation to the territory of the Detaining Power as would often be the case for that Power's own armed forces. ¶ 2231. Here is another resort to assimilation. In this case, though, Article 30 itself does not mention assimilation. Rather, assimilation has been read in by the updated *Commentary*. To support it being "generally accepted," the supporting note cites United Kingdom, *Joint Doctrine Captured Persons*, 2015, p. 3–11, para. 310(e); United States, *Medical Support to Detainee Operations*, 2007, p. 2–3, para. 2–4.

The comment notes the article does not explicitly require initial medical examinations but indicates State practice envisions them. ¶ 2233 (citing Canada, *Prisoner of War Handling Manual*, 2004, p. 3F-9, para. 3F08(6); United Kingdom, *Joint Doctrine Captured Persons*, 2015, pp. 3-8–3-9, para. 309; Japan, *Act on the Treatment of Prisoners of War and Other Detainees in Armed Attack Situations*, 2004, Article 31(1)). These sources are worth examining to discern whether they express a legal obligation or a policy. If the latter, the updated *Commentary* should make entirely clear these are State practices of policy. Using the phrase "State practice" will suggest to some a legal character. For States to indicate whether these sources indicate *opinio iuris* would be helpful as well.

The comment notes Article 30, paragraph 3 includes a recommendation, resorting to "preferably" and "possibly," rather than a strict obligation with respect to the nationality of medical personnel treating prisoners of war. ¶ 2263. The comment is a helpful reminder and acknowledgment of likely realities concerning the limited availability of medical personnel of the nationality of prisoners of war in camp settings.

With respect to prisoners requiring medical devices or prostheses, the comment indicates the 1929 Geneva Convention merely required the Detaining Power to fund a "temporary remedial apparatus." Notwithstanding that the 1949 Third Convention abandoned the term "temporary," the 1960 Pictet *Commentary* indicates only a duty to provide temporary prostheses. The updated *Commentary* abandons Dr. Jean Pictet's 1960 understanding. The view "no longer seems tenable today" in the opinion of the updated *Commentary*. ¶ 2281. This change of view is based on an evaluation of the advantages of fitting permanent prostheses sooner during treatment.

This is a curious basis on which to change views. A more compelling case might have been made through State practice, or the comment

might have admitted error on the part of the 1960 Pictet *Commentary*, particularly in light of the textual difference between the 1929 and 1949 provisions. Whether the preceding interpretation, and indeed the updated comment, adequately account for Article 30(5) as an obligation of conduct rather than of result is also in question. That is, Article 30 is not a general obligation to keep prisoners of war in a good state of health. The article is instead an obligation of treatment, presumably undertaken to achieve and assure good health. Little discretion seems left to the Detaining Power with respect to means.

ARTICLE 31

MEDICAL INSPECTIONS

Medical inspections of prisoners of war shall be held at least once a month. They shall include the checking and the recording of the weight of each prisoner of war. Their purpose shall be, in particular, to supervise the general state of health, nutrition and cleanliness of prisoners and to detect contagious diseases, especially tuberculosis, malaria and venereal disease. For this purpose the most efficient methods available shall be employed, e.g. periodic mass miniature radiography for the early detection of tuberculosis.

This comment presents Article 31 as a means to ensure the Article 29 obligation to maintain prisoners of war's health. ¶ 2283. The comment indicates inspections "should" be carried out by medical personnel of the prisoner of war's own forces when possible. ¶ 2289. Although the recommendation finds no explicit basis in Article 31, Article 30 provides a sound basis for it.

The comment identifies Article 31 inspections as distinct from Article 112 mixed medical commissions. But it notes the former may aid in identifying candidates for the latter. ¶ 2295. Here is another helpful point for navigating the Convention. Of course, the reference is somewhat buried in the updated *Commentary* and requires a detailed reading to uncover. But should a reader find themselves in this comment, the cross-reference is helpful.

The comment also detects from medical ethics a "principle of voluntary and informed consent" but acknowledges inspection against the will of a prisoner of war is permissible when a "serious threat to the lives and health of the rest of the camp population" is present. ¶ 2297–98.

ARTICLE 32

PRISONERS ENGAGED ON MEDICAL DUTIES

Prisoners of war who, though not attached to the medical service of their armed forces, are physicians, surgeons, dentists, nurses or medical orderlies, may be required by the Detaining Power to exercise their medical functions in the interests of prisoners of war dependent on the same Power. In that case, they shall continue to be prisoners of war, but shall receive the same treatment as corresponding medical personnel retained by the Detaining Power. They shall be exempted from any other work under Article 49.

The comment to Article 32 acknowledges "Having medical qualifications while being a member of the armed forces does not necessarily mean the person will be a member of the armed forces' medical service." ¶ 2302. It also notes physiotherapists and pharmacists do not appear in the article, although an earlier version of the Convention included them. The comment concludes these professionals are not covered by the article though the comment confesses to being unable to discern the reasoning. The comment notes, however, a Detaining Power may afford these categories of medical professionals Article 32 treatment as a matter of policy. ¶ 2307. This seems a reasonable concession to drafting and a helpful recognition of a Detaining Power's option to extend treatment as a matter of policy.

The comment indicates the domestic legislation of the Detaining Power "may preclude some personnel from performing their medical functions." ¶ 2308. Here is a surprising instance of a domestic legal obligation affecting an international obligation. The situation arises with respect to discrepancies in qualifications. The Convention does not indicate requirements related to training or certification. It refers only to categories of professions generally. To the extent these personnel will only treat prisoners of war of the same nationality or affiliation, why domestic law would be permitted to regulate treatment is unclear. On the other hand, the Detaining Power remains responsible for the health

conditions of prisoners of war and retains an interest in standards of medical treatment. A more detailed discussion on the subject might have been helpful.

The comment reminds Article 32 only applies when the *Detaining Power* requires qualified personnel to exercise medical functions. ¶ 2309. No right is guaranteed for such personnel to perform these functions. ¶ 2310. It also emphasizes Article 32 does not effect a change in status. Article 32 personnel remain prisoners of war. Their repatriation is governed by Article 118 rather than the Conventions' provisions applicable to retained persons. ¶ 2314.

CHAPTER IV:

MEDICAL PERSONNEL AND CHAPLAINS RETAINED TO ASSIST PRISONERS OF WAR

ARTICLE 33

RIGHTS AND PRIVILEGES OF RETAINED PERSONNEL

Members of the medical personnel and chaplains while retained by the Detaining Power with a view to assisting prisoners of war, shall not be considered as prisoners of war. They shall, however, receive as a minimum the benefits and protection of the present Convention, and shall also be granted all facilities necessary to provide for the medical care of, and religious ministration to prisoners of war.

They shall continue to exercise their medical and spiritual functions for the benefit of prisoners of war, preferably those belonging to the armed forces upon which they depend, within the scope of the military laws and regulations of the Detaining Power and under the control of its competent services, in accordance with their professional etiquette. They shall also benefit by the following facilities in the exercise of their medical or spiritual functions:

(a) They shall be authorized to visit periodically prisoners of war situated in working detachments or in hospitals outside the camp. For this purpose, the Detaining Power shall place at their disposal the necessary means of transport.

(b) The senior medical officer in each camp shall be responsible to the camp military authorities for everything connected with the activities of retained medical personnel. For this purpose, Parties to the conflict shall agree at the outbreak of hostilities on the subject of the corresponding ranks of the medical personnel, including that of societies mentioned in Article 26 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949. This senior medical officer, as well as chaplains, shall have the right to deal with the competent authorities of the camp on all questions

relating to their duties. Such authorities shall afford them all necessary facilities for correspondence relating to these questions.

(c) Although they shall be subject to the internal discipline of the camp in which they are retained, such personnel may not be compelled to carry out any work other than that concerned with their medical or religious duties.

During hostilities, the Parties to the conflict shall agree concerning the possible relief of retained personnel and shall settle the procedure to be followed.

None of the preceding provisions shall relieve the Detaining Power of its obligations with regard to prisoners of war from the medical or spiritual point of view.

The comment to Article 33 helpfully includes cross-references to relevant provisions of the First Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Arts 28, 30, and 31). ¶ 2320. It also identifies issues left unresolved by States at the 1949 Diplomatic Conference of Geneva such as "ratios between certain types of medical personnel and the number of prisoners of war" and "details of the relief of retained medical and religious personnel." ¶ 2328.

The comment notes academic "dissatisfaction" with the compromise reflected in Article 33. ¶ 2329. This observation presents an interesting case and is not the sort of observation that appears with any regularity in the updated *Commentary*. A great deal of academic dissatisfaction can be found with respect to many provisions of the Convention. Perhaps this particular academic dissatisfaction drew comment because the author was Dr. Pictet, editor of the original 1960 Pictet *Commentary*. What a user of the updated *Commentary* is expected to do with the observation is unclear. Perhaps the comment intends to provoke States to reconsider the issue.

The comment acknowledges the article preserves some discretion on the part of a Detaining Power with respect to retained persons, noting, "Thus, the determination of whether a provision of the Third Convention constitutes a 'benefit' in the sense of the second sentence of Article

33(1) has to be made on a case-by-case basis by the Detaining Power acting in good faith." ¶ 2335. The comment insists retained personnel are incorporated into the medical command and regulatory regimes of the Detaining Power. ¶ 2341.

CHAPTER V:

RELIGIOUS, INTELLECTUAL AND PHYSICAL ACTIVITIES

ARTICLE 34

RELIGIOUS DUTIES

Prisoners of war shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities.

Adequate premises shall be provided where religious services may be held.

Interestingly, the Convention itself makes no resort to assimilation with respect to religious practice and observance. The comment notes although the English text refers to "exercise of religious duties," the obligation clearly refers to the practice or exercise of religious *beliefs*, which the equally official French text confirms. ¶ 2362. Here is a textual adjustment made beyond the literal meaning of the text. This interpretation might have been augmented by a more complete survey of State practice.

The comment emphasizes complete latitude on the part of prisoners of war is required but the next section admits disciplinary routines of the camp may qualify that freedom. ¶¶ 2368, 2369. The first point being separated from the second in the updated *Commentary* risks selective citation. To introduce such qualified obligations in a way that makes clear from the outset their contingent or qualified nature is advisable. The way the updated *Commentary* presents the qualified obligations and emphasizes the language suggests an absolute obligation.

The comment presents a mixed bag of support for permissible discipline-based limits on religious practices. A citation identifies a State's detention standard operating procedure for guidance on measures "interfering with good order and discipline of the camp, posing a threat to himself or another detainee, threatening a guard or other staff member or destroying property." ¶ 2371, n. 29. But the citation continues by reference to religious rights guaranteed by a variety of human rights instruments. The comment's point seems adequately understood and supported without

resort to a legal regime outside the law of war. Moreover, the law of war includes a provision expressly dedicated to the subject. The comment regrettably resorts to a human rights provision of the *lex generalis* to inform a provision of a *lex specialis* in the law of war—a curious reversal of the usual flow of the *lex specialis* informing the *lex generalis* to the extent overlapping application is admitted.

The comment concludes with a helpful cross-reference to Articles 72 and 125 regarding relief shipments and representatives of religious organizations, respectively. ¶ 2378.

ARTICLE 35

RETAINED CHAPLAINS ASSISTING PRISONERS

Chaplains who fall into the hands of the enemy Power and who remain or are retained with a view to assisting prisoners of war, shall be allowed to minister to them and to exercise freely their ministry amongst prisoners of war of the same religion, in accordance with their religious conscience. They shall be allocated among the various camps and labour detachments containing prisoners of war belonging to the same forces, speaking the same language or practising the same religion. They shall enjoy the necessary facilities, including the means of transport provided for in Article 33, for visiting the prisoners of war outside their camp. They shall be free to correspond, subject to censorship, on matters concerning their religious duties with the ecclesiastical authorities in the country of detention and with international religious organizations. Letters and cards which they may send for this purpose shall be in addition to the quota provided for in Article 71.

This comment urges "Chaplains" should be understood as referring to religious personnel of any faith "attached to the armed forces." ¶ 2383. Although another example of a nonliteral reading of the Convention, the comment seems appropriate considering the now-universal ratification or accession by States which brings an extraordinarily diverse collection of religious practices and personnel. The comment clarifies, "The term 'religious personnel' is used to denote non-combatant members of the armed forces who have been *permanently* and *exclusively* assigned to meet the religious and spiritual needs of the armed forces as a whole." ¶ 2384 (emphasis in original). According to the comment, "Religious personnel does not apply to members of the armed forces who merely have religious training." ¶ 2385.

The comment adds, however, the term "religious" need not have a restrictive meaning. Humanists or life coaches may qualify if assigned to armed forces. ¶ 2384. Here is another nonliteral reading of the Convention that may warrant consideration and comment by States.

Overall, the comment seems adequate to its task by the end of its introductory section. The remaining clarifications seem to unnecessarily lengthen the comment, undermining the utility of the work and perhaps putting too fine a point on the article. For a provision that seems superfluous, see paragraph 2402 indicating religious personnel may find it helpful to have access to the libraries and reading rooms made available to prisoners' representatives.

ARTICLE 36

PRISONERS WHO ARE MINISTERS OF RELIGION

Prisoners of war who are ministers of religion, without having officiated as chaplains to their own forces, shall be at liberty, whatever their denomination, to minister freely to the members of their community. For this purpose, they shall receive the same treatment as the chaplains retained by the Detaining Power. They shall not be obliged to do any other work.

At Article 36, the Third Convention makes further resort to assimilation. In this case, however, assimilation is made between chaplains and non-chaplain religious personnel. This use of assimilation illustrates not all assimilation in the Convention involves equation to the armed forces of the Detaining Power.

The comment emphasizes non-chaplain religious ministers are prisoners of war, not retained personnel, but indicates Article 36 otherwise extends the Detaining Power's obligations with respect to chaplains to non-chaplain religious ministers. ¶ 2409. The comment identifies a textual tension between the equally authentic English and French expressions of Article 36. Where the English version indicates these personnel are "at liberty" to minister, the French version indicates ministry is contingent on "recevront l'autorisation" (having received authority from the Detaining Power). The updated *Commentary* seemingly interprets the latter as an obligation upon the Detaining Power, essentially "the Detaining Power must give that authorization." To its credit, the comment identifies situations that may give the Detaining Power pause in issuing an authorization. ¶ 2413. It seems the interpretation adequately reconciles the English and French expressions of Article 36 obligations.

The comment also observes, "The wording of this provision ('[f]or this purpose') indicates that the rationale behind assimilating ministers of religion with religious personnel is to permit the former to carry out their duties among prisoners of war of the same faith." ¶ 2418. The updated

Commentary catches the assimilation variation mentioned *supra* but does not include the distinction in the earlier, more general discussion of the proffered principle of assimilation.

ARTICLE 37

PRISONERS WITHOUT A MINISTER OF THEIR RELIGION

> *When prisoners of war have not the assistance of a retained chaplain or of a prisoner of war minister of their faith, a minister belonging to the prisoners' or a similar denomination, or in his absence a qualified layman, if such a course is feasible from a confessional point of view, shall be appointed, at the request of the prisoners concerned, to fill this office. This appointment, subject to the approval of the Detaining Power, shall take place with the agreement of the community of prisoners concerned and, wherever necessary, with the approval of the local religious authorities of the same faith. The person thus appointed shall comply with all regulations established by the Detaining Power in the interests of discipline and military security.*

The comment to Article 37 indicates,

> Article 37 comes into play only if there are no retained religious personnel or prisoners who are ministers of their religion available in the camp, or those available do not want to perform that role. In other words, Article 37 becomes relevant whenever Articles 35 or 36 are inapplicable or the services of ministers of a given religion are insufficient or unavailable, for whatever reason. ¶ 2429.

The preceding paragraph further clarifies the article by cross-referencing Article 125, which governs prisoners of war access to private religious relief organizations.

The comment updates the article's term "layman" to "layperson." ¶ 2430. Here is another nonliteral updating of language; however, considering the composition of persons involved in hostilities and the evolved composition of religious leaders and lay clergy, the interpretation seems reasonable.

The comment indicates the article's requests must originate from the

prisoners themselves. ¶ 2437. On the basis of the article's negotiating history, the comment concludes the Detaining Power has no authority to appoint such personnel, only authority to approve them. The alleged purpose is to prevent the appointment of a puppet or propaganda tool. ¶ 2438. This is a very specific use of *travaux préparatoires*. Worth considering is whether the resort to them is entirely called for. Rather than resolving ambiguity or avoiding an absurd understanding, the comment appears to use the Third Convention's preparatory work to devise and incorporate an obligation or limit considered but not included in the adopted text.

The comment indicates as "desirable" the approval procedures of Article 79(4) respecting prisoners' representatives to ministers, including the requirement to explain to the Protecting Power, or the International Committee of the Red Cross in its stead, the reason an appointee has not been approved. ¶ 2439. To see the comment use the term "desirable" rather than simply incorporating the procedures of Article 79(4) is a relief. Canons of interpretation clearly indicate formal implied incorporation would not be appropriate. The optional character of these procedures might be made clearer or better emphasized, however.

ARTICLE 38

INTELLECTUAL, EDUCATIONAL AND RECREATIONAL PURSUITS, SPORTS AND GAMES

While respecting the individual preferences of every prisoner, the Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits, sports and games amongst prisoners, and shall take the measures necessary to ensure the exercise thereof by providing them with adequate premises and necessary equipment.

Prisoners shall have opportunities for taking physical exercise, including sports and games, and for being out of doors. Sufficient open spaces shall be provided for this purpose in all camps.

The comment to Article 38 connects that article's text, "While respecting the individual preferences of every prisoner," to an obligation not to compel attendance at indoctrination or propaganda sessions. ¶¶ 2451–52. This seems logical, but if this were truly the intention of the Third Convention, then a stronger provision to this effect would seem to have appeared in the text. The comment provides relatively scant evidence for a purportedly fundamental obligation.

With respect to the obligation to provide opportunities "out of doors," the comment provides a helpful analysis based on another provision of the Convention. Considering the obligation to provide prisoners of war undergoing disciplinary punishment two hours of outdoor activity and exercise, the comment notes two hours is similarly the minimum to which other prisoners of war should have access. ¶ 2476.

CHAPTER VI:

DISCIPLINE

ARTICLE 39

ADMINISTRATION; SALUTING

Every prisoner of war camp shall be put under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power. Such officer shall have in his possession a copy of the present Convention; he shall ensure that its provisions are known to the camp staff and the guard and shall be responsible, under the direction of his government, for its application.

Prisoners of war, with the exception of officers, must salute and show to all officers of the Detaining Power the external marks of respect provided for by the regulations applying in their own forces.

Officer prisoners of war are bound to salute only officers of a higher rank of the Detaining Power; they must, however, salute the camp commander regardless of his rank.

Article 39 requires prisoner of war camps to be administered under the authority of a commissioned officer of the "regular armed forces" of the Detaining Power. The comment reinterprets the provision to admit administration of camps by "groups that are under the overall control of a Party . . . ." ¶ 2483. The interpretation has a reasonable logic. The comment cites the possibility that militias or other organizations will capture enemy forces that qualify for prisoner of war status to justify this reading of the Article.

But the relevant provision of Article 39 is extraordinarily clear and committing camp administration exclusively to regular armed forces has an equally compelling logic, considering its importance and the complexity of running a camp consistently with the Third Convention. Moreover, the enforcement mechanisms of international law likely better serve the obligations of the Third Convention if the camp command function is

limited to the military organs of the Detaining Power. Subsequent State practice might have justified the reimagining or amendment of Article 39 but the comment includes no such citation. This seems an instance of the updated *Commentary* trying to perfect the Convention rather than accepting it as it was adopted and is practiced by States.

ARTICLE 40

THE WEARING OF BADGES AND DECORATIONS

The wearing of badges of rank and nationality, as well as of decorations, shall be permitted.

The comment notes Article 40 is related to Articles 44, 45, and 87(4) concerning respect for rank. ¶ 2496. Here again is a helpful cross-reference of scattered but related provisions of the Convention. The reference to the Article 87(4) prohibition on stripping prisoner of war decorations and badges as punishment is a welcome reminder. However, an acknowledgment of authority to strip edged or potentially harmful badges and decorations for security reasons would have proved useful. The comment to Article 87(4) explicitly acknowledges such authority on the part of a Detaining Power. ¶ 3716.

Although a simple article, the citation includes a thorough review of States' military legal doctrine and practice with respect to Article 40 in armed conflict. ¶ 2499, n. 6–7. Other comments might have been supported similarly.

ARTICLE 41

POSTING OF THE CONVENTION, AND OF REGULATIONS AND ORDERS CONCERNING PRISONERS

In every camp the text of the present Convention and its Annexes and the contents of any special agreement provided for in Article 6, shall be posted, in the prisoners' own language, at places where all may read them. Copies shall be supplied, on request, to the prisoners who cannot have access to the copy which has been posted.

Regulations, orders, notices and publications of every kind relating to the conduct of prisoners of war shall be issued to them in a language which they understand. Such regulations, orders and publications shall be posted in the manner described above and copies shall be handed to the prisoners' representative. Every order and command addressed to prisoners of war individually must likewise be given in a language which they understand.

The comment to Article 41 characterizes posting the Convention as "an expression of the right of prisoners of war to be informed of the rules . . . ." ¶ 2500. Of course, the article does not identify any such right. It does not even feature the term "right." Nor does the article use any related term or phrase such as "entitled to." Nor is the obligation couched in these terms. Still, the 1960 Pictet *Commentary* makes the same error. (p. 243). The article is more clearly expressed as an obligation on the part of the Detaining Power. Although a distinction not likely noticed by the casual reader, rights carry special legal significance often including an opportunity of personal enforcement and of individual redress. The Convention does resort to the term "right" but only rarely and certainly not in this instance.

The comment relates Article 41 to other "rights" such as the right to make complaints under Article 78, which is expressed as a right by the Convention and which makes sense in light of the individual enforcement process outlined by Article 78. ¶ 2501. If only to underscore and support

the importance of true rights-bearing articles of the Convention, like Article 78, it seems important not to read in or casually ascribe rights as the updated *Commentary* does with respect to Article 41.

The comment helpfully reminds Article 128 obliges Parties to send official translations of the Convention through the Swiss Federal Council and Protecting Powers. These translations facilitate the Detaining Power's obligation to post the Convention in prisoners' languages. ¶ 2509. Here is another useful cross-reference to a provision likely to evade attention in the case of a referral to an isolated article of the Convention.

ARTICLE 42

USE OF WEAPONS AGAINST PRISONERS OF WAR

The use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances.

The comment to Article 42 indicates the Convention's rule on use of weapons applies outside internment settings and even as early as initial capture. ¶ 2542. This is an interesting clarification that may not be part of all States' instructions or training. The practice is probably well-understood and implemented in training for camps and guard personnel but not during all military operations that result in capture. Confirmation of that point from States would be useful and would enhance the reliability of the observation.

The comment also helpfully identifies the act of "eluding control" as the point at which an escape begins, and not mere gathering of tools or aids to escape. ¶ 2529. Here the comment offers further operationally useful guidance to practitioners.

Dr. Jean Pictet's 1960 *Commentary* cautions, "at least two warnings prior to resort to lethal force were required based on the article's use of the plural term 'warnings.'" p. 247. However, another interpretive possibility is the plural form of "warnings" is merely used to form grammatical agreement with the plural term "prisoners of war."

The comment indicates the term "specially" with reference to escapes in Article 42 implies other situations justify resort to weapons. The comment includes self-defense as such a situation and refers to "imminent threat to life or limb." ¶ 2351. Also, riots that threaten lives, safety, and control over prisoners of war justify resorts to weapons. ¶ 2532. The comment maintains, "In the absence of threat to life or limb, the use of lethal force is never justified." ¶ 2533. This statement, while true concerning self-defense or riots, is not correct with respect to escape. It should include a qualification to avoid selective misquotation or misunderstanding. This passage should probably be confined to the context of riots or uprisings within the camp or

another internment setting. It cannot apply to situations of escape.

Noting human rights law and legal standards for law enforcement operations, the comment states, "the [International Committee of the Red Cross] is nevertheless of the view that requirements under Article 42 would in many respects match the international human rights rules and principles of necessity, proportionality and precaution." ¶ 2536. The comment underestimates the extent to which these additional limits and precautions augment and effectively amend the article.

The Convention clearly states the warning requirement. It also makes clear the requirement that use of force against prisoners of war be exceptional. The effort to clarify what is meant by "exceptional" is understandable for an academic work but misplaced. Resorting to human rights law to understand a specific provision of the law of war again reverses the usual process of interpreting rules from a generally applicable regime and those of a regime specifically designed for a context such as the law of war with respect to armed conflict or the Convention with respect to prisoner of war treatment. The comment offers the interesting evaluation that "Article 42 is indeed one of the few provisions of humanitarian law that govern the use of force in situations that do not pertain to the conduct of hostilities." ¶ 2538. But that point seems to further confirm a deliberate effort on the part of States to agree to and include in the Convention a specific legal regime for a specific context. While admittedly less detailed than the use of force regime of human rights, the Convention's ambiguity seems a deliberate and justified concession to the unique context of armed conflict and detention of the armed forces of a nation's enemy.

The comment reminds readers Article 121 of the Convention requires an investigation after each use of force resulting in death or serious injury to a prisoner of war. ¶ 2543. Here is another helpful cross-reference. At this point, despite best efforts by States, the Convention is clearly not organized to fully facilitate implementation. Many related concepts and obligations lie scattered throughout the Convention. The updated *Commentary* includes helpful cross-references, although considering the length of the updated *Commentary* itself, these may be difficult for practitioners to collect and identify.

The comment also addresses potential use of land mines outside prisoner of war camps to deter and thwart escape. ¶ 2550. The comment observes, use of mines "without marking them or informing the prisoners of their presence, . . . may – depending on the circumstances – amount to the use of weapons without warning." ¶ 2550.

On the question of when an escape is complete, and therefore when status or ordinary conduct-based rules for conducting hostilities resume with respect to a former prisoner of war, the comment concedes, "The law on this issue is unsettled." ¶ 2554. The comment refers to separate treatment of escape by Article 91 of the Third Convention. ¶ 2554. Article 91 indicates an escape is successful when a prisoner of war has rejoined their own or allied forces, has left the territory of the Detaining Power, or has joined a ship of their own Power or an ally. Still, the comment does not embrace a particular view, leaving room for a view that escape may be regarded as complete for purposes of Article 42 short of conditions established under Article 91.

The reading is reasonable in light of these articles' distinct purposes. Moreover, the ambiguity leaves room for circumstances in which an escaping prisoner does not rejoin friendly lines but resumes participation in hostilities. Conceding ambiguity is often important with respect to the Third Convention, and the updated *Commentary* might make concessions more often and more explicitly. Such concessions might serve the International Committee of the Red Cross's goal of clarity by prompting States to advance clearer understandings or even to work toward amendments.

CHAPTER VII:

RANK OF PRISONERS OF WAR

ARTICLE 43

NOTIFICATION OF RANKS

Upon the outbreak of hostilities, the Parties to the conflict shall communicate to one another the titles and ranks of all the persons mentioned in Article 4 of the present Convention, in order to ensure equality of treatment between prisoners of equivalent rank. Titles and ranks which are subsequently created shall form the subject of similar communications.

The Detaining Power shall recognize promotions in rank which have been accorded to prisoners of war and which have been duly notified by the Power on which these prisoners depend.

The text of Article 43 appears to require direct communication between Parties to the armed conflict rather than by means of a Protecting Power or some other intermediary body. The question of whether the article should be interpreted to admit communication through an intermediary is relevant. The article's goal of communication could certainly be accomplished through these means. A survey of subsequent State practice in this respect would be helpful.

The comment to Article 43 relates discussion among States about whether to commit communications of rank between Parties to the International Committee of the Red Cross, but indicates States did not pursue the proposal further. ¶ 2561 (citing *Minutes of the Diplomatic Conference of Geneva of 1949*, Committee II, Vol. I, 8th meeting, pp. 35–37 (United Kingdom, Italy, and Sweden)). This information seems to put the reader of the Convention in the position of insisting on a literal interpretation further confirmed by negotiating history. Still, subsequent State practice and agreement might alter or supplement the original meaning, nonetheless.

The comment reminds readers ranks and hierarchies used in all Third Convention, Article 4-qualifying organizations must be communicated between belligerents and therefore existing, publicly available information on ranks may not be sufficient. ¶ 2566. The comment reflects extraordinarily

careful thinking about the implications of the Convention and is particularly helpful for implementation of the article.

The comment notes the obligation is independent of the Article 17 obligation for prisoners of war to give their rank. ¶ 2569. In addition to relating various articles, the updated *Commentary* helpfully identifies provisions related in subject but independent in their operation.

ARTICLE 44

TREATMENT OF OFFICERS

Officers and prisoners of equivalent status shall be treated with the regard due to their rank and age.

In order to ensure service in officers' camps, other ranks of the same armed forces who, as far as possible, speak the same language, shall be assigned in sufficient numbers, account being taken of the rank of officers and prisoners of equivalent status. Such orderlies shall not be required to perform any other work.

Supervision of the mess by the officers themselves shall be facilitated in every way.

This comment notes the 1929 Diplomatic Conference of Geneva deliberately retained general language rather than specifying standards of treatment of officers in the earlier Prisoners of War Convention. ¶ 2582. It indicates "The same approach was adopted in the 1949 Convention." ¶ 2583. Here the updated *Commentary* identifies a deliberate preservation of ambiguity by States at the 1949 Diplomatic Conference of Geneva. It seems in such situations efforts to refine ambiguity or even reject that choice should be undertaken with great care. Only where practice indicates both existence of a refinement and clear intent by States to reduce ambiguity as a matter of law, should any adjustment of the Convention's obligations be accepted as law.

The comment adds,

> In addition, it follows the military logic that leaving the hierarchy of the battlefield intact in prisoner-of-war camps serves the interests of both the Detaining Power and the Power on which the prisoners depend. Retaining a functioning command structure among prisoners of war of one Party will usually have a positive effect on camp order

> and discipline, which can be an important factor in ensuring the best possible conditions of internment for all prisoners of war. ¶ 2588.

The comment's reference to "military logic" is interesting. It seems the comment detects compatibility between military organizations primarily designed for the task of warfighting and the task of maintaining order and discipline in camp settings. At its heart, the Third Convention is a project to serve military logic to the extent possible while selectively preempting or tempering that reasoning with a humanitarian logic. The Convention appears to include numerous opportunities to apply or expand on the concept of military logic more carefully.

The comment concedes the "flexible wording" of Article 44. ¶ 2589. The comment suggests States enjoy a degree of flexibility or independent prerogatives in striking the balance between military and humanitarian logic. The comment observes, "separating officers from their troops may trigger Article 22(3), which provides that prisoners of war may not be 'separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture, except with their consent.'" ¶ 2592. Here the comment usefully highlights apparent tension between articles of the Convention. The updated *Commentary* does well navigating the two articles, suggesting security measures of separation may be necessary but should not be disingenuously disguised as measures to ensure respect for Article 44.

Addressing military courtesies, the comment notes, "The possible interpretation of Article 44(1) that would require members of armed forces of the Detaining Power to salute prisoners of war of superior rank neither found support in practice during the Second World War nor was raised at the 1949 Diplomatic Conference." ¶ 2593. This is a good point for awareness and an example of the updated *Commentary* identifying but rejecting an unfounded interpretation of the Convention.

The comment adds, "Article 44(2) applies only to armed forces that still have orderlies." ¶ 2598. This is one of the final observations of the comment on Article 44 and is not supported by a citation or mention of authority. This observation is a clear exception to the plain text of the Convention, which is unequivocal and is not supported by negotiating history. What prompted the observation is unclear, other than vague familiarity with prevailing conditions of organization and staffing in modern armed forces.

The comment notes a variance between the English and French instructions on mess "supervision" or "*gestion*" (management). ¶ 2600. The updated *Commentary* reconciles the two authoritative terms of English and French in favor of the latter French term which involves a more active or permissive role.

ARTICLE 45

TREATMENT OF OTHER PRISONERS OF WAR

Prisoners of war other than officers and prisoners of equivalent status shall be treated with the regard due to their rank and age.

Supervision of the mess by the prisoners themselves shall be facilitated in every way.

The comment refers to Article 45 as an effort to maintain the pre-capture "command structure" of the armed forces. ¶ 2604. The updated *Commentary* might have reproduced the prior reference to "military logic" in paragraph 2588. Like the comment to Article 44, this comment acknowledges the Convention's "flexible wording." ¶ 2605. This acknowledgment accounts well for the instrumental nature of military courtesy. Military courtesy and rank-based standards are not merely abstract traditions of civility; they are tools to instill and reinforce order and control in challenging conditions. The Convention's flexible integration of military courtesy acknowledges the peculiar conditions of internment of enemy armed forces during armed conflict and permits deviations from and adaptations to military courtesy to facilitate order and control.

The comment features the same English-French language reconciliation of the terms "supervision" and "*gestation*" as the comment on Article 44. ¶ 2609. *See supra* ¶ 2600.

CHAPTER VIII:

TRANSFER OF PRISONERS OF WAR AFTER THEIR ARRIVAL IN CAMP

ARTICLE 46

CONDITIONS FOR TRANSFER OF PRISONERS

The Detaining Power, when deciding upon the transfer of prisoners of war, shall take into account the interests of the prisoners themselves, more especially so as not to increase the difficulty of their repatriation.

The transfer of prisoners of war shall always be effected humanely and in conditions not less favourable than those under which the forces of the Detaining Power are transferred. Account shall always be taken of the climatic conditions to which the prisoners of war are accustomed and the conditions of transfer shall in no case be prejudicial to their health.

The Detaining Power shall supply prisoners of war during transfer with sufficient food and drinking water to keep them in good health, likewise with the necessary clothing, shelter and medical attention. The Detaining Power shall take adequate precautions especially in case of transport by sea or by air, to ensure their safety during transfer, and shall draw up a complete list of all transferred prisoners before their departure.

As a matter of disclosure, the author of this *Companion* drafted the comment to Article 46 in a personal capacity and at the invitation of the International Committee of the Red Cross.

The comment acknowledges the relevance of "geographical, logistical and operational considerations" in addition to Article 46. ¶ 2614. Thus, the comment acknowledges in the Convention a concession to operational context and how the law relates to varied battlefield conditions. The comment notes Article 46 does not designate specifically how the interests of prisoners of war must be taken into account; it merely indicates they must be. ¶ 2614. In this vein, the comment identifies Article 46(2) as an example of the Convention's resort to the "principle of assimilation." ¶ 2620.

Article 46(2) clearly reflects explicit adoption of an assimilative standard. A principle of assimilation may truly be at work here rather than a rule.

The comment identifies a practical advantage to assimilation, namely, "permitting the Detaining Power to use means and methods of transfer already at its disposal. A Detaining Power generally need not acquire new means and methods or modify existing ones to meet its obligations under Article 46." ¶ 2620. Here the comment mentions how the obligations of the Convention are designed to complement and coexist with military considerations and realities. However, the comment also identifies the limits of assimilation, observing, "the principle of assimilation serves as the starting point for determining conditions of transfer." It also indicates, "Where there is a conflict between the principle of assimilation and the principle of humane treatment of prisoners, humane treatment must prevail." ¶ 2621. The observation reveals a weakness in or inherent limit to the utility of assimilation particular to conditions applicable to members of the armed forces.

The comment concedes prisoners may be cuffed, and their senses deprived (for example, blindfolding though without specific mention) but only reluctantly. ¶ 2622. Although reticence is understandable on this point considering potential and past abuse, these techniques should perhaps be more clearly conceded and even enumerated to make the updated *Commentary* both credible and practically useful.

The comment identifies planning considerations for Detaining Powers. ¶¶ 2614, 2628. It highlights both how the Convention should be implemented and how States might prepare both prior to and during armed conflict. This is an important function of the updated *Commentary* and one it might engage more actively.

Finally, the comment identifies the Article 126 visit provisions as applicable during transfers. ¶ 2631. Here is a further cross-reference of a provision from another section of the Convention that might otherwise escape attention.

ARTICLE 47

CIRCUMSTANCES PRECLUDING TRANSFER OF PRISONERS

Sick or wounded prisoners of war shall not be transferred as long as their recovery may be endangered by the journey, unless their safety imperatively demands it.

If the combat zone draws closer to a camp, the prisoners of war in the said camp shall not be transferred unless their transfer can be carried out in adequate conditions of safety, or if they are exposed to greater risks by remaining on the spot than by being transferred.

As a matter of disclosure, the author of this *Companion* drafted the comment to Article 46 in a personal capacity at the invitation of the International Committee of the Red Cross.

The comment identifies a rare instance of the Convention largely eliminating from consideration the interests of the Detaining Power. Article 47 precludes operational considerations and relies solely on the interest of the wounded or sick prisoner to determine whether transfer may take place. ¶ 2633. This departure by the Convention is worth bringing to the attention of Detaining Powers, particularly considering the likely prevailing habit of balancing military necessity and feasibility in designing means for complying with the Convention.

The comment explains a derogation from the Article 46 transfer conditions, noting,

> If the transfer cannot be carried out in the required conditions, Article 47(2) provides that the Detaining Power must nevertheless go ahead with it if doing so will place the prisoners at less risk of harm than keeping them where they are. In that case, Article 47 foresees a derogation from the general conditions of transfer, i.e. that the Detaining Power may move prisoners of war so long as the purpose

and anticipated result of the transfer are in the prisoners' best interests. ¶ 2638.

Here is another illustration of the interaction of articles of the Convention and in this case an important and rare derogation provision.

ARTICLE 48

PROCEDURE FOR TRANSFER OF PRISONERS

In the event of transfer, prisoners of war shall be officially advised of their departure and of their new postal address. Such notifications shall be given in time for them to pack their luggage and inform their next of kin.

They shall be allowed to take with them their personal effects, and the correspondence and parcels which have arrived for them. The weight of such baggage may be limited, if the conditions of transfer so require, to what each prisoner can reasonably carry, which shall in no case be more than twenty-five kilograms per head.

Mail and parcels addressed to their former camp shall be forwarded to them without delay. The camp commander shall take, in agreement with the prisoners' representative, any measures needed to ensure the transport of the prisoners, community property and of the luggage they are unable to take with them in consequence of restrictions imposed by virtue of the second paragraph of this Article.

The costs of transfers shall be borne by the Detaining Power.

As a matter of disclosure, the author of this *Companion* drafted the comment to Article 48 in a personal capacity and at the invitation of the International Committee of the Red Cross.

The comment includes a cross-reference to the Article 122(5) obligation to notify national information bureaux of transfers. ¶ 2643. It also explains the decision to change the term "destination" in the 1929 Convention to the phrase "postal address" in the 1949 Convention to limit geographic indications of prisoner of war camp locations. ¶ 2645. This is an account of a deliberate change in language between the 1929 and 1949 Conventions. However, this interpretation apparently conflicts with the

earlier interpretation of the Article 23(3) phrase "all useful information" as analyzed in paragraph 2042 of the updated *Commentary* to include geographic coordinates rather than a mere routing address.

SECTION III

LABOUR OF PRISONERS OF WAR

The Section III chapeau comment identifies framing thoughts for the Convention's provision on labor by prisoners of war. It acknowledges the apparent logic of resorting to labor to defray the significant expense incurred by the Detaining Power obligation to provide for the maintenance of prisoners of war. ¶ 2655. From the perspective of prisoners of war and the Power on which they depend, the Third Convention's drafters conceived of labor as contributing to well-being and reducing the monotony of internment. ¶ 2655.

ARTICLE 49

GENERAL OBSERVATIONS ON LABOUR OF PRISONERS OF WAR

The Detaining Power may utilize the labour of prisoners of war who are physically fit, taking into account their age, sex, rank and physical aptitude, and with a view particularly to maintaining them in a good state of physical and mental health.

Non-commissioned officers who are prisoners of war shall only be required to do supervisory work. Those not so required may ask for other suitable work which shall, so far as possible, be found for them.

If officers or persons of equivalent status ask for suitable work, it shall be found for them, so far as possible, but they may in no circumstances be compelled to work.

The comment to Article 49 identifies a logical connection between the Detaining Power's obligation to provide for the maintenance of prisoners of war and its "related right" to use prisoners of war for labor. ¶ 2662. Although an intuitive connection, there seems to be some danger in relating labor with maintenance of prisoners of war. Suggesting a relationship might jeopardize one or the other. For instance, refusal to work would not excuse a Detaining Power from providing maintenance to prisoners of war. A clarification in this respect would have been helpful.

Although the comment describes a right on the part of the Detaining Power to put prisoners to work, it disclaims labor as a "right" of prisoners of war. ¶ 2673. The comment also links the condition that labor assignments account for prisoners' medical conditions to the Article 55 requirement of monthly medical exams. ¶ 2678. Here is another helpful cross-reference to a separate and separated article of the Convention.

The comment includes historical background on proposals for more detailed regulation of prisoner of war labor involving the International

Labor Organization. However, it makes clear States rejected the proposed elaborations on existing standards and rules. ¶ 2681. The comment is an accurate accounting of how States identified the level of specificity appropriate to the context of armed conflict and prisoner of war internment. Although more refined regulation was available from another regime of law and even proposed, States chose to retain comparatively less-developed regulations. This episode counsels caution toward efforts to develop or refine the Convention's regulations, particularly through incorporation of standards developed in separate legal regimes.

ARTICLE 50

AUTHORIZED WORK

Besides work connected with camp administration, installation or maintenance, prisoners of war may be compelled to do only such work as is included in the following classes:

(a) agriculture;

(b) industries connected with the production or the extraction of raw materials, and manufacturing industries, with the exception of metallurgical, machinery and chemical industries; public works and building operations which have no military character or purpose;

(c) transport and handling of stores which are not military in character or purpose;

(d) commercial business, and arts and crafts;

(e) domestic service;

(f) public utility services having no military character or purpose.

Should the above provisions be infringed, prisoners of war shall be allowed to exercise their right of complaint, in conformity with Article 78.

Article 50(2) recites the right of complaint treated explicitly in Article 78 of the Third Convention. This drafting technique suggests the interpretive possibility that only provisions that include such explicit references are subject to Article 78.

Article 50 is also notable as an expressly inclusive enumeration of permissible work. The drafting history related by the comment indicates

vigorous debate and a close vote on this approach. ¶ 2697. The comment notes the Convention settled on an approach to restricting work in some categories yet leaving other categories unrestricted. For instance, work in agriculture is unrestricted whereas manufacturing work is qualified by prohibited fields of work. ¶ 2701. The comment helpfully highlights the technique of drafting employed in the Convention and highlights an appropriately textual interpretive approach. In this case, the fact that some categories of work are unqualified and others are not counsels great caution when reading in qualifications or prohibitions on work in unqualified fields.

The comment cites the 2003 International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Naletilić and Martinović* Trial Judgment at paragraph 269 to support private car repair and headquarters cleaning as not prohibited for prisoners of war. ¶ 2703 n. 16. Reliance on the *Naletilić* case calls for caution, however, with respect to prisoner of war standards. The prosecution in that case seems to have averred it was unable to conclusively determine the prisoner of war status of the alleged victims of unlawful labor. *Prosecutor v. Naletilić and Martinović* Trial Judgment, ¶ 252. The trial court agreed but curiously proceeded nonetheless without having made a full determination of prisoner of war status. The judgment probably should not be assigned significant precedential value on this count.

Returning to the regulatory method of the article, the comment helpfully characterizes three approaches employed by Article 50. First, certain work in specific industries is permissible without qualification. Second, work in other industries is generally permissible but stated exceptional work is prohibited. Third, other work is permissible subject to not having a "military character." ¶¶ 2701–09. The three approaches to drafting and regulation are identified in separate paragraphs. A *chapeau* paragraph identifying the approaches together would have been useful to organize readers' thinking on permissible and prohibited labor, yet overall, the comment's structural analysis is helpful.

The comment indicates, "The concept of 'military character' is understood to include activities which are commanded and regulated by military authorities, as opposed to by civilian authorities." ¶ 2709 (citing Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 267). However, command and regulation are strange choices of identifying criteria, particularly during armed conflict and in States where the military plays a larger role in civil functions.

The comment judges, "The criterion of 'purpose' concerns the intended

use of an activity. In armed conflict, any activity could have at least an incidental military purpose, depending on the circumstances." ¶ 2709. The comment cites International Criminal Tribunal for the former Yugoslavia cases as authorities respecting work of a military character or purpose. ¶ 2713, n. 33 (citing *Prosecutor v. Naletilić and Martinović* Trial Judgment, 2003, paras 268–269; *Prosecutor v. Prlić* Trial Judgment, 2013, Vol. 3, paras 157–164, 1500–1522 and 1592–1612; *Prosecutor v. Blaškić* Appeal Judgment, 2004, para. 597; and *Prosecutor v. Aleksovski* Trial Judgment, 1999, paras 127–129). As noted above, the precedential value of the *Naletilić* trial judgment is dubious in light of the court's inability to make a ruling on the prisoner of war status of the case's alleged victims.

The comment clarifies prisoners may volunteer to do otherwise prohibited work subject to Article 52, which permits even "work which is of an unhealthy or dangerous nature." ¶ 2714. It also identifies Article 50 as a provision susceptible to renunciation by prisoners of war, a rarity in the Convention in light of the Article 7 general prohibition on renunciation of protections. ¶ 2715. The cross-reference and reconciliation of potentially conflicting provisions is helpful.

Last, the comment observes, in relation to complaints under Article 78, "the drafters of the Convention felt it necessary, in particular in relation to prohibited fields of work, to recall this right in this section of the Convention." ¶ 2717. This raises a potential interpretive difficulty in determining whether matters to be raised in Article 78 complaint procedures should be open-ended or specifically enumerated in the Convention as is the case with Article 50.

ARTICLE 51

WORKING CONDITIONS

Prisoners of war must be granted suitable working conditions, especially as regards accommodation, food, clothing and equipment; such conditions shall not be inferior to those enjoyed by nationals of the Detaining Power employed in similar work; account shall also be taken of climatic conditions.

The Detaining Power, in utilizing the labour of prisoners of war, shall ensure that in areas in which prisoners are employed, the national legislation concerning the protection of labour, and, more particularly, the regulations for the safety of workers, are duly applied.

Prisoners of war shall receive training and be provided with the means of protection suitable to the work they will have to do and similar to those accorded to the nationals of the Detaining Power. Subject to the provisions of Article 52, prisoners may be submitted to the normal risks run by these civilian workers.

Conditions of labour shall in no case be rendered more arduous by disciplinary measures.

Like other articles of the Third Convention, Article 51 resorts to a form of assimilation. In this case, the Convention equates prisoner of war working conditions to similarly employed "nationals of the Detaining Power" rather than to the Detaining Power's armed forces. This standard reflects a change from the 1929 Convention which assimilated standards for "depot troops of the Detaining Power." This change is notable as a rare instance when the Convention incorporates a standard applicable to a civilian population rather than to enemy armed forces. Given the rarity, it seems incorporation of civilian treatment standards by implication should be disfavored and asserted exceptionally and very cautiously, if not abandoned entirely.

Article 51 also expressly incorporates "national legislation concerning the protection of labour . . . ." Importantly, when the Convention intends to incorporate standards from legal regimes outside the law of war, it does so explicitly. Great reluctance should be exercised in implying incorporation of outside standards into the obligations of the Convention, particularly considering comparatively more frequent and recent refinements and the development of other regimes, such as international human rights law, may amount to reinterpretations of the Convention. These reinterpretations should be in most cases rejected.

The comment seizes on the civilian standard used by Article 51, observing,

> This choice makes it clear that the national standard is the benchmark, which has the important advantage of being a single standard applicable to all prisoners of war engaged in the same task, irrespective of the Power on which they depend. Complying with the standard normally granted to civilian workers may also mean greater protection for prisoners of war than that provided for in the 1929 Convention. ¶ 2724.

Considering the comment's assessment that assimilation to civilian labor standards reflects "greater protection," the interpretive act of incorporating such standards should be undertaken cautiously, selectively, and on the basis of clear intent expressed through treaty text.

The comment recalls States rejected international labor standards as the basis for regulating prisoner labor in favor of respective national standards. It reminds readers national standards applied to prisoners may not fall below standards identified in the Convention itself. Thus, international law, though only directly the law of war, remains relevant even when national standards are incorporated. ¶ 2731. International standards may in limited cases have been incorporated into national standards and may thereby indirectly influence prisoners' working conditions. ¶ 2732. This is an interesting regulatory choice as well. It seems to be compelling evidence of reluctance to incorporate international legal standards from outside the law of war.

ARTICLE 52

DANGEROUS AND HUMILIATING LABOR

Unless he be a volunteer, no prisoner of war may be employed on labour which is of an unhealthy or dangerous nature.

No prisoner of war shall be assigned to labour which would be looked upon as humiliating for a member of the Detaining Power's own forces.

The removal of mines or similar devices shall be considered as dangerous labour.

Article 52 resorts to assimilation to armed forces to evaluate humiliating and therefore prohibited labor. To imagine this standard could be either underinclusive or overinclusive is not difficult. That is, some labor humiliating for soldiers may not be so for prisoners of war and especially *vice versa*. Nonetheless, military assimilation is the express choice of the Third Convention for evaluating permissible or prohibited labor on this basis. The extent to which the article should be regarded as a *lex specialis* for humiliating labor is not entirely clear. The soundest approach to forming a holistic analysis of prohibited labor may also consider the Third Convention Article 13 prohibition on "insults" and Article 14 generally with respect to honor.

Note also Article 52(1) includes a consent-based exception whereas Article 52(2) does not. The latter indicates "[n]o prisoner" may be assigned work looked on as humiliating for a member of the Detaining Power's armed forces, regardless of consent. In this sense, Article 52 seems to be an outlier in the Third Convention. Ordinarily, the Convention rejects prisoner of war waivers of treatment obligations and is reasonably skeptical of voluntary consent in the context of detention.

The comment indicates Article 32 of the 1929 Geneva Convention Relating to the Treatment of Prisoners of War had prohibited "unhealthy or dangerous work" outright without the possibility of volunteers. ¶ 2740. The comment concludes Article 52 of the 1949 Third

Convention assigns determinations of what is unhealthy or dangerous to the Detaining Power. ¶ 2744. Here is a concession of responsibility and flexibility by the updated *Commentary*. Still, the comment claims prisoners of war may take their objections to the Article 78 complaint procedure. ¶ 2744. This conclusion seems consistent with Article 78 but is somewhat in tension with the Convention's approach in Article 50 to specifically enumerate a subject susceptible to an Article 78 complaint. *See* discussion *supra* at Article 50.

The comment identifies implied obligations in Article 52 to provide training to safely perform dangerous or unhealthy work as well as testing to ensure competence. The latter obligation indicates a Detaining Power may not simply rely on the representations made by prisoners of war in this respect. ¶ 2746. Implied obligations such as these might be better expressed as best practices or suggested means for implementing the Convention. Expressing them as obligations suggests failure to perform them itself constitutes a breach of the Convention. One can easily envision a situation in which the training or testing required by the comment is not provided but no harm results, raising the possibility of a harmless but distracting breach.

The comment does not address the likely scenario of a Detaining Power incentivizing volunteers to perform dangerous or unhealthy work. Whether a Detaining Power may so entice volunteers to dangerous work is unclear. The question may implicate the requirement of equal treatment under Article 16. States may wish to consider this question and publish views.

The comment admirably adheres to the rule of assimilation to the Detaining Power's armed forces as articulated by the article, despite obvious concern about a subjective evaluation of whether labor is humiliating or not. The updated *Commentary* identifies subjective analysis of cultural sensitivities as more protective but concedes the article's plain meaning. ¶ 2753. This is a wise choice and serves, perhaps more effectively than reinterpretation, to alert States to a provision that may merit amendment.

ARTICLE 53

DURATION OF LABOR

The duration of the daily labour of prisoners of war, including the time of the journey to and fro, shall not be excessive, and must in no case exceed that permitted for civilian workers in the district, who are nationals of the Detaining Power and employed on the same work.

Prisoners of war must be allowed, in the middle of the day's work, a rest of not less than one hour. This rest will be the same as that to which workers of the Detaining Power are entitled, if the latter is of longer duration. They shall be allowed in addition a rest of twenty-four consecutive hours every week, preferably on Sunday or the day of rest in their country of origin. Furthermore, every prisoner who has worked for one year shall be granted a rest of eight consecutive days, during which his working pay shall be paid him.

If methods of labour such as piece work are employed, the length of the working period shall not be rendered excessive thereby.

Article 53 features further resort to assimilation to the Detaining Power's civilian population. Interestingly, it assimilates local rather than national standards. The article adopts the Detaining Power's local civilian labor standards to prescribe hours worked and breaks. It abandons assimilation, however, for annual leave from work, specifically prescribing eight consecutive days of leave for each year worked.

The comment to Article 53 notes, "The length of working hours is an important part of the labour regime of prisoners of war as the main purpose of having them work is to maintain them in a good state of health." ¶ 2757. This comment lies in tension with a previous comment concerning the purpose of prisoner of war labor. *See* ¶ 2655. That prisoner health is the true "main purpose" of the work regime is not clear. The

updated *Commentary* earlier identifies prisoner work as a function for the Detaining Power to recoup the costs of maintaining prisoners, including their facilities and feeding. ¶¶ 2655, 2662. Indeed, the updated *Commentary* refers to Detaining Powers' "right" to use prisoners for labor and rejects labor as a right belonging to prisoners of war. ¶ 2673.

Addressing the article's use of the term "excessive," the comment resorts to the International Labor Organization maximum of 48 hours per week. It further estimates "various ILO Conventions . . . may apply to prisoners of war if the Detaining Power is party to them." ¶ 2762. This seems a poor choice of support considering the 1949 Diplomatic Conference of Geneva's explicit rejection of International Labor Organization standards for prisoner of war labor conditions. The updated *Commentary* itself notes this rejection as relevant negotiating history above at paragraph 2731. A sounder approach might have been to survey the working hour maximums of the law the Convention actually incorporates; namely, locally applicable and national labor standards of States Parties.

Despite arguments to the contrary, particularly views that urge adoption of standards from the prisoners' country of origin, the comment wisely reserves the choice of the day of rest for the Detaining Power. ¶ 2768.

ARTICLE 54

WORKING PAY. OCCUPATIONAL ACCIDENTS AND DISEASES

The working pay due to prisoners of war shall be fixed in accordance with the provisions of Article 62 of the present Convention.

Prisoners of war who sustain accidents in connection with work, or who contract a disease in the course, or in consequence of their work, shall receive all the care their condition may require. The Detaining Power shall furthermore deliver to such prisoners of war a medical certificate enabling them to submit their claims to the Power on which they depend, and shall send a duplicate to the Central Prisoners of War Agency provided for in Article 123.

Article 54 reflects a significant change from the scheme for occupational injuries to prisoners of war under Article 27(4) of the preceding 1929 Geneva Convention Relating to the Treatment of Prisoners of War. ¶ 2772. That article assigned responsibility for injury payments and compensation to the Detaining Power, including by some interpretations an obligation that extended to the period following final repatriation. The 1947 Conference of Government Experts and the 1949 Convention abandoned this scheme. They shifted responsibility to the Power on which the injured prisoner of war depends; that is, the prisoner's State of military origin. This might be pointed out as an example of States abandoning assimilation in favor of a context-specific rule for compensating injuries that accounts for the realities of the temporary relationship between a prisoner of war and a Detaining Power.

Under the Third Convention's Article 54 scheme, the Detaining Power must treat injuries and diseases suffered during labor by prisoners of war. ¶ 2776. It must further provide documentation of such conditions. But responsibility for compensation is left to the Power on which the prisoner of war depends. ¶ 2779.

The comment includes an interesting note on practice, indicating no evidence exists of any State having recorded, forwarded, or compensated

any claim to injuries or diseases suffered by prisoners of war during labor. ¶ 2782. The absence of practice seems to call for analysis of the continued viability of the provision. Whether absence of practice over seventy years is of legal relevance seems worth greater attention by the updated *Commentary*. States may wish to review and publish their own practices in this respect.

ARTICLE 55

MEDICAL SUPERVISION

The fitness of prisoners of war for work shall be periodically verified by medical examinations at least once a month. The examinations shall have particular regard to the nature of the work which prisoners of war are required to do.

If any prisoner of war considers himself incapable of working, he shall be permitted to appear before the medical authorities of his camp. Physicians or surgeons may recommend that the prisoners who are, in their opinion, unfit for work, be exempted therefrom.

This brief comment indicates Article 55's relationship to Article 49(1) on labor and Article 31 on periodic medical inspections. ¶ 2785. The comment also acknowledges Article 55(1) does not prescribe who must conduct the medical examinations. It recognizes the Detaining Power's discretion to determine who performs the article's medical examinations. ¶ 2792. This seems a helpful example of a comment preserving ambiguity in the Convention and recognizing flexibility in the obligations and discretion of Parties.

ARTICLE 56

LABOR DETACHMENTS

The organization and administration of labour detachments shall be similar to those of prisoner of war camps.

Every labour detachment shall remain under the control of and administratively part of a prisoner of war camp. The military authorities and the commander of the said camp shall be responsible, under the direction of their government, for the observance of the provisions of the present Convention in labour detachments.

The camp commander shall keep an up-to-date record of the labour detachments dependent on his camp, and shall communicate it to the delegates of the Protecting Power, of the International Committee of the Red Cross, or of other agencies giving relief to prisoners of war, who may visit the camp.

The Third Convention requires the Detaining Power to organize and administer labor detachments in a fashion "similar" to prisoner of war camps. Yet the article also requires "the observance of the provisions of the present Convention in labor detachments." Thus, good faith implementation of the article calls for a reconciliation of these provisions. The most helpful interpretation might regard the latter "observance" requirement to include and have been prefaced by the similarity provision. Such an understanding acknowledges the practical source of the similarity qualification. Conditions involved in labor detachments, being removed from camp infrastructure and lines of supply, will often make literal and full observance of the Convention impossible. For instance, full access to canteens might be impossible at a remote worksite. Similarly, observation of many of the Conventions' assimilated standards may not be feasible in such conditions.

The comment indicates, "The [International Committee of the Red Cross] is not aware of any prisoners being assigned to labour detachments

in international armed conflicts since 1949." ¶ 2801. This is a helpful acknowledgment of a void in subsequent practice. This is apparently a stark change from pre-1949 practice when most prisoners of war were dispersed to such detachments. The effort of the updated *Commentary* to account for evolutions of the meaning of the Convention seems to require deeper consideration of the lack of subsequent practice in Article 56.

The comment also indicates the 1949 Third Convention abandoned the 1929 Geneva Convention's resort to enumerated conditions for labor detachments. The 1949 Diplomatic Conference of Geneva determined enumeration would have a limiting effect. ¶ 2803. This observation is instructive as to the drafting approach of the Third Convention. The 1949 Diplomatic Conference of Geneva seems to have selectively abandoned enumerated examples but retained others. Each should be accounted for in interpretation. That is, situations in which the Convention resorts to enumerations might suggest exclusivity.

The comment concludes, "labour detachments do not have to be exact replicas of prisoner-of-war camps." ¶ 2807. However, the example of permissible variance likely does not reflect the full extent of permissible variance. The comment indicates somewhat superficially, "Article 56(1) will not be violated if a prisoner-of-war camp is equipped with central heating, while a labour detachment has a different source of heating." ¶ 2807. Surely the example does not reflect anything approaching the outer limit of permissible variation between conditions in permanent camps and remote labor detachments.

Finally, the comment includes two helpful cross-references reminding Detaining Powers of their obligation to provide access to a prisoners' representative (Article 79) and access by a Protecting Power (Article 126) extends to labor detachments. ¶ 2810.

ARTICLE 57

PRISONERS WORKING FOR PRIVATE EMPLOYERS

The treatment of prisoners of war who work for private persons, even if the latter are responsible for guarding and protecting them, shall not be inferior to that which is provided for by the present Convention. The Detaining Power, the military authorities and the commander of the camp to which such prisoners belong shall be entirely responsible for the maintenance, care, treatment, and payment of the working pay of such prisoners of war.

Such prisoners of war shall have the right to remain in communication with the prisoners' representatives in the camps on which they depend.

Addressing treatment of prisoners of war working for private persons, the Third Convention employs a standard of care distinct from the assimilative standards previously seen. Article 57 commands treatment by private persons may not be "inferior to that which is provided by the present Convention." The comment to Article 57 observes, "While this provision serves as the minimum standard of treatment for prisoners working for private employers, it also allows for the possibility of treatment more favourable than that required by the Convention." ¶ 2830. While a reasonable reading of the article's standard of care which sets the Convention as a floor or minimum of treatment, the observation concerning more favorable treatment raises concern about equality of treatment under the Third Convention's Article 16. Whether a Detaining Power may run afoul of the equal treatment requirement by assigning prisoners of war to a private party known to offer more favorable treatment is unclear.

The comment asserts private persons may neither impose disciplinary measures on prisoners of war nor use weapons to halt escape by prisoners of war in their employment. ¶ 2833. The former limit is justified by Article 96(2) of the Convention which explicitly restricts disciplinary

matters to officers of the Detaining Power and more particularly to camp commanders. The latter limit on use of weapons, however, finds no support in the text of the Convention. The comment instead cites the 1960 Pictet *Commentary* for this prohibition.

Both the comment and Dr. Pictet appear to deduce their prohibition on weapon use from a supposed limit on civilian participation in acts of war. ¶ 2833. The 1960 Pictet *Commentary* reads, "The justification for firing on an escaping prisoner of war lies in the fact that he is committing an act of war in his capacity as a member of the enemy armed forces; but only military personnel can respond by an act of war." (p. 296). To the extent the updated *Commentary* adopts positions taken in the original, it of course incorporates the excesses and errors of that work. The observation by the 1960 Pictet *Commentary* concerning civilian participation is neither descriptively nor legally correct. While any number of practical or other considerations may commend withholding private persons' power to use weapons against escaping prisoners of war, the Convention does not offer an obvious legal limit in this respect. The contrast between the clear Article 96(2) limit and the absence of any such limit in Article 57 is compelling evidence in favor of a distinction. Moreover, the use of weapons is regulated quite thoroughly by the Convention but the Convention includes no trace of a prohibition against private persons using weapons against escaping prisoners of war. The United Kingdom *Joint Service Law of Armed Conflict Manual* offers some support, however. *See* ¶ 8.91. Still, whether that manual forbids weapons use as a matter of the 1949 Third Convention, owing to Article 57 specifically, or for another reason, is not entirely clear. A better approach may have been to note State policies on the matter and leave unclear whether the Convention may be interpreted to imply a prohibition.

SECTION IV

FINANCIAL RESOURCES OF PRISONERS OF WAR

Addressing Part III, Section IV of the Third Convention, the 1960 Pictet *Commentary* includes three "principles" identified by a sub-committee at the 1947 Conference of Government Experts.

> 1. The amounts paid out to prisoners of war by the Detaining Power shall be limited so that the maximum sum may be available for the next of kin of prisoners of war.
>
> 2. The amounts paid shall be determined by rank or status.
>
> 3. Credit balances shall be made easily transferable to the next of kin of prisoners of war. 1960
>
> 1960 Commentary, p. 299.

These provisions illustrate how alleged principles of the Convention might work as guiding sensibilities or broad instructional sentiments. The first alleged principle operates quite generally. It does not prescribe specific amounts or proportions of disbursement other than indicating "the maximum sum." Similarly, the second does not designate amounts. It merely prescribes a framework for identifying amounts through rules. Last, while the credit balances provision resorts to the imperative "shall," it does not require particular means or arrangements but merely identifies the goal of easy transfer.

Dr. Pictet's purported principles also illustrate the possibility of using principles on a small scale. That is, these principles do not operate with respect to the entire Convention. Nor are they principles of the law of war, or for that matter, of international law. They guide only the formation of Part III, Section IV of the Convention.

The updated *Commentary* adds its own principle to those of Dr. Pictet. The chapeau comment to Part III, Section IV discerns in the Convention a principle, "that money found on prisoners of war at the time of their capture

is their private property." ¶ 2843. Few of the Convention's users are likely to be familiar with this principle and it seems more reminiscent of a rule.

ARTICLE 58

READY MONEY

Upon the outbreak of hostilities, and pending an arrangement on this matter with the Protecting Power, the Detaining Power may determine the maximum amount of money in cash or in any similar form, that prisoners may have in their possession. Any amount in excess, which was properly in their possession and which has been taken or withheld from them, shall be placed to their account, together with any monies deposited by them, and shall not be converted into any other currency without their consent.

If prisoners of war are permitted to purchase services or commodities outside the camp against payment in cash, such payments shall be made by the prisoner himself or by the camp administration who will charge them to the accounts of the prisoners concerned. the Detaining Power will establish the necessary rules in this respect.

The comment to Article 58 observes, "The purpose of this provision is, on the one hand, to ensure prisoners of war have a reasonable amount of money at their disposal for daily purchases and, on the other hand, to limit that amount to avoid such money being used to facilitate escape or other abuses." ¶ 2854. The comment emphasizes Article 58 outlines "non-compulsory" measures. That is, a Detaining Power need not necessarily establish a maximum amount of currency prisoners of war may hold. ¶ 2866. It further indicates State practice since the Second World War has not resulted in any of the anticipated agreements as to maximum amount with Protecting Powers. ¶ 2867. The latter point is interpretively important as, according to its seeming non-compulsory character, Article 58 does not seem to call for a conclusion of desuetude (loss of binding character owing to disuse).

The comment notes "the Detaining Power may choose to issue 'token money' or 'camp money,' which is not valid outside the camp (unless those

outside agree to accept it). Article 58(1) thus recognizes the practice of Detaining Powers during both world wars." ¶ 2870.

A footnote confirms the purpose of the maximum amount provision is to avoid facilitating escapes. It relates, in 1985, a UN mission reported Iraqi prisoners of war in Iran did not receive cash, because this "would facilitate the task of those seeking to escape." ¶ 2871 (citing United Nations Security Council, *Prisoners of War in Iran and Iraq: The Report of a Mission Dispatched by the Secretary-General*, January 1985, UN Doc. S/16962, 22 February 1985, para. 172(j)). Again, State practice such as this might feature in the comment itself rather than in footnotes. The comment indicates currency other than that of the Detaining Power is governed by Article 18(6) rather than Articles 18(4), 58(1), and 59(2). ¶ 2874. The updated *Commentary* provides a helpful navigational aid to the Convention in this respect.

The comment deduces, because Article 58(2) regulates payments for purchases outside the camp only when authorized by the Detaining Power, "the Detaining Power is under no obligation to permit prisoners of war to purchase goods or services outside the camp." ¶ 2880. The point emphasizes a Detaining Power retains discretion and prerogative in such matters. The updated *Commentary* is often as helpful when it identifies what the Convention does *not* regulate as when it identifies what and how the Convention does regulate.

Overall, the comment to Article 58 proves to be an especially strong section of the updated *Commentary*.

ARTICLE 59

AMOUNTS IN CASH TAKEN FROM PRISONERS

Cash which was taken from prisoners of war, in accordance with Article 18, at the time of their capture, and which is in the currency of the Detaining Power, shall be placed to their separate accounts, in accordance with the provisions of Article 64 of the present Section.

The amounts, in the currency of the Detaining Power, due to the conversion of sums in other currencies that are taken from the prisoners of war at the same time, shall also be credited to their separate accounts.

This comment notes Article 59 duplicates part of Article 18(4). ¶ 2887. It emphasizes Article 59 applies only to sums in the Detaining Power's currency and does not apply to other currency. ¶ 2888. Here is another useful observation concerning the Convention generally and concerning the limited scope of application of a provision of the Convention.

ARTICLE 60

ADVANCES IN PAY

The Detaining Power shall grant all prisoners of war a monthly advance of pay, the amount of which shall be fixed by conversion, into the currency of the said Power, of the following amounts:

Category I: Prisoners ranking below sergeants: eight Swiss francs.

Category II: Sergeants and other non-commissioned officers, or prisoners of equivalent rank: twelve Swiss francs.

Category III: Warrant officers and commissioned officers below the rank of major or prisoners of equivalent rank: fifty Swiss francs.

Category IV: Majors, lieutenant-colonels, colonels or prisoners of equivalent rank: sixty Swiss francs.

Category V: General officers or prisoners of war of equivalent rank: seventy-five Swiss francs.

However, the Parties to the conflict concerned may by special agreement modify the amount of advances of pay due to prisoners of the preceding categories.

Furthermore, if the amounts indicated in the first paragraph above would be unduly high compared with the pay of the Detaining Power's armed forces or would, for any reason, seriously embarrass the Detaining Power, then, pending the conclusion of a special agreement with the Power on which the prisoners depend to vary the amounts indicated above, the Detaining Power:

(a) shall continue to credit the accounts of the prisoners with the amounts indicated in the first paragraph above;

(b) may temporarily limit the amount made available from these advances of pay to prisoners of war for their own use, to sums which are reasonable, but which, for Category I, shall never be inferior to the amount that the Detaining Power gives to the members of its own armed forces.

The reasons for any limitations will be given without delay to the Protecting Power.

Article 60 and its comment subtly dispel one of the enduring misconceptions about the Convention; namely, the notion that prisoners of war must be paid in Swiss francs. As each makes clear, amounts denominated in Swiss francs by Article 60 merely provide a basis for calculating pay in the currency of the Detaining Power.

The comment notes Article 60(1) is "subject to the modifications pursuant to paragraphs 2 and 3, eliminates the 'practice of tying the amount of the advance of pay to the pay scale of the armed forces of either the Detaining Power or the Power of Origin.'" ¶ 2897 (quoting Howard S. Levie, *Prisoners of War in International Armed Conflict*, *International Law Studies*, vol 59, 1978, p. 198). This provision seems at odds with, and even designed to avoid assimilation to, enemy armed forces pay which was the approach of the 1899 and 1907 Hague Regulations. This decision to abandon assimilation was apparently contested. *See Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 279 and 532; 280 and 532.

The comment indicates the phrase "advances of pay" was chosen "to replace the word 'pay' (or, as had been suggested, 'allowances')" because such advances "were not comparable to the sums received by soldiers on active service." ¶ 2905 (citing *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 278, 280, & 533). It provides further,

> The term 'advances of pay' implies that prisoners of war receive a part – an 'advance' – of the regular pay owed to them by their armed forces and that, according to Article 67, is paid by the Detaining Power 'on behalf of the Power on which they depend'. Of the salary due, an 'advance' is paid by the Detaining Power to enable prisoners to improve

> their lot during captivity, which is to be reimbursed by the Power on which they depend. ¶ 2908.

Here the updated *Commentary* provides a helpful explanation and clarifies another common misconception about the Convention. The comment indicates these advances are independent of any assurance the Detaining Power will be reimbursed by the Power on which the prisoners of war depend. ¶ 2908. This is an implied, though reasonable, assumption in light of the Convention's unqualified duty to provide advances of pay.

Finally, the comment reminds readers depreciation of currency during armed conflict may make providing amounts equivalent to the amounts agreed upon difficult for some Detaining Powers. ¶ 2918.

ARTICLE 61

SUPPLEMENTARY PAY

The Detaining Power shall accept for distribution as supplementary pay to prisoners of war sums which the Power on which the prisoners depend may forward to them, on condition that the sums to be paid shall be the same for each prisoner of the same category, shall be payable to all prisoners of that category depending on that Power, and shall be placed in their separate accounts, at the earliest opportunity, in accordance with the provisions of Article 64. Such supplementary pay shall not relieve the Detaining Power of any obligation under this Convention.

This comment emphasizes the particular utility and importance of supplemental pay by the Power on which prisoners of war depend as a measure to address reductions in advances of pay pursuant to Article 60(3). ¶ 2926. The comment illustrates the interplay between articles of the Third Convention that may not be apparent at first reading or through partial consultations of the Convention. Although no State practice is evident with respect to Article 61, the comment is likely correct *desuetude* does not result. ¶ 2929. Article 61 refers to a contingent obligation. The obligation to credit accounts of prisoners of war only arises when a Power on which they depend forwards such supplemental amounts.

The comment also reminds readers supplemental pay is distinct from advances of pay under Article 60, which is a helpful orientation to the terminology of the Convention that facilitates its correct implementation. ¶ 2932.

ARTICLE 62

WORKING PAY

Prisoners of war shall be paid a fair working rate of pay by the detaining authorities direct. The rate shall be fixed by the said authorities, but shall at no time be less than one-fourth of one Swiss franc for a full working day. The Detaining Power shall inform prisoners of war, as well as the Power on which they depend, through the intermediary of the Protecting Power, of the rate of daily working pay that it has fixed.

Working pay shall likewise be paid by the detaining authorities to prisoners of war permanently detailed to duties or to a skilled or semi-skilled occupation in connection with the administration, installation or maintenance of camps, and to the prisoners who are required to carry out spiritual or medical duties on behalf of their comrades.

The working pay of the prisoners' representative, of his advisers, if any, and of his assistants, shall be paid out of the fund maintained by canteen profits. The scale of this working pay shall be fixed by the prisoners' representative and approved by the camp commander. If there is no such fund, the detaining authorities shall pay these prisoners a fair working rate of pay.

This comment indicates Article 62 corresponds with the labor regime of Articles 49–57, as well as with Articles 23–33 and 35–36 on persons performing medical and spiritual duties under the Third Convention. ¶ 2941. This is a further example of helpful cross-referencing and an example of interrelationship in the Convention.

Considering the article's history, the comment notes the 1907 Hague Convention Regulations tied pay rates to "work of a similar kind done by soldiers of the national army." ¶ 2945 (citing Art. 6(3)). In this case, the Convention abandoned the historical practice of assimilation to the

Detaining Power's armed forces, which is an interesting point worth emphasizing. The comment highlights, "denying prisoners of war any pay for work they are required to do is a violation of the present article." ¶ 2950 (citing Eritrea-Ethiopia Claims Commission, Prisoners of War, Ethiopia's Claim, Partial Award, 2003, para. 131). The International Committee of the Red Cross also acknowledges abandonment of assimilation to the national population of the Detaining Power when it observes,

> the detaining authorities are not obliged to fix a rate equal to the one they have agreed upon with a private employer. Similarly, as prisoners of war should not be equated with civilian workers, the Detaining Power is free to fix its own rate of working pay and is not obliged to pay the same rates applied to civilian workers.' ¶ 2952.

It also provides a persuasive and helpful justification; namely, that prisoners of war may be paid less because their maintenance is provided for, and they continue to receive pay from the Power on which they depend. ¶ 2952. Here the updated *Commentary* usefully identifies the logic behind the text of the Convention in a seemingly principled manner.

The comment notes ambiguity in the term "fair." ¶ 2953. The evaluation that the Convention's codified rate of "one-fourth of one Swiss franc for a full working day" is not "fair" is understandable but problematic as an interpretive matter. The comment incorporates inflation rates to calculate today's equivalent is 1.25 Swiss francs. ¶ 2955. It argues, "Working pay must be paid directly by the detaining authorities in the currency of the Detaining Power." ¶ 2956. This comment further debunks the misconception that payment must be made in Swiss francs.

The comment observes, "The Convention does not state how frequently payment should be made, although the issue was raised at the 1949 Diplomatic Conference." ¶ 2956. That the updated *Commentary* resists filling this gap by interpretation or implications is an admirable concession to ambiguity.

The comment indicates the phrase "through the intermediary of the Protecting Power" was added by delegates at the 1949 Diplomatic Conference of Geneva. ¶ 2960. It relates,

> The delegates believed that 'it would be excessively difficult to notify the country of origin, as in time of war relations were

> broken off between belligerents'. However, this may not always be the case. If the Parties to the conflict have maintained direct relations, there may be no need to involve the Protecting Power. ¶ 2960 (quoting Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-A, p. 539).

Here the updated *Commentary* confronts a difficult interpretive situation. Failure by States to implement the Protecting Powers regime leaves tasks assigned to the Protecting Power, and particularly obligations to commit issues to them, in an uncertain condition. The comment does not indicate whether the International Committee of the Red Cross has ever performed this function as a substitute for a Protecting Power. The command of Article 62 is clear. Information concerning rates of pay "shall" be provided "through the intermediary of the Protecting Power . . . ." The purpose of the provision is seemingly met if the Detaining Power is in communication with the Power on which prisoners of war depend. But there may yet be value in involving an intermediary. This provision seems ripe for subsequent agreement between the States Parties to the Convention. But that agreement should be as explicit as possible.

The comment notes, "Practice since 1949 has shown that some detaining authorities have interpreted the phrase 'permanently detailed' to exclude those activities performed on a rotational basis, as well as those carried out occasionally to assist the work of fellow prisoners." ¶ 2967. This passage teases the sort of State practice that might well inform subsequent meaning. But no supporting citation is included. The passage does, however, include a helpful recommendation that Detaining Powers clarify paid permanent work and unpaid occasional or "fatigue" work in the camp.

ARTICLE 63

TRANSFER OF FUNDS

Prisoners of war shall be permitted to receive remittances of money addressed to them individually or collectively.

Every prisoner of war shall have at his disposal the credit balance of his account as provided for in the following Article, within the limits fixed by the Detaining Power, which shall make such payments as are requested. Subject to financial or monetary restrictions which the Detaining Power regards as essential, prisoners of war may also have payments made abroad. In this case payments addressed by prisoners of war to dependents shall be given priority.

In any event, and subject to the consent of the Power on which they depend, prisoners may have payments made in their own country, as follows: the Detaining Power shall send to the aforesaid Power through the Protecting Power, a notification giving all the necessary particulars concerning the prisoners of war, the beneficiaries of the payments, and the amount of the sums to be paid, expressed in the Detaining Power's currency. The said notification shall be signed by the prisoners and countersigned by the camp commander. The Detaining Power shall debit the prisoners' account by a corresponding amount; the sums thus debited shall be placed by it to the credit of the Power on which the prisoners depend.

To apply the foregoing provisions, the Detaining Power may usefully consult the Model Regulations in Annex V of the present Convention.

The comment to Article 63 identifies an interesting international legal interaction. It notes,

> In practice, States that send or receive funds pursuant to Article 63, including the Detaining Power, may have relevant obligations in this regard coming from sources of international law other than international humanitarian law, including those from sanctions regimes established by the UN Security Council under Chapter VII of the 1945 UN Charter, particularly asset freezes, against designated persons or entities. ¶ 2976.

This is an important consideration and a rare instance in which the law of war, even as *lex specialis*, would yield to another legal regime.

The comment continues, "The Detaining Power may not refuse individual money transfers, even if it has reason to believe that the resulting privileged situation of those who receive them could lead to envy or unrest among the other prisoners." ¶ 2983. This seems a faithful reading of the text and even of the context of negotiating history. Yet to disregard the clear interest and obligation of the Detaining Power to maintain order reflects disregard of a fundamental object and purpose of the Convention. In other cases, the updated *Commentary* seizes on such a purposive interpretation; yet not here.

Some mitigation of the potentially disruptive effects of Article 63 remittances is achieved by resort to Article 58. The updated *Commentary* observes, "The obligation under Article 63(1) does not conflict with the application of Article 58, which limits the amount of money that prisoners may have in their possession." ¶ 2984.

The comment provides a series of useful instructions on remittance of funds. It advises,

> When remittances are received in a currency other than that of the Detaining Power . . . in line with Articles 58(1) and 18(4), the remittances 'shall not be converted into any other currency' unless with the consent or at the request of the prisoner of war who has received them. ¶ 2986.

Additionally,

> According to Article 63(2), prisoners of war have a right to dispose of the credit balance of their accounts. The first sentence regulates payments made within the territory of the Detaining Power. The second sentence applies to payments

> made abroad, which may be restricted in accordance with financial or monetary restrictions considered essential by the Detaining Power. ¶ 2988.

Further,

> the Detaining Power may end up being compelled to purchase foreign exchange for the benefit of citizens of enemy (or neutral) countries, a requirement that would not easily be accepted. The obligation on the Detaining Power is therefore '[s]ubject to financial or monetary restrictions which [it] regards as essential.' ¶ 2991.

Finally,

> The use of the word 'essential', which means 'absolutely necessary', 'extremely important' or 'central to the nature of something', might be understood as limiting the right of the Detaining Power to prohibit payments made abroad. However, the use of the verb 'regards' leaves the Detaining Power with considerable discretion to determine which restrictions it considers essential. In practice, this exception is so broad that it could prevent all transfers of funds abroad. ¶ 2991.

Here the updated *Commentary* reconciles terms in tension within a clause of the Convention. It gives plain meaning to each and accounts for how the latter modifies the former to mitigate an absolute or unqualified meaning.

Last, the comment indicates, "The system of 'delegation of pay' provided for in Article 63(3) has not been used as such in any international armed conflict since 1949." ¶ 2995. Here is another dormant provision of the Third Convention though not an example of desuetude in that no apparent obligation has been breached by States through disuse.

ARTICLE 64

PRISONERS' ACCOUNTS

The Detaining Power shall hold an account for each prisoner of war, showing at least the following:

(1) The amounts due to the prisoner or received by him as advances of pay, as working pay or derived from any other source; the sums in the currency of the Detaining Power which were taken from him; the sums taken from him and converted at his request into the currency of the said Power.

(2) The payments made to the prisoner in cash, or in any other similar form; the payments made on his behalf and at his request; the sums transferred under Article 63, third paragraph.

The comment indicates, "Article 64 obliges the Detaining Power to hold a separate account for each prisoner of war showing at a minimum the details enumerated in subparagraphs (1) and (2)." ¶ 2997. This appropriately brief comment chiefly offers helpful illustrations of interaction with other provisions of the Convention.

ARTICLE 65

MANAGEMENT OF PRISONERS' ACCOUNTS

Every item entered in the account of a prisoner of war shall be countersigned or initialled by him, or by the prisoners, representative acting on his behalf.

Prisoners of war shall at all times be afforded reasonable facilities for consulting and obtaining copies of their accounts, which may likewise be inspected by the representatives of the Protecting Powers at the time of visits to the camp.

When prisoners of war are transferred from one camp to another, their personal accounts will follow them. In case of transfer from one Detaining Power to another, the monies which are their property and are not in the currency of the Detaining Power will follow them. They shall be given certificates for any other monies standing to the credit of their accounts.

The Parties to the conflict concerned may agree to notify to each other at specific intervals through the Protecting Power, the amount of the accounts of the prisoners of war.

Examining the means for securing accountability for funds of prisoners of war, the comment to Article 65 concludes, although time-consuming, every credit or debit to prisoner-of-war accounts must be countersigned by prisoners. ¶ 3019. The comment notes later, however, the prisoners' representative may countersign in the place of a prisoner of war. ¶ 3020. The comment also emphasizes the requirement that prisoners of war "at all times be afforded reasonable facilities for consulting and obtaining copies of their accounts." ¶ 3023. It then advises, "Accordingly, the phrase 'at all times' is to be understood widely, subject, of course, to reasonable limits, such as regular working hours." ¶ 3023. Here the updated *Commentary* mitigates the absolute character of the Convention's text. The basis for the

interpretation, other than adopting what appears reasonable, is unclear. Considering the thin basis for the comment, States may wish to consider the issue and publish views or to adjust this meaning more authoritatively through subsequent agreement.

The comment further indicates reasonableness of access may be satisfied so long as a prisoner of war's information is "up-to-date." ¶ 3024. Finally, the comment indicates Article 65(3) supplements Articles 46–48 on transfers with respect to movement of prisoner accounts. ¶ 3026.

ARTICLE 66

WINDING UP OF PRISONERS' ACCOUNTS

On the termination of captivity, through the release of a prisoner of war or his repatriation, the Detaining Power shall give him a statement, signed by an authorized officer of that Power, showing the credit balance then due to him. The Detaining Power shall also send through the Protecting Power to the government upon which the prisoner of war depends, lists giving all appropriate particulars of all prisoners of war whose captivity has been terminated by repatriation, release, escape, death or any other means, and showing the amount of their credit balances. Such lists shall be certified on each sheet by an authorized representative of the Detaining Power.

Any of the above provisions of this Article may be varied by mutual agreement between any two Parties to the conflict.

The Power on which the prisoner of war depends shall be responsible for settling with him any credit balance due to him from the Detaining Power on the termination of his captivity.

The negotiating history of Article 66 indicates, "A close majority of the delegates . . . preferred a rule to the effect that the Power on which the prisoner of war depended would be responsible for settling any credit balance due to that prisoner from the Detaining Power on the termination of his captivity." ¶ 3039. Clearly, the Convention then leaves settlement of debts to interactions between the former Detaining Power and the Power on which the former prisoners of war depended.

The comment to Article 66 indicates, "Article 66(1) regulates the procedure that the Detaining Power must follow on the termination of prisoners' captivity, so that the prisoners and the Power on which they depend have all the information they need for the prisoners to receive the balances of their accounts." ¶ 3040. This is true except, rather than being

a provision Parties "must follow," as the comment concludes, instead, Article 66(1) is more of the nature of a rare default provision of the Convention. Article 66(2) provides Parties an opportunity to conclude a special agreement negating Article 66(1). Here the updated *Commentary* might have frontloaded analysis of a succeeding provision considering its effect on the character of a preceding provision.

The comment conditions the Parties' power under Article 66(2) to conclude a special agreement in place of Article 66(1) procedures. The comment concludes prisoners of war may not be deprived of their right to information to prove their entitlement to reimbursement. ¶ 3052. Although not an explicit limit in Article 66(2), this condition better accords with other articles of the Conventions than an unfettered power under Article 66(2). A stronger comment might have identified those articles that support this interpretation of Article 66(2) as well as those that produced State practice or agreement to this effect. States may be prompted to express subsequent agreement on this point.

ARTICLE 67

ARRANGEMENTS BETWEEN PARTIES TO THE CONFLICT

Advances of pay, issued to prisoners of war in conformity with Article 60, shall be considered as made on behalf of the Power on which they depend. Such advances of pay, as well as all payments made by the said Power under Article 63, third paragraph, and Article 68, shall form the subject of arrangements between the Powers concerned, at the close of hostilities.

This awkwardly phrased article of the Third Convention essentially captures the change respecting pay to prisoners of war and reimbursements between the Detaining Power and the Power on which prisoners of war depend. Under previous instruments, a Detaining Power might withhold advances of pay out of concern it would not be reimbursed by a former adversary State. Article 67 indicates reimbursement is a separate matter from advances and is to be settled between the former belligerents after an armed conflict is concluded.

The comment concludes the phrase, "the 'close of hostilities' mentioned in Article 67 and the 'cessation of active hostilities' mentioned in Article 118 refer to the same moment." ¶ 3064. The comment does not offer support for or analysis of this conclusion. Ordinarily, a distinct meaning should be given to varied terms within treaties. States may wish to consider this question and publish their understandings.

ARTICLE 68

CLAIMS FOR COMPENSATION

Any claim by a prisoner of war for compensation in respect of any injury or other disability arising out of work shall be referred to the Power on which he depends, through the Protecting Power. In accordance with Article 54, the Detaining Power will, in all cases, provide the prisoner of war concerned with a statement showing the nature of the injury or disability, the circumstances in which it arose and particulars of medical or hospital treatment given for it. This statement will be signed by a responsible officer of the Detaining Power and the medical particulars certified by a medical officer.

Any claim by a prisoner of war for compensation in respect of personal effects, monies or valuables impounded by the Detaining Power under Article 18 and not forthcoming on his repatriation, or in respect of loss alleged to be due to the fault of the Detaining Power or any of its servants, shall likewise be referred to the Power on which he depends. Nevertheless, any such personal effects required for use by the prisoners of war whilst in captivity shall be replaced at the expense of the Detaining Power. The Detaining Power will, in all cases, provide the prisoner of war with a statement, signed by a responsible officer, showing all available information regarding the reasons why such effects, monies or valuables have not been restored to him. A copy of this statement will be forwarded to the Power on which he depends through the Central Prisoners of War Agency provided for in Article 123.

As with arrangements for final accountings of pay, the Convention refers prisoners of war to the Power on which they depend, rather than to the Detaining Power, to settle claims arising from injuries or lost property sustained during internment. Both arrangements seem premised on the assumption that prisoners of war will find dealing with their own State more practicable

and effective than dealing with a foreign State against which they formerly fought. This arrangement further confirms a general point about the law of war and does not envision or enable claims by individuals against foreign States for losses or for breaches. To implement or remedy such disputes is generally left to the international system, rather than to private enforcement.

For its part, the comment indicates settlement of reimbursement for these claims is a matter for Article 67 procedures between the former belligerents. ¶ 3070. It further indicates the 1929 Convention made injury claims subject to the domestic legal regime of the Detaining Power. ¶ 3071. Here is perhaps a further example of the 1949 Third Convention abandoning military assimilation of enemy standards.

The comment identifies a close linkage between Article 68(1) and Article 54(2) addressing occupational accidents during internment. ¶ 3079. Here again the updated *Commentary* offers helpful cross-referencing of scattered, though related, provisions of the Convention.

The comment notes,

> Based on its wording ('forthcoming on his repatriation'), Article 68(2) might seem to apply only if the prisoners are repatriated and not to other situations terminating captivity, such as if the prisoner has successfully escaped. However, Levie notes that the provisions of Articles 66(1), 68(2), 119(2) and 122(9) 'vary widely as to the types of termination of captivity to which reference is made' but should be taken 'to include all relevant cases of the termination of captivity, whether by release, repatriation, escape, death, or any other means.' ¶ 3090 (citing Howard S. Levie, Prisoners of War in International Armed Conflict, International Law Studies, Vol. 59, 1978, p. 211, n. 477).

The resolution of this difficulty seems reasonable but not otherwise a particularly principled application of ordinary practices of interpretation. Subsequent State practice seems a more principled basis on which to resolve the issue; or as the case may be, to leave the text to speak for itself. To the extent the approach of the updated *Commentary* is reasonable, it might be referred to States for endorsement or resolution.

SECTION V

RELATIONS OF PRISONERS OF WAR WITH THE EXTERIOR

A chapeau comment to Part III, Section V identifies "ensuring that prisoners of war remain connected with the outside world" as a focal point of that section. It also helpfully outlines the section's articles. ¶ 3094. The chapeau comment further emphasizes the section's reliance on outside contact as a means to inspect the condition of prisoners of war. ¶ 3094.

ARTICLE 69

NOTIFICATION OF MEASURES TAKEN

Immediately upon prisoners of war falling into its power, the Detaining Power shall inform them and the Powers on which they depend, through the Protecting Power, of the measures taken to carry out the provisions of the present Section. They shall likewise inform the parties concerned of any subsequent modifications of such measures.

The comment to Article 69 notes the 1929 Geneva Convention Relating to the Treatment of Prisoners of War obligation to publish measures in Article 35 attached "on the commencement of hostilities." ¶ 3107. The comment indicates the Article 69 obligation instead attaches when prisoners of war fall into the power of the Detaining Power. ¶ 3112. Still, the comment concludes nothing prohibits a Party from providing Article 69 notices at the commencement of hostilities instead. ¶ 3112.

The comment characterizes the obligation as "an absolute one" and insists it "exists even if the Detaining Power believes that the persons and entities referred to in the article are already aware of the measures taken." ¶ 3109. This is a highly formalist reading of the text that stands in contrast with other interpretations such as the updated *Commentary*'s mitigation of the textually absolute character of prisoners of war's access to account balances. *See* ¶ 3023.

The comment acknowledges the scope of Article 69 notice does not extend to all measures. For instance, precise procedures of censorship may be withheld for security reasons. ¶ 3111. Here, in the same comment, is a looser reading of the Convention's text. It seems informed by a principle the updated *Commentary* applies but does not explicitly acknowledge: that of Detaining Power security or the internment imperative. The updated *Commentary* frequently resorts to principles to help explain the Convention, but they are chiefly or even exclusively humanitarian as opposed to military principles. More effort to identify and acknowledge military principles explicitly would

offer a fuller understanding of the Convention (for example, security, force protection, economy of force).

ARTICLE 70

CAPTURE CARDS

Immediately upon capture, or not more than one week after arrival at a camp, even if it is a transit camp, likewise in case of sickness or transfer to hospital or another camp, every prisoner of war shall be enabled to write direct to his family, on the one hand, and to the Central Prisoners of War Agency provided for in Article 123, on the other hand, a card similar, if possible, to the model annexed to the present Convention, informing his relatives of his capture, address and state of health. The said cards shall be forwarded as rapidly as possible and may not be delayed in any manner.

Addressing the phrase "shall be enabled to write" as it appears in Article 70, the comment indicates, "there is no obligation for prisoners of war to actually fill in the cards." ¶ 3134. Later, the comment converts what is phrased by the Convention as an obligation of the Detaining Power into a right held by prisoners of war. The comment alleges, "The wording 'every prisoner of war' indicates that having the opportunity to write and send capture cards is an individual right." ¶ 3135.

The accuracy of this characterization is doubtful. For instance, the article's preparatory work does not clearly reveal any intent to create an individual right and it seems other provisions refer explicitly, if sloppily, to rights. Moreover, the significance of this provision attaining the status of an individual right rather than of an obligation owed by the Detaining Power to other States Parties is unclear. The comment asserts, "It therefore falls to the Detaining Power to inform each prisoner of this right, without discrimination; it must not wait until a prisoner requests it." ¶ 3135. It seems more accurate to say the Detaining Power has an obligation to inform each prisoner of war simply because the Convention says so at Article 69.

The comment further asserts, because Article 70 expresses an individual right, "Nor may the completion of the capture cards be used as

an incentive, for example for good behaviour or for providing information to the Detaining Power." ¶ 3135. While also true, this is not because Article 70 is an individual right but rather because the article is an obligation on the part of the Detaining Power "to enable" prisoners of war to send capture cards.

The comment indicates, "Where the Detaining Power has not already enabled prisoners of war to complete capture cards, they will be given the opportunity to fill in the cards, or their equivalents, during visits by [International Committee of the Red Cross] delegates." ¶ 3136. How this obligation developed is not clear. The comment does not explain how the International Committee of the Red Cross gains the power to implement an obligation of a Detaining Power. Nor is it clear why the International Committee of the Red Cross should assume authority to perform a function allocated by the Convention to the Detaining Power; namely, that of enabling prisoners of war to fill out cards. A citation would help to better evaluate this claim.

The comment adds, "As specified in the present article, the capture cards must contain the fact of capture, the address, and state of health of the prisoner of war." ¶ 3149. The comment notes the model capture card includes the date of capture. ¶ 3149. It seems a Detaining Power may have a legitimate interest in withholding that information. Leaving uncertainty as to the precise date of capture makes it more difficult for enemies to determine precisely what military information a prisoner of war may have compromised through interrogation. The updated *Commentary* might have mentioned this or more clearly emphasized, notwithstanding the model, only the fact of capture must be disclosed.

The comment identifies Article 70 as a provision that resorts to the term "capture" but indicates a broader meaning that equates to "falling into the hands of the adverse Party" which appears in Article 4. ¶ 3159. Here again, is an obviously functionalist reading that stands in contrast to other formalist interpretations of the Convention by the updated *Commentary*.

The comment anticipates conversion from delivery by mail to electronic transmittal but not electronic recording or collection. ¶ 3169. The comment observes, "However, the use of such technologies does not relieve the Detaining Power of the obligation to forward to the Central Tracing Agency the actual capture card filled in by each prisoner of war." ¶ 3169. The comment seems to somewhat stubbornly adhere to legacy methods of accountability. Earlier, the updated *Commentary* envisions providing "electronic devices . . . to complete the cards." ¶ 3132. An earlier comment also refers

to "digital capture cards, which may be completed electronically, provided the process is secure." ¶ 3143. Further, a comment notes, "A standard card or electronic template also facilitates rapid censorship." ¶ 3145.

ARTICLE 71

CORRESPONDENCE

Prisoners of war shall be allowed to send and receive letters and cards. If the Detaining Power deems it necessary to limit the number of letters and cards sent by each prisoner of war, the said number shall not be less than two letters and four cards monthly, exclusive of the capture cards provided for in Article 70, and conforming as closely as possible to the models annexed to the present Convention. Further limitations may be imposed only if the Protecting Power is satisfied that it would be in the interests of the prisoners of war concerned to do so owing to difficulties of translation caused by the Detaining Power's inability to find sufficient qualified linguists to carry nut the necessary censorship. If limitations must be placed on the correspondence addressed to prisoners of war, they may be ordered only by the Power on which the prisoners depend, possibly at the request of the Detaining Power. Such letters and cards must be conveyed by the most rapid method at the disposal of the Detaining Power; they may not be delayed or retained for disciplinary reasons.

Prisoners of war who have been without news for a long period, or who are unable to receive news from their next of kin or to give them news by the ordinary postal route, as well as those who are at a great distance from their homes, shall be permitted to send telegrams, the fees being charged against the prisoners of war's accounts with the Detaining Power, or paid in the currency at their disposal. They shall likewise benefit by this measure in cases of urgency.

As a general rule, the correspondence of prisoners of war shall be written in their native language. The Parties to the conflict may allow correspondence in other languages.

Sacks containing prisoner of war mail must be securely sealed and labelled so as clearly to indicate their contents, and must be addressed to offices of destination.

The comment characterizes Article 71 as imposing "an obligation on the Detaining Power to allow prisoners of war to send and receive letters and cards . . . ." ¶ 3180. To compare this characterization with that concerning capture cards is interesting. *See* ¶ 3135. That comment characterizes completion of capture cards as an individual right of prisoners of war. What supports the distinction is not clear until the following paragraph also characterizes Article 71 as an individual right. The comment asserts Article 71, "recognizes the right of prisoners of war to maintain, to a certain extent, relations with the outside world." ¶ 3181. As with the comment concerning capture cards, the basis for characterizing correspondence as a right is not clear, nor is the practical significance of this treatment obligation constituting a right.

The comment further characterizes Article 71 as "a statement of principle." ¶ 3181. Here the updated *Commentary* identifies a further principle. However, its separate significance as a principle rather than merely as a rule or conduct obligation is not clear.

The comment notes, "The only restrictions that may be placed on this right are those that are specifically permitted under the Convention." ¶ 3181. This seems a mischaracterization or at least a misreading of the article. Article 71 enumerates available restrictions such as limiting the volume of correspondence. But it also refers open-endedly to "further limitations" that may be imposed. A later passage refers generically, rather than as alleged by the comment's characterization of "specifically permitted" restrictions, to "limitations."

The comment adopts a nonexclusive reading of the article. That is, the comment observes, "Although Article 71 refers to 'letters and cards', those terms do not exclude correspondence by other means." ¶ 3186. The comment might more clearly indicate whether availability of other means permits the Detaining Power to decline to facilitate correspondence by letter and card. On one hand, other means might satisfy the object and purpose of Article 71. On the other hand, there may be reasons physical means of correspondence must be accommodated.

ARTICLE 72

RELIEF SHIPMENTS: I. GENERAL PRINCIPLES

Prisoners of war shall be allowed to receive by post or by any other means individual parcels or collective shipments containing, in particular, foodstuffs, clothing, medical supplies and articles of a religious, educational or recreational character which may meet their needs, including books, devotional articles, scientific equipment, examination papers, musical instruments, sports outfits and materials allowing prisoners of war to pursue their studies or their cultural activities.

Such shipments shall in no way free the Detaining Power from the obligations imposed upon it by virtue of the present Convention.

The only limits which may be placed on these shipments shall be those proposed by the Protecting Power in the interest of the prisoners themselves, or by the International Committee of the Red Cross or any other organization giving assistance to the prisoners, in respect of their own shipments only, on account of exceptional strain on transport or communications.

The conditions for the sending of individual parcels and collective relief shall, if necessary, be the subject of special agreements between the Powers concerned, which may in no case delay the receipt by the prisoners of relief supplies. Books may not be included in parcels of clothing and foodstuffs. Medical supplies shall, as a rule, be sent in collective parcels.

Interestingly, Article 72 includes in its unofficial title—assigned by the Swiss government for purposes of reference rather than adopted by States at the 1949 Diplomatic Conference of Geneva—the phrase "General Principles." The practical significance or effect of this label is not entirely clear other than to characterize Article 72 as introductory in nature. In that

vein, the comment identifies a relationship between Articles 72 through 76 respecting relief shipments and other provisions on correspondence, activities, and exercise. ¶ 3224. The former are distinct obligations but facilitate observance of the latter. ¶ 3224.

The comment characterizes receipt of post and parcels as "an entitlement." ¶ 3229. It also observes, "it is the prisoners' right to receive parcels addressed to them." ¶ 3230. These characterizations are problematic, as rights usually imply individual enforcement opportunities. A better characterization would emphasize them as obligations of the Detaining Power. The article itself does not refer explicitly to rights, although other articles of the Convention which resort to that term do.

The comment offers a helpful cross-reference to paragraph 3 limits on restrictions on prisoner of war parcels as well as to Article 76 respecting inspections by the Detaining Power. ¶ 3230.

The comment then draws attention to the terms, "individual parcels" and "collective shipments." ¶ 3231. It reminds readers Article 73 regulates the latter rather than the former. ¶ 3231. Here is a helpful sorting or framework of understanding for the Convention not entirely obvious at first reading.

The comment also identifies a concession to military operational considerations, stating, "Should military operations prevent transport by either of the means referred to in Article 72(1), Article 75 foresees other options." ¶ 3232. It suggests a practice of requiring prisoners of war to sign for parcels to prove compliance by the Detaining Power. ¶ 3233. This seems a helpful suggestion for practice. Continuing, the comment observes, "In practice, the activities of the Protecting Power, the [International Committee of the Red Cross] or an organization acting on the basis of Articles 9 or 125 may also include ensuring that each relief parcel reaches its intended beneficiary." ¶ 3233. The basis for this authority is not clear. The comment does not indicate whether this authority derives from the general role of a Protecting Power in ensuring compliance or from some other source. It would be helpful in cases like this to include citations to authoritative sources or interpretive methods. The citation refers to special agreements between belligerents in the First World War and two military legal manuals, however, to bolster the interpretation's authority.

The comment helpfully suggests Detaining Powers publish a list of the articles prohibited from shipments. ¶ 3238.

In another formalist reading of the Convention, the comment insists relief shipments cannot reduce the obligations of the Detaining Power to supply articles required by the Convention (arts. 15, 28, 30, 34, 38).

Relief parcels, according the updated *Commentary* "may only be seen as complementary . . . ." ¶ 3239. This interpretation is somewhat curious, particularly considering the scarcity of essential items that accompanies war. By implication, the comment converts the obligations of the Detaining Power into obligations of conduct rather than result. The comment provides no citations to State practice which, if collected, might have been both persuasive and useful.

Addressing permissive restrictions on relief parcels, the comment dutifully relates only Protecting Powers and humanitarian organizations may limit shipments. ¶ 3241. This is certainly a plain reading of Article 72(3). But Article 72(4) permits the Parties to form special agreements between themselves, including restrictions. ¶ 3245. The comment notes Article 72(4) accommodates need for conditions on parcels "if necessary." ¶ 3246. But it emphasizes agreement with the Power on which prisoners of war depend is required. ¶ 3247. Although the comment admits as much, this concession by the Third Convention to military necessity is buried four paragraphs later, permitting a quick consultation to form the wrong impression. A fuller synopsis at the beginning of the section would have been preferable. In defense of the comment, it must be conceded the Convention itself buries the lede on this issue.

Last, the comment provides a helpful explanation for the prohibition on including books in shipments of food or medicine. ¶ 3251. Books need not be examined in the presence of prisoners of war under Article 76. Prohibiting books in shipments of food and medicine prevents the latter from being slowed by censoring.

ARTICLE 73

RELIEF SHIPTMENTS: II. COLLECTIVE RELIEF

In the absence of special agreements between the Powers concerned on the conditions for the receipt and distribution of collective relief shipments, the rules and regulations concerning collective shipments, which are annexed to the present Convention, shall be applied.

The special agreements referred to above shall in no case restrict the right of prisoners' representatives to take possession of collective relief shipments intended for prisoners of war, to proceed to their distribution or to dispose of them in the interest of the prisoners.

Nor shall such agreements restrict the right of representatives of the Protecting Power, the International Committee of the Red Cross or any other organization giving assistance to prisoners of war and responsible for the forwarding of collective shipments, to supervise their distribution to the recipients.

Article 73(1) refers to the Third Convention's annexed agreement for conditions on relief shipments. *See* Annex III. The annexed agreement is itself binding if Parties to a conflict do not conclude a supplemental agreement otherwise and is thus worthy of special attention. In this respect, the annex is a sort of default agreement on the issue of relief shipments for prisoners of war. Articles 73(2) and (3) limit Parties' power to restrict distributions among prisoners of war and recognize the opportunity of a Protecting Power or other qualified organization to supervise distribution. Meanwhile, the Article 73(3) reference to "any other organization giving assistance to prisoners of war and responsible for forwarding of collective shipments" is eye-catchingly open-ended.

A cross-reference to Article 76 by the comment helpfully notes an intersection with respect to the Detaining Power's inspections of

shipments. ¶ 3253. The comment also notes the exceptional status of Annex III to the Convention as an automatic or default agreement rather than a model agreement for consideration by Parties. ¶ 3258. Whether Annex III suits the anticipated purposes and conditions of an armed conflict is a helpful prompt for States to consider in advance. Additionally, the comment identifies "principles of Annex III." ¶ 3259. Here the updated *Commentary* proffers still more principles for States to consider. These principles are likely unfamiliar even to those who know the Third Convention well.

The comment helpfully compiles considerations for special agreements intended to displace Annex III, including Article 6 and Article 73(2) and (3). ¶ 3260. It also helpfully suggests requirements for signatures on receipts of parcels as a matter to be included in special agreements on collective relief shipments, which is not addressed by the Convention. ¶ 3262. The comment notes, "The concept of 'any other organization giving assistance to the prisoners of war' includes, but is not limited to, organizations covered by Article 125." ¶ 3269. This suggests an extraordinarily broad scope of organizations that need only offer assistance to gain access to the camp and to involve themselves in distributions. The comment does not make clear the extent to which State practice has preserved or curtailed the textual breadth of this provision. States may wish to consider and indicate whether the passage actually operates as indiscriminately as both the text and the updated *Commentary* suggest.

As to implementation of supervision, the comment offers room for the Detaining Power to negotiate with the entity providing assistance. ¶ 3270. Here is an encouraging concession to security and operational necessity. But the legal basis for the concession is not clear.

ARTICLE 74

RELIEF SHIPMENTS: III. EXEMPTION FROM CHARGES AND DUTIES

All relief shipments for prisoners of war shall be exempt from import, customs and other dues.

Correspondence, relief shipments and authorized remittances of money addressed to prisoners of war or despatched by them through the post office, either direct or through the Information Bureaux provided for in Article 122 and the Central Prisoners of War Agency provided for in Article 123, shall be exempt from any postal dues, both in the countries of origin and destination, and in intermediate countries.

If relief shipments intended for prisoners of war cannot be sent through the post office by reason of weight or for any other cause, the cost of transportation shall be borne by the Detaining Power in all the territories under its control. The other Powers party to the Convention shall bear the cost of transport in their respective territories.

In the absence of special agreements between the Parties concerned, the costs connected with transport of such shipments, other than costs covered by the above exemption, shall be charged to the senders.

The High Contracting Parties shall endeavour to reduce, so far as possible, the rates charged for telegrams sent by prisoners of war, or addressed to them.

The comment identifies a reasonable purpose of the article, namely "to ensure financial constraints are no impediment" to correspondence. ¶ 3171. The comment helpfully notes the article underpins Articles 63, 71, and 72 of the Convention. Returning to the article's purported purpose, the comment observes, "Regardless of how a State labels a given tax, the wording 'and

other dues' (nowadays, the term 'duties' is more commonly used) indicates that this is to be interpreted widely and that no tax whatsoever may be levied." ¶ 3278. The comment in this instance updates and broadens the terminology of the Convention to better vindicate the purpose of an article.

The comment identifies State practice distinguishing "gift parcels" subject to duties from immune "relief shipments." The comment alleges the practice is based on an incorrect understanding. ¶ 3280. However, no source or details accompany the comment. The comment may be drawn from the International Committee of the Red Cross archives but still subject to confidentiality; but the comment does not indicate so.

The comment helpfully highlights a passage of the Universal Postal Convention specifically drafted to account for Article 74. ¶ 3284. Here is a useful reference outside the law of war with explicit evidence of agreement by States Parties to the Universal Postal Convention to address conduct during armed conflict. The comment identifies an apparent conflict between the 1949 Third Convention and the Universal Postal Convention. The latter permits "air surcharges" at Article 16(2)(1). The comment indicates military legal manuals have incorporated that provision into their understanding of the Third Geneva Convention, Article 74. ¶ 3287 (citing Germany, Military Manual, 2013, para. 838, and United States, Law of War Manual, 2016, pp. 595–596, para. 9.20.4.3.). Whether these select citations to practice are sufficient and appropriate subsequent practice and agreement to alter the meaning of the Third Convention is not immediately clear.

A stronger effort to harmonize and interpret the article respecting allocations of costs would be helpful. The comment indicates a Detaining Power is responsible for the costs of transport when postal services are not available. ¶ 3291. Moreover, it emphasizes those costs shall be borne "regardless of the mode of transport used . . . ." ¶ 3291. Yet, as the subsequent paragraph makes clear, that obligation applies only with respect to transport within the territory of the Detaining Power. ¶ 3292. To avoid errors by partial consultations, the updated *Commentary* should synthesize these internal rules when possible.

The comment identifies an inconspicuous, perhaps unappreciated implication for States not Party to an armed conflict, noting they are responsible for transport costs of relief shipments across their territories. ¶ 3293. A compilation of such provisions applicable to States not Party to a conflict might be useful. Such work would better vindicate the updated *Commentary*'s ambition to be a resource for practitioners.

The comment alerts readers to the International Telecommunication

Union regime relative to prisoner of war communications, though the identified provisions have been removed. ¶¶ 3303–05. This lengthy passage is perhaps evidence of a desire for academic completeness rather than practical utility.

Last, the comment identifies, with respect to provisions on telegrams, "no solid legal basis exists to transpose the obligation of this provision, applicable to the mode of communication known and deemed relevant in 1949, to other means of communication." ¶ 3306. This is odd considering the updated *Commentary*'s willingness to update the Convention in other respects; for instance, with respect to gender. As the updated *Commentary* indicates, many States no longer maintain capacity to support telegrams.

ARTICLE 75

SPECIAL MEANS OF TRANSPORT

Should military operations prevent the Powers concerned from fulfilling their obligation to assure the transport of the shipments referred to in Articles 70, 71, 72 and 77, the Protecting Powers concerned, the International Committee of the Red Cross or any other organization duly approved by the Parties to the conflict may undertake to ensure the conveyance of such shipments by suitable means (railway wagons, motor vehicles, vessels or aircraft, etc.). For this purpose, the High Contracting Parties shall endeavour to supply them with such transport and to allow its circulation, especially by granting the necessary safe-conducts.

Such transport may also be used to convey:

(a) correspondence, lists and reports exchanged between the Central Information Agency referred to in Article 123 and the National Bureaux referred to in Article 122;

(b) correspondence and reports relating to prisoners of war which the Protecting Powers, the International Committee of the Red Cross or any other body assisting the prisoners, exchange either with their own delegates or with the Parties to the conflict.

These provisions in no way detract from the right of any Party to the conflict to arrange other means of transport, if it should so prefer, nor preclude the granting of safe-conducts, under mutually agreed conditions, to such means of transport.

In the absence of special agreements, the costs occasioned by the use of such means of transport shall be borne proportionally by the Parties to the conflict whose nationals are benefited thereby.

Article 75 explicitly anticipates military operational conditions may prevent a Party from fulfilling its obligations under the Third Convention. Article 75 is interesting and perhaps underappreciated in that regard. It confirms the suspicions of some that law of war obligations may not always prove feasible. As much as the law of war is couched and even marketed as considering military operational needs (military necessity), even the law itself, in a universally ratified treaty, concedes there will be times it cannot be followed. The implications of Article 75 are potentially enormous. The article raises the possibility that simple breaches are part of the calculus of the law of war. At some level, the article may suggest the obligations it refers to are aspirational, something States will ideally strive for but cannot reasonably be expected to fully comply with in all conditions.

Article 75 provides for this circumstance by permitting private groups, though only the International Committee of the Red Cross and those "duly approved by the Parties," to act in case of a breach of Articles 70, 71, 72, and 77. To be clear, according to the comment, Article 75 does not seem to operate as a legal excuse, defense, or circumstance precluding wrongfulness. The comment does not address this issue. This may be an instance in which the updated *Commentary* has missed the larger significance of an article of the Convention.

Article 75 secured considerable attention from Dr. Jean Pictet's 1960 *Commentary* to the Third Convention. He observes the term "Powers concerned" includes both Parties to the conflict and neutral States required to facilitate deliveries." p. 370. He also notes Article 75 only applies "if military operations prevent [Parties] from carrying [their obligations] out." p. 370. Pictet styles Article 75 as reflecting a circumstance in which a Party "may be released from this obligation." p. 370. This passage may suggest Article 75 operates as a preclusion of wrongfulness. He also observes "military operations" must be understood broadly. He surmises the term includes indirect effects of armed conflict and effects on neutral States. Dr. Pictet concludes necessity "need not be absolute." p. 371. He notes the requirement of approval but does not identify the conditions on which approval may be withheld. p. 371. Presumably, such prerogative is unfettered by any conditions not mentioned in the article, as Pictet identifies none. He also notes, in that regard, "it is conceivable that military necessity might oblige a belligerent to refuse permission of this kind, provided that the refusal is temporary and for the shortest time possible." p. 372.

For its part, the updated *Commentary* confirms a similarly broad

understanding of the phrase "Powers concerned" that includes Parties through whose territory correspondence and parcels move. ¶ 3314. The comment to Article 75 notes the term "military operations" also appears in Articles 6(2) and (3) of the Fourth Convention; in that case, addressing the end of armed conflict. The comment suggests a contextual meaning that includes events that prevent Powers from being able to transport letters and other items. ¶ 3315. This point is perhaps not phrased as broadly as Dr. Pictet's 1960 *Commentary*.

The new comment emphasizes three distinct entities may step in for Powers prevented from their duties by military operations: Protecting Powers; the International Committee of the Red Cross; and "any other organization duly approved by the Parties to the conflict." ¶ 3316. The comment notes the latter need not be "an impartial humanitarian organization" in the sense of Article 9 of the Convention.

The comment suggests, "the Powers concerned retain their discretion to assess whether to accept the services of such an organization. Thus, not every organization assisting prisoners of war will necessarily be approved to undertake the types of transports covered by Article 75." ¶ 3316. This comment seems to retain the discretion of States. It provides an interesting contrast, however, to the updated *Commentary*'s view on the question of States' discretion concerning offers of humanitarian relief in the comments on common Article 3 of the Third Convention. *See* ¶¶ 871–878.

It bears mentioning the Convention switches in Article 75 from the term "Powers concerned" to "Parties to the conflict." It seems in this respect approval of delivery substitutes must come from the warring Parties rather than from other States under the obligation to deliver parcels and other items.

The comment maintains Protecting Powers and the International Committee of the Red Cross do not require approval of the Parties as a formality but do seek approval "in practice." ¶ 3317. This is a plain reading of the Convention. Moreover, the reading sits in contrast to Fourth Convention offers of relief as well as 1977 Additional Protocol I provisions concerning activities of humanitarian organizations. *See* 1949 Fourth Geneva Convention, Art. 23; 1977 Additional Protocol I, Art. 70.

The comment emphasizes the obligation to allow circulation of transports is one to "endeavour" to fulfill rather than an absolute obligation. ¶ 3325. In a further concession it observes, "in practice, considerations pertaining to the ongoing military operations would be a legitimate reason to temporarily restrict the movements of the

transports." It leaves the determination to "good faith." ¶ 3325. Here is an admirable concession to operational realities. To commit the issue to the Parties' good faith rather than to contort the provision into a contrived obligation is also a wise choice.

The comment indicates Article 75(3) clarifies entrusting special transport to the three mentioned organizations is not obligatory. It reminds Article 75(1) permits Powers to organize alternative transport among themselves. ¶ 3328. The comment then identifies Article 75(4) as a "guiding principle" in light of its sparse details. Actual implementation, according to the comment, likely requires a special agreement between the Parties to the conflict. ¶ 3331. The comment also indicates "Despite use of the word 'shall,' the Protecting Powers, the International Committee of the Red Cross or any other duly approved organization may also decide to perform these services without recovering their expenses." ¶ 3332.

Overall, it must be noted the comment to Article 75 stands out as particularly thin on examples of State practice and implementation.

ARTICLE 76

CENSORSHIP AND EXAMINATION

The censoring of correspondence addressed to prisoners of war or despatched by them shall be done as quickly as possible. Mail shall be censored only by the despatching State and the receiving State, and once only by each.

The examination of consignments intended for prisoners of war shall not be carried out under conditions that will expose the goods contained in them to deterioration; except in the case of written or printed matter, it shall be done in the presence of the addressee, or of a fellow-prisoner duly delegated by him. The delivery to prisoners of individual or collective consignments shall not be delayed under the pretext of difficulties of censorship.

Any prohibition of correspondence ordered by Parties to the conflict, either for military or political reasons, shall be only temporary and its duration shall be as short as possible.

Article 76(3) seems to be a provision, like Article 75 of the Convention, that anticipates States may not be "for military or political reasons" able to meet their obligations; in this case, those related to delivering correspondence to prisoners of war. It appears to operate as a condition on the obligation of correspondence in Article 71. Alternatively, although not found in Article 71 itself, it may be understood to operate as a sort of internal circumstance precluding wrongfulness.

The comment characterizes Article 76 as a balance between the interest of prisoners of war in correspondence and consignments and the Parties' interest in the control of information. ¶¶ 3335–3336. The comment identifies "good faith" as a limit on the extent and conduct of censorship. ¶ 3341. This is an abstract but wise approach. It would be tempting to generate further rules or limits but essentially good faith governs.

The comment notes correspondence to and from prisoners of war is generally subject to censorship. But it identifies complexities with respect to legal documents dealt with in comments to Article 77 and it extends censorship to modern means of communication. ¶ 3343.

The comment indicates delay is a common aspect of correspondence involving prisoners of war. It relates International Committee of the Red Cross delegates have often requested speeding of such dispatches. ¶ 3345. The comment cites UN Security Council, Prisoners of war in Iran and Iraq: The report of a mission dispatched by the Secretary-General, January 1985, UN Doc. S/16962, 22 February 1985, paras 147–148. The citation seems a positive identification of practice. But no source is provided with respect to delegates' activities.

The comment observes, "The standard of 'as quickly as possible' is a relative one." It concedes multiple factors influence the time required to deliver correspondence. ¶ 3346. The comment initially avoids an arbitrary timeline but then indicates, "[International Committee of the Red Cross] experience suggests that censorship should normally not exceed a period of one month." ¶ 3346. Although perhaps well-intentioned, the estimate is probably unnecessary and unhelpful.

The comment helpfully notes practice when it observes, "Some States do not allow certain types of information to be included in correspondence, such as 'numbers, ciphers, codes, music symbols, shorthand, marks, or signs other than those used for normal punctuation.'" ¶ 3349 (citing United States, Army Regulation 190-8). The comment also recommends Detaining Powers publish in advance prohibited items in consignments. ¶ 3358. Finally, the comment usefully notes, although States through which prisoner-of-war mail transits are prohibited from censoring correspondence, they are not prohibited by Article 76(2) from inspecting consignments. ¶ 3362.

ARTICLE 77

PREPARATION, EXECUTION AND TRANSMISSION OF LEGAL DOCUMENTS

The Detaining Powers shall provide all facilities for the transmission, through the Protecting Power or the Central Prisoners of War Agency provided for in Article 123, of instruments, papers or documents intended for prisoners of war or despatched by them, especially powers of attorney and wills.

In all cases they shall facilitate the preparation and execution of such documents on behalf of prisoners of war; in particular, they shall allow them to consult a lawyer and shall take what measures are necessary for the authentication of their signatures.

This comment emphasizes Article 77(1) concerns transmission of legal papers, which is a simple observation but a helpful navigational aid for a source as complex as the Third Convention. The comment also recites a practice of permitting prisoners of war to provide papers to International Committee of the Red Cross delegates. ¶ 3376. The comment provides no citation, however, to State practice or otherwise to support the practice as an obligation under Article 77.

The comment concludes censorship of legal documents is not prohibited. But it advises an expert legal professional be involved subject to confidentiality obligations. ¶ 3377. This is a sound conclusion and recommendation as phrased in advisory terms.

In a tidy example of interpretation, the comment reads the phrase "instruments, papers or documents" as involving *legal* papers rather than general documents. In this respect, the comment resorts to context, preparatory work, and a survey of State practice. ¶ 3378. The comment also emphasizes Article 77(2) relates to "preparation and execution" of documents described in Article 77(1). ¶ 3385. This is another helpful navigational aid to the Convention.

Discussing prisoners' access to lawyers to prepare papers, the comment

concludes either the lawyer must be granted access to the camp or the prisoner of war must be permitted to travel outside the camp. ¶ 3391. The comment seems to neglect the possibility of remote conferral. This option seems particularly appropriate given the likelihood that legal expertise in the preparation of documents to have effect in the territory of the Power on which the prisoner depends will be found in that territory.

SECTION VI

RELATIONS BETWEEN PRISONERS OF WAR RESPECTING THE CONDITIONS OF CAPTIVITY

The chapeau comment to Part III, Section VI observes,

> The principle of assimilation operates as the starting point for determining the conditions or the standards of treatment to be accorded to prisoners of war. It does not operate in a vacuum but in conjunction with the minimum standards and safeguards spelled out in the rest of the Convention. Several provisions of the Convention expressly incorporate an upward exemption to the principle of assimilation, in that they provide for certain standards for prisoners of war, irrespective of whether or not these are applicable to members of the Detaining Power's armed forces. ¶ 3403.

The chapeau comment identifies in Section VI a further principle in the form of "legality," identified with respect to Article 87. ¶ 3409.

CHAPTER I:

COMPLAINTS OF PRISONERS OF WAR AND THE AUTHORITIES

ARTICLE 78

COMPLAINTS AND REQUESTS FROM PRISONERS

Prisoners of war shall have the right to make known to the military authorities in whose power they are, their requests regarding the conditions of captivity to which they are subjected.

They shall also have the unrestricted right to apply to the representatives of the Protecting Powers either through their prisoners' representative or, if they consider it necessary, direct, in order to draw their attention to any points on which they may have complaints to make regarding their conditions of captivity.

These requests and complaints shall not be limited nor considered to be a part of the correspondence quota referred to in Article 71. They must be transmitted immediately. Even if they are recognized to be unfounded, they may not give rise to any punishment.

Prisoners' representatives may send periodic reports on the situation in the camps and the needs of the prisoners of war to the representatives of the Protecting Powers.

This comment clarifies the term "requests," as it appears in Article 78(1), refers to communications to camp authorities, whereas "complaints" refer to matters submitted to a Protecting Power. The comment adds, however, no exhaustion requirement attaches with respect to the latter. ¶ 3422. That is, prisoners of war need not first submit a request to camp authorities prior to submitting a complaint to a Protecting Power.

In a textual sense, the comment correctly identifies a "right" of prisoners of war to make requests to camp authorities. ¶ 3423. Here is an unfortunate slip by the drafters of the Convention. The updated *Commentary* cannot be faulted here for referring to a right held by prisoners of war. The "right" of request is, however, unlike a classic right as understood in international law

and would perhaps have been better expressed as an obligation on the part of the Detaining Power to permit requests.

The comment indicates a prisoner of war "may prefer to make the request anonymously." ¶ 3424. Whether the comment intends to indicate Article 78 guarantees a right to make requests anonymously is not entirely clear. The comment may be read as a suggestion that a Detaining Power may consider these requests. If the former, that view is certainly not clear from the text or any citation of support. Moreover, this is certainly the sort of matter States might develop through subsequent agreement, but no evidence of such development is available. This question may be a matter to propose to States for consideration and comment.

Although Article 78(2) refers to an "unrestricted" right to submit complaints, the comment recognizes the legitimacy of balancing that right against security requirements. ¶ 3436. Here is a further example of a nonliteral reading of the text. For instance, the Detaining Power need not permit complaints that are attempts to communicate matters prejudicial to security to the outside.

CHAPTER II:

PRISONERS OF WAR REPRESENTATIVES

General Comment on Chapter II

Though buried in his comment to Article 79, Dr. Pictet's 1960 *Commentary to the Third Geneva Convention* includes a general comment on Chapter II. His work ascribes a fundamental nature to the rights of request and complaint. He connects these prisoner-of-war rights to a prisoner-of-war corollary interest in acquiring information about their circumstances and fate. p. 381–82. Despite their allegedly fundamental nature and customary status, Dr. Pictet concedes pre-1949 Third Convention practice often failed in this respect. p. 382. He indicates "the majority of written complaints submitted by prisoners of war never reached their destination." p. 382.

The updated *Commentary* offers no general comment on Part III, Section VI, Chapter II.

ARTICLE 79

ELECTION OF PRISONERS' REPRESENTATIVES

In all places where there are prisoners of war, except in those where there are officers, the prisoners shall freely elect by secret ballot, every six months, and also in case of vacancies, prisoners' representatives entrusted with representing them before the military authorities, the Protecting Powers, the International Committee of the Red Cross and any other organization which may assist them. These prisoners' representatives shall be eligible for re-election.

In camps for officers and persons of equivalent status or in mixed camps, the senior officer among the prisoners of war shall be recognized as the camp prisoners' representative. In camps for officers, he shall be assisted by one or more advisers chosen by the officers; in mixed camps, his assistants shall be chosen from among the prisoners of war who are not officers and shall be elected by them.

Officer prisoners of war of the same nationality shall be stationed in labour camps for prisoners of war, for the purpose of carrying out the camp administration duties for which the prisoners of war are responsible. These officers may be elected as prisoners' representatives under the first paragraph of this Article. In such a case the assistants to the prisoners' representatives shall be chosen from among those prisoners of war who are not officers. Every representative elected must be approved by the Detaining Power before he has the right to commence his duties. Where the Detaining Power refuses to approve a prisoner of war elected by his fellow prisoners of war, it must inform the Protecting Power of the reason for such refusal.

In all cases the prisoners' representative must have the same nationality, language and customs as the prisoners of war whom he represents. Thus, prisoners of war distributed in different sections of a camp, according to their nationality, language or customs,

shall have for each section their own prisoners' representative, in accordance with the foregoing paragraphs.

Article 79, paragraph 1 requires elections for prisoners' representatives and provides elected representatives may represent their constituents with external organizations. The article refers in that respect to the Protecting Powers, the International Committee of the Red Cross, and to "any other organization which may assist." It seems this open-ended reference calls for interpretation unless the same representative may be required to represent all organizations. Even then, whether the representative must be permitted to interact with *any* such organization is unclear. It seems a Detaining Power may exclude organizations deemed harmful to its security interests or to its ability to meet its obligations under the Convention. The comment to Article 79 does not address this question. ¶ 3467. This may imply a view that a single representative which serves for the purposes of all Article 79 representations is sufficient to meet the obligation. Although, perhaps the comment indicates the article addresses representatives more so than the organizations with which the Detaining Power must permit them to meet.

The comment offers a helpful description of select State doctrine permitting women's representatives. ¶ 3468. This is a sound approach that makes military doctrine available without overreaching to conclude an obligation of results, though this overreach is tempting from a humanitarian perspective. The comment also helpfully explains distinctions between officer representatives' "advisers" and prisoners' representatives' "assistants." ¶¶ 3473–75.

Finally, the comment indicates Detaining Power approval only applies to elected prisoners' representatives. It does not apply to officer representatives. ¶ 3486. This understanding is textually sound in that the Convention only requires approval of "elected" representatives at Article 79(4).

ARTICLE 80

DUTIES OF PRISONERS' REPRESENTATIVES

Prisoners' representatives shall further the physical, spiritual and intellectual well-being of prisoners of war.

In particular, where the prisoners decide to organize amongst themselves a system of mutual assistance, this organization will be within the province of the prisoners' representative, in addition to the special duties entrusted to him by other provisions of the present Convention.

Prisoners' representatives shall not be held responsible, simply by reason of their duties, for any offences committed by prisoners of war.

The comment to Article 80 helpfully notes overlap between the Detaining Power's Article 38 obligation to "encourage the practice of intellectual, educational, and recreational pursuits, sports and games . . ." and the prisoners' representatives' duty to "further the physical, spiritual and intellectual well-being of prisoners of war." It concludes representatives are not responsible for well-being but rather must "further" that state. ¶ 3502. This is a helpful interpretation. The "further" distinction may have been overemphasized in that the Detaining Power's obligation is to "encourage," which seems an obligation of conduct rather than of result. But the comment soundly distinguishes the Detaining Power's obligation to provide for maintenance of health at Article 15.

The comment also includes a practically helpful collection of duties relevant to representatives' activity with cross-references to other articles of the Convention. ¶¶ 3507–3510.

The Article's reference to "mutual assistance" is likely a warranted elaboration. The comment cross-references the 1929 Convention's Article 43(3). ¶ 3511. However, little meaning is offered for this term, or the duties associated with it. A survey of State practice concerning Article 80 would have been useful.

ARTICLE 81

PREROGATIVES OF PRISONERS' REPRESENTATIVES

Prisoners' representatives shall not be required to perform any other work, if the accomplishment of their duties is thereby made more difficult.

Prisoners' representatives may appoint from amongst the prisoners such assistants as they may require. All material facilities shall be granted them, particularly a certain freedom of movement necessary for the accomplishment of their duties (inspection of labour detachments, receipt of supplies, etc.).

Prisoners' representatives shall be permitted to visit premises where prisoners of war are detained, and every prisoner of war shall have the right to consult freely his prisoners' representative.

All facilities shall likewise be accorded to the prisoners, representatives for communication by post and telegraph with the detaining authorities, the Protecting Powers, the International Committee of the Red Cross and their delegates, the Mixed Medical Commissions and with the bodies which give assistance to prisoners of war. Prisoners' representatives of labour detachments shall enjoy the same facilities for communication with the prisoners' representatives of the principal camp. Such communications shall not be restricted, nor considered as forming a part of the quota mentioned in Article 71.

Prisoners' representatives who are transferred shall be allowed a reasonable time to acquaint their successors with current affairs.

In case of dismissal, the reasons therefor shall be communicated to the Protecting Power.

The comment to Article 81 offers a helpful observation that while the article's limit on assigning labor to prisoners' representatives does not

extend to senior officers serving in that capacity, Article 49 of the Third Convention effects the same limit by prohibiting assignments of labor to officers generally. ¶ 3519. The comment also makes a helpful connection in this respect to the Article 79(3) administrative duties of officers, which would detract from obligations of representation. ¶ 3520.

The comment extends shielding from labor assignments to assistants chosen by prisoners' representatives. ¶ 3526. The requirement is not at all clear from the text, but support is offered in a citation to two States' military detention doctrines. Other States may wish to consider and publicize views on this question.

The comment suggests a course of action for removing a representative, which the Third Convention does not address. A reasonable balance is couched in terms careful not to take liberties with the text. ¶ 3554. The comment also indicates removal of a representative does not seem possible for officers. ¶ 3555. The comment seems an effort to bring an issue to the attention of States. It might have been done more explicitly, particularly if experience implementing the Convention or matter from the archives of the International Committee of the Red Cross brought the issue into relief.

CHAPTER III:

PENAL AND DISCIPLINARY SANCTIONS

I. General Provisions

ARTICLE 82

APPLICABLE LEGISLATION

A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against such laws, regulations or orders. However, no proceedings or punishments contrary to the provisions of this Chapter shall be allowed.

If any law, regulation or order of the Detaining Power shall declare acts committed by a prisoner of war to be punishable, whereas the same acts would not be punishable if committed by a member of the forces of the Detaining Power, such acts shall entail disciplinary punishments only.

The comment to Article 82 identifies a "basic principle" that applies laws of the Detaining Power's armed forces to prisoners of war. ¶ 3556. Here the updated *Commentary* identifies a further principle to consider. Although the alleged "basic principle" sounds much like assimilation, the next comment implies the present comment intends to identify "applicability of laws . . ." as a distinct principle. Still, the next comment identifies the article as an example of the "principle of assimilation." ¶ 3557. However, it soon clarifies, "The principle of assimilation therefore serves to identify the starting point when determining the standards of treatment that prisoners of war are to be accorded." ¶ 3558. The comment notes assimilation with respect to laws and discipline was included in the 1899 and 1907 Hague Regulations. ¶ 3559.

C. Paragraph 1: The principle of assimilation

The comment acknowledges the difficulty and unreasonableness of expecting a Detaining Power to apply the penal regime of the Power on which prisoners of war depend; hence, the Convention directs application

of the laws of the Detaining Power itself. ¶ 3564. The comment asserts, "This principle permeates the Third Convention as a whole, and the present chapter in particular." ¶ 3565. This is, of course, an overstatement and in many respects misleading. As noted previously, the Convention frequently abandons assimilation in favor of specialized regimes of treatment. The Convention also assimilates prisoners of war into legal regimes other than those applicable to the Detaining Power's armed forces.

The comment observes the logic of assimilation—that prisoners are military and therefore military penal provisions are appropriate—is strained with respect to civilian prisoners of war identified in Third Convention Articles 4A(4) and (5). ¶ 3567. In this respect, the comment wisely concedes ambiguity, concluding, "International law at present contains more specific rules on and guarantees for civilian persons, and it is appropriate to question whether there is a continued justification to apply the principle of assimilation to civilian prisoners of war. This matter is unresolved at present, as there is not sufficient State practice in this area." ¶ 3567. This approach avoids the temptation to fill gaps or import standards, although because the Convention seems quite clear on this point, the issue may be somewhat contrived or overwrought.

The comment helpfully cross-references Article 85 respecting prosecution of offenses prior to capture. ¶ 3574. It also reminds readers the principle of assimilation is qualified by minimal standards set out in the chapter and helpfully compiles those standards. ¶ 3576. Last, the comment explains the interaction of related articles, observing, "Article 82(2) therefore goes further than the general leniency clause set out in Article 83, as it excludes the option of imposing penal sanctions for offences that can only be committed by prisoners of war." ¶ 3581. Essentially, this means special laws for prisoners of war may only give rise to disciplinary measures; punitive measures are prohibited for prisoner of war-specific violations.

ARTICLE 83

CHOICE OF DISCIPLINARY OR JUDICIAL PROCEEDINGS

In deciding whether proceedings in respect of an offence alleged to have been committed by a prisoner of war shall be judicial or disciplinary, the Detaining Power shall ensure that the competent authorities exercise the greatest leniency and adopt, wherever possible, disciplinary rather than judicial measures.

Article 83—a particularly interesting and challenging provision of the Convention—is compulsory in its language though hortatory in spirit. Its call for leniency is clear yet it seems to leave broad discretion to the authorities of a Detaining Power.

The comment helpfully identifies other provisions of the Convention that counsel or require leniency toward prisoners of war including Articles 82(2), 87(2), 92(1), 93, and 100(3). ¶ 3584. Recall leniency concerning choice of measures associated with a particular forum to redress infractions or breaches by prisoners of war is the exclusive focus of Article 83. ¶ 3587. The comment might have done more to confirm leniency in the sense of Article 83 does not apply, *de iure*, to other decisions.

Interestingly, the French version of the Convention appears to refer to punishment rather than choice of forum as the subject of Article 83 leniency. The comment concludes Article 83 leniency is required both with respect to proceedings and punishment, observing "both versions must be interpreted as requiring leniency." ¶ 3593. The supporting footnote points out later the article refers to "measures" which seem to follow proceedings and suggests a broader scope of leniency. ¶ 3593, n. 14. The textual disparities between the English and French versions again call for reconciliation. The comment seems to have achieved a reasonable reconciliation, especially with respect to the footnote's analysis which might be moved to the comment text for interested readers.

ARTICLE 84

COURTS

A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.

In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105.

Article 84, another intriguing provision of the Third Convention, is essentially a default rule that sets a military venue as the starting point for adjudications involving prisoners of war. This default venue may, however, run contrary to emerging trends in military justice that import civilian characteristics to courts-martial or displace them entirely. Article 84 is also notable for its explicit textual cross-reference, in this case to Article 105 of the Convention.

The comment identifies Article 84 as part of the Convention's resort to the "principle of assimilation." ¶ 3596. Beyond the article's explicit cross-reference, the comment includes a helpful cross-reference to Article 102 requiring prisoners of war be tried at the same military courts that try members of the Detaining Power's armed forces. ¶ 3600.

The comment characterizes Article 84(1) as a rebuttable presumption in favor of military trial. The article permits departure if the armed forces of the Detaining Power may also be tried by civilian courts. ¶ 3601. The comment helpfully explains many of the practical implications of the article. Specifically, the comment concludes a

prisoner of war need not necessarily be tried by a civilian court if that forum is available to the armed forces of the Detaining Power. Rather, the decision regarding forum should simply track that which is applied to the armed forces of the Detaining Power. Whichever forum a member of the armed forces would ordinarily be sent to is the forum applicable to prisoners of war. ¶ 3603.

The comment gives full, literal meaning to the phrase "in no circumstances whatever" to absolutely preclude deprival of minimal due process described in Article 84(2) and, by reference, Article 105. ¶ 3606. The comment indicates the Third Convention's drafters acknowledged the very general formation of Article 84 due process standards. The drafters thus recognized various States might interpret the article differently. ¶ 3610.

The comment observes military judicial independence and impartiality were "relatively new" in 1949. ¶ 3611. This may have been true with respect to some corners but certainly not in developed military legal systems. More likely, the comment means to indicate these concepts were new as internationally guaranteed rights or obligations owed between States. The comment identifies a subsequent "wealth of jurisprudence" on the meanings of independence and impartiality. ¶ 3611. But these are chiefly human rights-based developments rather than law of war notions. Some caution is surely appropriate in incorporating such developments into the Convention itself.

The comment offers subjective and objective components of impartiality. ¶ 3612. Although understandable, the comment may, in this respect, be putting too fine a point on the concept for the Convention which does not refine or develop the subject explicitly. The comment mentions certain military justice systems have reformed, clarifying how independence and impartiality apply. ¶ 3616. In these cases, those reforms would certainly apply to prisoners of war held by the Powers that have enacted them. However, to extend the reforms of a particular State—or of any collection of States—to a State that has not undertaken them seems beyond the scope of Article 84 and even runs contrary to its assimilative approach. Recall assimilation both equates prisoners of war with members of the Detaining Power and commits prisoners of war to a system with which the Detaining Power has experience and expertise.

By comparison, the comment does little work on the notion of rights

and means of defense. ¶ 3617 *et seq*. This may be attributable to the work done on those subjects by Articles 105 and 96 of the Convention.

ARTICLE 85

OFFENCES COMMITTED BEFORE CAPTURE

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

A preface to the comment reminds readers Albania, Angola, the Democratic People's Republic of Korea, the People's Republic of China, Russia, and Vietnam have active reservations to Article 85 and several States have active declarations, including Australia, Barbados, New Zealand, the United States of America, and the United Kingdom of Great Britain and Northern Ireland. The substance of these reservations and declarations is available in the International Committee of the Red Cross online treaty database.

The comment indicates Article 85 reverses post–Second World War practices that stripped status and protections from prisoners of war who were convicted for pre-capture war crimes. ¶ 3620. The comment also acknowledges the article as "one of the most contentious" during negotiations. ¶ 3621. All delegations at the 1949 Diplomatic Conference of Geneva agreed prisoners of war could be tried for pre-capture offenses, yet agreement could not be reached on trial-phase and post-conviction treatment and status. ¶ 3621. The comment notes, during the Second World War, many States rejected International Committee of the Red Cross urgings to apply the 1929 Geneva Convention Relative to the Treatment of Prisoners of War protections to convicted prisoners of war. ¶ 3623.

The comment advises disciplinary proceedings may be undertaken for pre-capture offenses in lieu of criminal proceedings. ¶ 3628. It characterizes the conclusion as a deduction *a fortiori* considering the lesser consequences of disciplinary proceedings. ¶ 3628. Of course, the text of Article 85 does not indicate as much. Here the updated *Commentary* concludes, perhaps, a greater power necessarily includes a lesser. This reasoning may call for deeper interpretive consideration.

Two points of concern occur. First, one must examine the footnote to realize this is a reversal of the position taken by Dr. Pictet's 1960

Commentary. ¶ 3628, n. 24 (citing Pictet, *Commentary III*, p. 416)). Second, the reason the disagreement with Dr. Pictet is buried in a footnote is unclear. Depositing important matters in the footnotes is not optimal, as in electronic versions of the updated *Commentary* they appear as endnotes that must be more deliberately consulted. The preceding footnote makes an interesting analytical reference to Article 83, which notes disciplinary rather than judicial measures be adopted "whenever possible." ¶ 3628, n. 23. The term "whenever" might suggest wide application or availability, including for pre-capture offenses. But recall disciplinary procedures may be accompanied by reduced due-process protections.

ARTICLE 86

THE PROHIBITION AGAINST DOUBLE JEOPARDY

No prisoner of war may be punished more than once for the same act, or on the same charge.

Notwithstanding wide adoption of the *non bis in idem*, or no double jeopardy, rule in other legal regimes, the comment notes persistent differences concerning its details surfaced at the 1949 Diplomatic Conference of Geneva. Ultimately, a proposal to generate greater specificity in Article 86 was withdrawn during this preparatory work. ¶ 3649.

Interestingly, Article 86 refers only to punishment. Whether disciplinary or corrective measures are covered is not entirely clear from the face of the article. The comment observes, "The word 'punished' should be understood broadly as encompassing any form of punishment imposed on a prisoner by the Detaining Power, however characterized by that Power." ¶ 3652. It supports this view by noting other provisions in the Convention consider both disciplinary and judicial measures as involving "punishment." ¶ 3652 (citing Articles 89, 92, 93, 96, 97, 98, 115(2), and 119(5)).

The most persuasive of these references may be Articles 89 and 92, which refer to "disciplinary punishments." This is an interesting resort to intratextualism as a means of interpretation. Intratextualism interprets the meanings of terms or phrases that recur in a legal instrument or document. *See, for example,* Akhil Reed Amar, "Intratextualism," *Harvard Law Review*, Vol. 112 (1999) p. 748. It can be contrasted, in some respects, with so-called "clause-bound textualism," which considers terms in isolation. Amar, p. 788. Intratextualism discerns meaning by investigating how clauses featuring the same or similar terms can be brought into concordance or made to "fit together." Amar, p. 788. Of course, whether these linkages exist or, more importantly, if States intended them to or now agree they exist, determines much of the integrity of the sort of intratextualism at work in the comment. Consideration of the issue by States and expressions of views would be

helpful to both clarify the article and validate or rebuff this interpretive approach.

The comment encourages an account of post–Third Convention understandings and expressions that double-jeopardy prohibitions include circumstances of acquittal. The comment highlights a 1977 Additional Protocol I, Article 75 reference to "a final judgment acquitting or convicting." ¶ 3654. The Protocol's addition of the term "final" seems to account for regimes in which an initial acquittal might be appealed. Still, States could more clearly accomplish an addition to the Third Convention and evidence of agreement should be found. Just as previous sections accounted for the broader Convention, it seems this comment should account for the presence of acquittal in the 1977 Additional Protocol I and its absence in Article 86.

The comment leaves unresolved differences concerning the effect of foreign judgments or punishments, noting a variety of approaches. It notes, again, the 1977 Additional Protocol I, Article 75 passage referenced to resolve doubt concerning final acquittal refers only to previous punishment by "the Same Party." This would seem to indicate foreign judgments carry no double jeopardy effect. Yet the comment avoids the conclusion suggested by Article 75 in this case. ¶ 3657–59. Here is a relatively stark discord in interpretation. In one case, 1977 Additional Protocol I, Article 75 informs meaning. In another case, that information is disregarded.

ARTICLE 87

PENALTIES

Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power 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.

When fixing the penalty, the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will. The said courts or authorities shall be at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused, and shall therefore not be bound to apply the minimum penalty prescribed.

Collective punishment for individual acts, corporal punishments, imprisonment in premises without daylight and, in general, any form of torture or cruelty, are forbidden.

No prisoner of war may be deprived of his rank by the Detaining Power, or prevented from wearing his badges.

The comment characterizes Article 87 as a reflection of "the principle of assimilation between prisoners of war and members of the armed forces." ¶¶ 3660, 3668. The comment's more helpful characterization recites the principle of legality in the succeeding passage. ¶ 3661. The important point is only established or—again, in the language of the Convention—"provided" penalties may be imposed.

The comment emphasizes Article 87 extends leniency, which is addressed in Article 83 with respect to forum of prosecution, to penalties. ¶ 3662. The comment notes Article 87 seems inapplicable

to administrative authorities that are not military or judicial. ¶ 3672 (citing Pictet, p. 429). This reading is highly literal, though it displays an admirable respect for the textual limits of the Convention.

The comment understands Article 87 to apply to disciplinary measures as well as to penal or punitive judgments. It resorts to preparatory work to buttress this conclusion. ¶ 3673. The article's resort to the term "penalty" seems logically to extend to disciplinary measures. A stronger, or at least a more consistent, justification may lie in the analysis used by the comment to Article 86 in this same respect. Other articles of the Third Convention refer to "disciplinary punishment," which bears a sufficiently strong similarity in meaning to cover disciplinary "penalties." Still, some account of the later Article 89 enumeration of forms of disciplinary punishment seems appropriate. That is, the reason Article 87 should be read to include disciplinary measures in its assimilative regime when Article 89 specifically enumerates such measures is unclear. A sounder reading may understand the Article 87 assimilative regime to apply to judicial penalties whereas Article 89 addresses administrative or disciplinary measures.

The comment acknowledges authority to strip badges from prisoners of war for security purposes. ¶ 3716. This understanding is highly practical, though nonliteral, by implied resort to the concerns of the Detaining Power's security. Had the updated *Commentary* identified security as a principle of the Third Convention, that principle would have no doubt informed this interpretation.

ARTICLE 88

EXECUTION OF PENALTIES

Officers, non-commissioned officers and men who are prisoners of war undergoing a disciplinary or judicial punishment, shall not be subjected to more severe treatment than that applied in respect of the same punishment to members of the armed forces of the Detaining Power of equivalent rank.

A woman prisoner of war shall not be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a woman member of the armed forces of the Detaining Power dealt with for a similar offence.

In no case may a woman prisoner of war be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a male member of the armed forces of the Detaining Power dealt with for a similar offence.

Prisoners of war who have served disciplinary or judicial sentences may not be treated differently from other prisoners of war.

This comment cites Article 88 as "a specific application of the 'principle of assimilation' in disciplinary and penal matters." ¶¶ 3718, 3722. Article 88 may be an instance in which the assimilation principle operates fully, except with respect to Article 88(4) which the comment acknowledges. More often, the Third Convention adopts a qualified or limited form of assimilation. *See* Sean Watts, "Military Assimilation and the 1949 Third Geneva Convention on Prisoners of War" *in Prisoners of War in Contemporary Conflict*, Michael N. Schmitt and Christopher Kosnitzky eds (2023). The comment reminds Article 88 merely establishes a floor on treatment, and conditions of discipline or punishment may be favorable to prisoners of war without violating the Convention. ¶ 3724.

The comment also offers a helpful observation on the organization of

the Convention, indicating Article 88(2) on discipline and punishment would be better placed in Article 87. ¶ 3726. Here is a useful observation for future efforts to amend or update the Convention.

The comment associates Article 88(4) with a "principle of equity," a seeming incorporation of general fairness. ¶ 3734. Here is still another principle that may be unfamiliar to law of war circles. Still, the concept has been expressed in other sources such as the US Department of Defense *Law of War Manual*. The United States identifies "fairness" as an aspect of the principle of "honor." ¶ 2.6, 2.6.2, 2.6.2.2. The United States finds particular application for honor in treatment of prisoners of war. *See* ¶ 2.6.3.1.

The comment helpfully identifies Article 92(3) as creating an exception to the requirement that prisoners of war who have served punishments not be treated differently from prisoners of war who have not. Article 92(3) acknowledges a Detaining Power's authority to subject escapees to special surveillance. ¶ 3735. The comment is valuable, particularly considering the Convention's nonsequential treatment of the subject. The comment well illustrates to the practitioner resort to the unofficial, though eye-catching, section headings of the Convention does not guarantee awareness of every provision relevant to an issue.

II. Disciplinary Sanctions

ARTICLE 89

FORMS OF DISCIPLINARY PUNISHMENT

The disciplinary punishments applicable to prisoners of war are the following:

(1) A fine which shall not exceed 50 per cent of the advances of pay and working pay which the prisoner of war would otherwise receive under the provisions of Articles 60 and 62 during a period of not more than thirty days.

(2) Discontinuance of privileges granted over and above the treatment provided for by the present Convention.

(3) Fatigue duties not exceeding two hours daily.

(4) Confinement.

The punishment referred to under (3) shall not be applied to officers.

In no case shall disciplinary punishments be inhuman, brutal or dangerous to the health of prisoners of war.

Article 89 is a particularly interesting article considering the Third Convention's earlier resort to assimilation to address disciplinary punishment through Article 87. In this vein, the comment characterizes Article 89 as departing from the assimilation regime featured in Article 82(1) as well. ¶ 3737. As this comment confirms, assimilation is something of a misnomer with respect to Article 89. The Convention abandons assimilation also with respect to punishment duration (Art. 90), procedures (Arts 95 and 96), and implementation (Arts 97 and 98).

As suggested above, the better concordance of Articles 87 and 89 may be to limit each to its respective scope. That is, Article 87—including its assimilative regime and, notwithstanding, the updated *Commentary*'s

conclusion to the contrary—might be limited to judicial punishment. Whereas Article 89 might be understood as the Convention's exclusive limitation on administrative or non-judicial measures. Alternatively, Articles 87 and 89 might be understood to operate in conjunction. Such an approach to Article 87 would require disciplinary measures be featured in the Detaining Power's disciplinary code for its own forces. Although Article 89 would further limit prisoner of war discipline to measures enumerated in that article. Thus, only measures appearing in *both* the Detaining Power's authorized measures as well as in Article 89 would be available. States will no doubt wish to consider and publicize their views on the issue.

The comment helpfully compiles relevant provisions on disciplinary punishment. It notes Article 82(1) assimilates prisoners of war into the regimes of Detaining Powers, as does Article 87. Meanwhile, Article 89 enumerates its standards exclusively and exhaustively. ¶ 3741. The comment also anticipates a situation in which a Detaining Power's system of discipline does not provide for the measures identified in Article 89. In this case, the comment advises the Detaining Power might, Article 82(1) notwithstanding, apply the measures of Article 89 as a "disciplinary code in miniature." ¶ 3743 (quoting 1960 Pictet *Commentary*, p. 439–40). This reconciliation is interesting but not interpretively attractive. The more principled approach to a Detaining Power's concern would simply make discipline unavailable until a State amended the disciplinary code applicable to its armed forces.

Finally, the comment helpfully identifies provisions applicable to disciplinary confinement described in Article 89. ¶ 3755.

ARTICLE 90

DURATION OF DISCIPLINARY PUNISHMENT

The duration of any single punishment shall in no case exceed thirty days. Any period of confinement awaiting the hearing of a disciplinary offence or the award of disciplinary punishment shall be deducted from an award pronounced against a prisoner of war.

The maximum of thirty days provided above may not be exceeded, even if the prisoner of war is answerable for several acts at the same time when he is awarded punishment, whether such acts are related or not.

The period between the pronouncing of an award of disciplinary punishment and its execution shall not exceed one month.

When a prisoner of war is awarded a further disciplinary punishment, a period of at least three days shall elapse between the execution of any two of the punishments, if the duration of one of these is ten days or more.

This comment clarifies, "The term 'any single punishment' refers to all types of punishments listed in Article 89: fines, discontinuance of privileges, fatigue duties and confinement." ¶ 3768.

ARTICLE 91

SUCCESSFUL ESCAPE

The escape of a prisoner of war shall be deemed to have succeeded when:

(1) he has joined the armed forces of the Power on which he depends, or those of an allied Power;

(2) he has left the territory under the control of the Detaining Power, or of an ally of the said Power;

(3) he has joined a ship flying the flag of the Power on which he depends, or of an allied Power, in the territorial waters of the Detaining Power, the said ship not being under the control of the last named Power.

Prisoners of war who have made good their escape in the sense of this Article and who are recaptured, shall not be liable to any punishment in respect of their previous escape.

The comment to Article 91 includes a helpful cross-reference to Article 42 respecting the use of weapons against escaping prisoners of war. ¶ 3782. Nonetheless, whether a completed escape for purposes of Article 42 should be equated with successful escape for purposes of Article 91 is unclear. Conditions that render an escaping prisoner of war no longer *hors de combat* and therefore subject to status-based targeting may differ from those that render a prisoner of war escaped for purposes of Article 91 protections from punishment on recapture. A former prisoner of war no longer under the control of a Detaining Power may pose a sufficient threat to justify immediate targeting prior to rejoining their own forces. Whereas the concerns addressed by Article 91—namely, punishment on the basis of contrived charges of a prior escape—may not mature until the conditions identified by that article have materialized.

The comment identifies, "The principle that prisoners of war who successfully escape and are recaptured are not liable to punishment in respect of their escape." ¶ 3784. Here is still another unfamiliar, and in this case quite specific, principle. The notion may seem more in the nature of a rule than a principle to many readers.

Respecting ambiguity concerning the condition of rejoining armed forces, the comment points to Article 4 of the Third Convention. ¶ 3791. According to the comment, the armed forces that an escaping prisoner of war must join to benefit from Article 91 are those referred to in Article 4 of the Convention. More specifics on this point would have been helpful, particularly if evidence of State practice exists in this respect. Presumably the comment refers to Articles 4A(1) and (3), but this is unclear. Whether an escape would be complete or successful if a prisoner of war managed to join an Article 4A(2) militia or volunteer corps or an Article 4A(6) *levée en masse* is uncertain. The term "joining" suggests as much in that the latter qualify for prisoner of war status. The goal of such a clarification would not be to force a finer point on the article than States have established through the mechanisms of the Vienna Convention on the Law of Treaties. Rather, the question is whether evidence of such an interpretation exists.

Admittedly, a later passage refers to joining a "resistance group opposing the Detaining Power as sufficient." ¶ 3793. Although seeming to elaborate, this passage introduces as much ambiguity as it resolves and is a doubtful interpretation of the term "armed forces" in Article 91. Resistance groups opposing a Detaining Power are not in all cases equated with armed forces. This passage cites a Belgian law of war manual to support its view. However, on close examination, that passage makes no reference to joining resistance groups; it only mentions armed forces. Thankfully, the footnote to the comment reproduces the passage for ease of examination.

To further develop the notion of "joining," for purposes of Article 91, the comment references an escape placing a prisoner of war "outside the power of the enemy and beyond the reach of the opposing forces." ¶ 3793. Again, the latter phrase may introduce as much ambiguity as it resolves. A unit within weapon range of the Detaining Power may be said to be within its reach. However, it seems "reach" in this case more likely refers to control or custody. The footnote supporting the statement supports the control or custody view.

The comment helpfully cross-references the 1907 Hague Convention V on Rights and Duties of Neutral States. ¶ 3797. It also helpfully highlights and explains a departure from the view of the 1960 Pictet *Commentary,*

indicating an escape by small craft to high seas without rescue does not amount to successful escape. The International Committee of the Red Cross abandons the 1960 view, however, considering both the text of Article 91 and select State views. ¶ 3803.

ARTICLE 92

UNSUCCESSFUL ESCAPE

A prisoner of war who attempts to escape and is recaptured before having made good his escape in the sense of Article 91 shall be liable only to a disciplinary punishment in respect of this act, even if it is a repeated offence.

A prisoner of war who is recaptured shall be handed over without delay to the competent military authority.

Article 88, fourth paragraph, notwithstanding, prisoners of war punished as a result of an unsuccessful escape may be subjected to special surveillance. Such surveillance must not affect the state of their health, must be undergone in a prisoner of war camp, and must not entail the suppression of any of the safeguards granted them by the present Convention.

The comment to Article 92 restates from the preceding comment, "The principle that prisoners of war who are recaptured before having made good their escape cannot be liable to more than disciplinary punishment." ¶ 3815. Again, this notion will be unfamiliar to most as a principle. The notion may sound more in the nature of a rule than a principle to many readers.

The comment notes difficulty identifying the precise beginning of "attempts to escape." It asserts preparatory acts are not "attempts" and therefore do not give rise to disciplinary measures. ¶ 3818. The support for this interpretation is thin and includes only the prior 1960 Pictet *Commentary* and an academic work. However, alerting practitioners to the importance of this determination can inspire development of national legal doctrine. The comment concedes a preparatory act "may be subject to disciplinary measures under separate camp regulations," but the comment does not offer any examples. ¶ 3818. To elaborate on the comment in this respect, though gathering resources may not constitute escape, collecting prohibited articles or contraband such as wire cutters, weapons, and maps

may violate legitimate camp rules and, therefore, may provoke appropriate disciplinary measures.

The comment includes a helpful survey of International Committee of the Red Cross–observed State practice, including specific disciplinary measures tailored to unsuccessful escapees. ¶ 3822. The comment also helpfully refers to Article 93(3) on disciplining prisoners of war who aid or assist another prisoner's escape. ¶ 3824.

The comment notes the Convention does not define "special surveillance" as the term appears in Article 91. It indicates the Convention's drafters considered, but ultimately declined to, identify specific measures. The comment observes, "Special surveillance is surveillance that is more invasive than the ordinary surveillance measures adopted in a prisoner-of-war camp setting . . . ." ¶ 3831. The comment wisely avoids undermining the decision not to define the phrase. Instead, the comment highlights limits based on the article itself.

A later passage includes a somewhat surprising observation endorsing temporary restraints on prisoners of war, indicating,

> [S]ecurity and preventive measures may be put in place in a prisoner-of-war camp to stop any prisoner of war escaping and to maintain order and discipline in general. As long as these measures remain in conformity with the Convention, they may be employed. For instance, instruments of restraint which are not inherently degrading or painful, such as handcuffs, may be used under certain conditions as a precaution against escape during a transfer or from the time of capture until evacuation from the conflict zone is complete. ¶ 3842.

ARTICLE 93

ESCAPES: III. CONNECTED OFFENSES

Escape or attempt to escape, even if it is a repeated offence, shall not be deemed an aggravating circumstance if the prisoner of war is subjected to trial by judicial proceedings in respect of an offence committed during his escape or attempt to escape.

In conformity with the principle stated in Article 83, offences committed by prisoners of war with the sole intention of facilitating their escape and which do not entail any violence against life or limb, such as offences against public property, theft without intention of self-enrichment, the drawing up or use of false papers, the wearing of civilian clothing, shall occasion disciplinary punishment only.

Prisoners of war who aid or abet an escape or an attempt to escape shall be liable on this count to disciplinary punishment only.

Article 93 presents an interesting textual structure. In addition to its admonition not to consider escape as an aggravating factor during judicial proceedings, it identifies a notion expressed by Article 83, namely a command to apply leniency to decisions on whether to process infractions by disciplinary or judicial processes. Whether the Article 93 reference to "the *principle* stated in Article 83" (rather than to Article 83 as a whole) indicates a looser connection or reduced obligation is not entirely clear. (emphasis added). Worth highlighting is the relevant passage of Article 93(2) states an independent obligation, which seems meant to achieve "conformity" with the principle stated in Article 83. Thus, compliance with that Article 93(2) obligation may not, in fact, require particular or deliberate attention to Article 83 or any principle therein. Satisfaction of the Article 93(2) obligation itself seems sufficient. In this respect, the comment characterizes Article 93(2) as a special application of "the general principle stated in Article 83." ¶ 3856.

Addressing the Article 93(2) obligation, the comment helpfully identifies the article's focus on "connected offenses," that is, offenses committed along with or coincidental to an escape. ¶ 3844. The comment asserts, "The principle that an escape or an attempt to escape is not an aggravating circumstance applies regardless of the nature of the sanction (judicial or disciplinary) that is imposed following the judicial proceeding." ¶ 3852. More attention to—and examples of—connected and unconnected offenses may have been a more valuable contribution than restating the article's vaguely intentioned cross-reference.

The comment notes an important limit to Article 93. It assesses only the fact of escape or attempted escape is precluded as an aggravating factor. Other factors, such as the depravity of a crime, may be aggravating circumstances. ¶ 3853. The comment identifies prisoner motive as relevant to assessing whether or not an offense is connected to escape. ¶ 3857. It concludes, when motive is not connected to facilitating escape, the crime in question is subject to criminal prosecution rather than to mere disciplinary proceedings. The comment also offers considerations for evaluating motive in this respect. ¶ 3858. The comment characterizes the enumerated offenses of Article 93(2) as "non-exhaustive." ¶ 3860. Readers have no reason to doubt this characterization.

The comment identifies an interesting implication of wearing civilian clothes during escape as a mere disciplinary infraction. The comment suggests, though wearing civilian clothes might ordinarily amount to a violation of passive distinction obligations and forfeiture of prisoner of war status, Article 93(2) anticipation of the practice rejects those consequences in the context of prisoner of war escapes. ¶ 3861. The bases for the conclusion are not entirely clear. But then neither is the purported requirement of uniform wear for regular armed forces under Article 4A(1) entirely clear. *See* Sean Watts, "Who is a Prisoner of War" in *The 1949 Geneva Conventions: A Commentary* (Andrew Clapham *et al.* eds 2015).

The comment helpfully notes prisoners of war do not regain combatant immunity until escape is complete. It determines acts of war committed prior to completion of escape can be prosecuted as criminal acts as clearly anticipated by Article 93. ¶ 3864. All armed forces are likely not instructed in this respect. Here, the updated *Commentary* offers helpful guidance and perhaps a prod to training.

Last, the comment admits the Convention does not provide an answer to what constitutes "aiding or abetting." ¶ 3869. Although the

comment excludes passive conduct and failure to report, the comment largely allows the Convention's ambiguity to stand. This seems to be a sound approach that avoids putting too fine a point on a generally framed article of the Convention.

ARTICLE 94

ESCAPES: IV. NOTIFICATION OF RECAPTURE

If an escaped prisoner of war is recaptured, the Power on which he depends shall be notified thereof in the manner defined in Article 122, provided notification of his escape has been made.

The comment to Article 94 highlights separation of the Convention's obligation to report escapes to the Central Tracing Agency (expressed in Article 122) and the Convention's obligation to report recapture to the Power on which a prisoner of war depends (expressed in Article 94). ¶ 3876. The comment's effort to link these separated yet related articles of the Third Convention is another helpful navigational aid.

The comment largely avoids a narrow interpretation of the reporting requirement. The text of the article only requires reporting in cases of recapture. By its plain meaning, recapture suggests capture following a successful escape. By this meaning, capture following *unsuccessful* escape would be excluded. This understanding both reflects a plain meaning and comports with likely practicalities in that a brief, unsuccessful escape may not provide the Detaining Power opportunity to fully report in accordance with Article 122, though admittedly not all unsuccessful escapes will be so brief.

The comment evades this interpretation, however, by mentioning the Convention resorts to the term "recapture" in Article 92 concerning unsuccessful escapes. ¶ 3879. Although Article 92 might, by contrast, be invoked to emphasize when the Convention intends to address unsuccessful escapes it does so explicitly, the reading proposed by the comment is not unreasonable. Moreover, the comment's reading of Article 94 gives effect to the Convention's practice of referring to escape generally in some cases and specifically to either successful or unsuccessful cases in others. Article 94 refers to escape generally and should therefore be read to include both successful and unsuccessful escapes that have been reported. The best position may be to bring this issue to the attention of States to confirm and develop it through subsequent agreement as they see fit.

The comment connects the notification procedures of Article 122 and Article 94. ¶ 3881–82. It indicates notification procedures for Article 94 "are described in Article 122." ¶ 3882. Article 94 refers expressly to notices in "the manner defined in Article 122." Worth emphasizing, however, is Article 94 requires notice of recapture to the Power on which the prisoner of war depends, whereas Article 122 relates to matters provided to an official Information Bureau. The practicalities of communication may prove easier by merging the two reporting procedures in practice and considering the difficulty of communicating directly with an opposing Party to a conflict.

Procedure

ARTICLE 95

DISCIPLINARY PROCEDURE:
I. CONFINEMENT AWAITING HEARING

A prisoner of war accused of an offence against discipline shall not be kept in confinement pending the hearing unless a member of the armed forces of the Detaining Power would be so kept if he were accused of a similar offence, or if it is essential in the interests of camp order and discipline.

Any period spent by a prisoner of war in confinement awaiting the disposal of an offence against discipline shall be reduced to an absolute minimum and shall not exceed fourteen days.

The provisions of Articles 97 and 98 of this Chapter shall apply to prisoners of war who are in confinement awaiting the disposal of offences against discipline.

This is a relatively minor point, but the comment to Article 95 indicates early the general prohibition on pre-disciplinary confinement is excepted when such confinement is authorized for armed forces of the Detaining Power "and" when essential to camp order and discipline. ¶ 3887. The Third Convention itself employs an "or," clearly indicating either condition is sufficient to lift the article's general prohibition. To its credit, the comment later refers to each condition as an "exception," suggesting either may be independently sufficient. ¶¶ 3888, 3889. But when feasible, paragraphs and comments should be amenable to singular consultation. An "or" in the first paragraph would eliminate the possibility of a misunderstanding.

ARTICLE 96

DISCIPLINARY PROCEDURE: II. COMPETENT AUTHORITIES AND RIGHTS OF DEFENSE

Acts which constitute offences against discipline shall be investigated immediately.

Without prejudice to the competence of courts and superior military authorities, disciplinary punishment may be ordered only by an officer having disciplinary powers in his capacity as camp commander, or by a responsible officer who replaces him or to whom he has delegated his disciplinary powers.

In no case may such powers be delegated to a prisoner of war or be exercised by a prisoner of war.

Before any disciplinary award is pronounced, the accused shall be given precise information regarding the offences of which he is accused, and given an opportunity of explaining his conduct and of defending himself. He shall be permitted, in particular, to call witnesses and to have recourse, if necessary, to the services of a qualified interpreter. The decision shall be announced to the accused prisoner of war and to the prisoners, representative.

A record of disciplinary punishments shall be maintained by the camp commander and shall be open to inspection by representatives of the Protecting Power.

Article 96 reflects States' poor historical experience with the principle of assimilation. The historical section of the comment confirms the article as a reaction against former approaches that resorted to military assimilation to regulate disciplinary procedures. ¶ 3896.

The comment understands Article 96(3) to completely divest Detaining Powers of authority to delegate disciplinary matters to

prisoners of war. ¶ 3907. Although the article itself clearly prohibits the Detaining Power from enlisting or deputizing prisoners of war for its own disciplinary functions, it does not so clearly prohibit the Detaining Power from permitting prisoners of war to enforce military discipline amongst themselves. A deeper investigation of State practice and a comment in this latter respect may have been helpful. Still, the comment's interpretation is reasonable and certainly vindicates concern with historical experience that provided a role to prisoners of war in disciplinary matters. States may wish to consider the issue and make public their views on this question.

The comment notes the absence of a right to legal assistance in defense at disciplinary proceedings. ¶ 3912. Here the updated *Commentary* avoids filling a perceived gap in protection. The comment, however, includes an exceptionally vague reference to protections of domestic law and human rights law applicable to disciplinary proceedings. The supporting citation, though not the comment itself, suggests human rights law rulings respecting rights to counsel may apply in disciplinary proceedings, though not in the specifically regulated context of prisoner of war internment. Overall, the article's abandonment of assimilation on matters of due process strongly suggests the comment's resort to incorporation of domestic law standards of due process for prisoners of war is misplaced. The comment is, in this respect, difficult to reconcile with the historical record and apparent intention of its drafters.

Execution of Punishment

ARTICLE 97

EXECUTION OF DISCIPLINARY PUNISHMENT: I. PREMISES

Prisoners of war shall not in any case be transferred to penitentiary establishments (prisons, penitentiaries, convict prisons, etc.) to undergo disciplinary punishment therein.

All premises in which disciplinary punishments are undergone shall conform to the sanitary requirements set forth in Article 25. A prisoner of war undergoing punishment shall be enabled to keep himself in a state of cleanliness, in conformity with Article 29.

Officers and persons of equivalent status shall not be lodged in the same quarters as non-commissioned officers or men.

Women prisoners of war undergoing disciplinary punishment shall be confined in separate quarters from male prisoners of war and shall be under the immediate supervision of women.

The comment to Article 97 helpfully outlines the Third Convention's somewhat disjointed structure on disciplinary measures. It reminds readers Article 97 deals only with matters related to confinement as a disciplinary measure. Article 89 deals more generally with disciplinary measures. Moreover, Article 98 deals with conditions of treatment. ¶ 3919. The comment further recalls disciplinary measures may not involve "treatment more severe" than that applied to armed forces of the Detaining Power, an approximate resort to assimilation. ¶ 3920. Article 97 presents additional protections worthy of attention beyond those derived from assimilation. ¶ 3920.

The comment holds the line on literal interpretation of the Convention when it observes a prisoner of war serving disciplinary confinement may not be transferred to a correctional facility or prison even if those facilities provide greater protection and comfort than camp conditions. The comment

cites respect for military honor to forbid mixing prisoners of war with convicts. ¶ 3922. Here, the updated *Commentary* reinforces the Convention as a *lex specialis* to conditions of internment—a body of law attuned to notions of military honor and specifically designed for the unique condition of prisoner of war internment during armed conflict.

ARTICLE 98

EXECUTION OF DISCIPLINARY PUNISHMENT: II. ESSENTIAL SAFEGUARDS

A prisoner of war undergoing confinement as a disciplinary punishment, shall continue to enjoy the benefits of the provisions of this Convention except in so far as these are necessarily rendered inapplicable by the mere fact that he is confined. In no case may he be deprived of the benefits of the provisions of Articles 78 and 126.

A prisoner of war awarded disciplinary punishment may not be deprived of the prerogatives attached to his rank.

Prisoners of war awarded disciplinary punishment shall be allowed to exercise and to stay in the open air at least two hours daily.

They shall be allowed, on their request, to be present at the daily medical inspections. They shall receive the attention which their state of health requires and, if necessary, shall be removed to the camp infirmary or to a hospital.

They shall have permission to read and write, likewise to send and receive letters. Parcels and remittances of money however, may be withheld from them until the completion of the punishment; they shall meanwhile be entrusted to the prisoners' representative, who will hand over to the infirmary the perishable goods contained in such parcels.

The comment to Article 98 offers navigational advice for this somewhat obtusely worded article of the Convention. It helpfully indicates Article 98(1) provides treatment standards for confinement, and the remaining paragraphs address disciplinary measures more generally. ¶ 3930.

The comment acknowledges discretion on the part of the camp

commander to determine which protections of the Third Convention, other than those preserved by the article, may be suspended as "inapplicable" to conditions of confinement. ¶ 3931.

Last, the comment identifies a further principle at work, in this case noting, "This provision reflects the general principle that officers and prisoners of equivalent status must be treated with the regard due to their rank." ¶ 3937. Again, whether the notion is truly a "general principle" and what significance that label carries or, whether the notion is rather a rule of conduct under the Convention, seems ripe for development.

III. Judicial Proceedings

ARTICLE 99

JUDICIAL PROCEDURE: I. GENERAL PRINCIPLES

No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.

No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.

No prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel.

The comment to Article 99 notes the Third Convention turns from disciplinary proceedings to judicial proceedings with Article 99. ¶ 3946.

Here, the updated *Commentary* offers still further resort to principles. In this case, the comment characterizes the provisions of Article 99 as "setting out 'general principles' for judicial proceedings against prisoners of war. These general principles oblige Detaining Powers to observe certain fundamental guarantees when exercising their judicial authority over prisoners of war." ¶ 3946. Although the article title indeed refers to "General Principles," the Convention's article titles are not part of the Convention as adopted by States. Recall the Swiss government added the titles simply to ease reference and aid navigation. Whether the provisions are truly principles or not and what legal significance that designation imparts is still ripe for debate. The phrasing of the article seems to suggest specific obligations in the nature of rules of conduct.

In that vein, the comment characterizes the provisions of Article 99 as "absolute prohibitions." ¶ 3947. It alerts readers willful deprival of regular trial rights amounts to a grave breach of the Convention under Article 130. ¶¶ 3947, 3955. The comment also ties Article 99(1) to the principle of "legality . . . a principle of penal law." ¶¶ 3948, 3953.

The comment helpfully cross-references that principle to Article 87(1) respecting penalties.

The comment identifies a "general principle . . . proscrib[ing] the use of coercion . . . to confess guilt." ¶ 3949. It also identifies a "general principle . . . [of] the presumption of innocence." ¶¶ 3950, 3970. Again, whether each is truly a general principle may be worthy of careful consideration, particularly by States that might evaluate the utility of labeling these notions general principles for purposes of dissemination or implementation of the Convention. It seems these provisions might function just as well and perhaps with clearer force if couched simply as rules of conduct rather than as general principles.

The comment identifies the Article 99(1) provisions that refer to "international law" as the so-called "'Nuremberg clause,'" which permits prosecution of international crimes notwithstanding absence of crimes in domestic law. ¶ 3959. The comment helpfully reminds the international crime in question must have been established in law prior to commission by the prisoner of war. ¶ 3959. The comment also recommends evidentiary rules prohibiting admission of coerced evidence as a disincentive to coerced statements by prisoners of war. ¶ 3975. The comment wisely confesses the view is purely hortatory, however, conceding Article 99(2) itself includes no such binding obligation. ¶ 3975.

Finally, the comment notes Article 99(3) does not specify details of prisoner of war access to defense counsel or legal assistance. ¶ 3977. The comment, in this respect, prudently resists the urge to inject or import details not adopted by the drafters and Parties. ¶ 3977.

ARTICLE 100

ESSENTIAL RULES: II. DEATH PENALTY

Prisoners of war and the Protecting Powers shall be informed as soon as possible of the offences which are punishable by the death sentence under the laws of the Detaining Power.

Other offences shall not thereafter be made punishable by the death penalty without the concurrence of the Power upon which the prisoners of war depend.

The death sentence cannot be pronounced on a prisoner of war unless the attention of the court has, in accordance with Article 87, second paragraph, been particularly called to the fact that since the accused is not a national of the Detaining Power, he is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will.

The comment connects the Article 100 conditions on imposition of the death penalty with other general limits on punishment, such as the assimilative measures of Article 87. ¶ 3980. It correctly notes the Article 100(1) advance notice requirement operates in conjunction with the Article 87 assimilative measures. ¶ 3984.

A historical section indicates assimilation had previously been the only limit on imposition of the death penalty on prisoners of war. ¶ 3981. That is, prisoners of war were fully eligible for death sentences in circumstances in which members of the Detaining Power's armed forces were eligible. Article 100 reflects an adjustment of sorts to that former approach. The comment also indicates the Third Convention's retention of the possibility of capital punishment was deemed essential to wide ratification. ¶ 3982. To many readers, the Convention's provisions on the death penalty may undermine faith in its commitment to humanity or the extent to which it embodies emerging and important values. Still, the text of the Convention is

clear on the point and the comment retains admirable fidelity to its approach in this respect.

ARTICLE 101

DELAY IN EXECUTION OF DEATH PENALTY

If the death penalty is pronounced on a prisoner of war, the sentence shall not be executed before the expiration of a period of at least six months from the date when the Protecting Power receives, at an indicated address, the detailed communication provided for in Article 107.

Article 101 requires a six-month delay between notifying a Protecting Power of a capital sentence pursuant to Article 107 and the Detaining Power carrying out that sentence. ¶ 3996. The comment indicates the delay period under the 1929 Geneva Convention Relative to the Treatment of Prisoners of War had been three months. ¶ 3994. The comment identifies examining the communication and affording an opportunity for the Protecting Power to intervene as the purposes of the Third Convention Article 101 delay period. ¶ 3999.

Although the comment makes clear the communication requirement attaches on initial sentencing, it does not address whether the communication requirement is refreshed and whether the delay period is reset upon appeals. State practice in this respect may be of use.

ARTICLE 102

JUDICIAL PROCEDURE: CONDITIONS FOR VALIDITY OF SENTENCE

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.

The comment identifies Article 102 as reflecting the principle of assimilation. ¶ 4003. It indicates the principle "runs through the Convention as a whole and underpins several provisions of the present chapter." ¶ 4003. This is, in many respects, an overbroad claim. As the updated *Commentary* itself indicates, many provisions of the 1949 Convention reflect a poor historical experience with assimilation and expressly modify or abandon the principle. *See also* Sean Watts, "Military Assimilation and the 1949 Third Geneva Convention on Prisoners of War" in *Prisoners of War in Contemporary Conflict*, Michael N. Schmitt and Christopher Kosnitzky eds (2023).

The comment notes deficiencies of assimilation as an approach to prisoner of war treatment. It observes, "The principle of assimilation, however, does not operate in a vacuum. Although a necessary condition, parity of treatment in matters of judicial procedure and forums is not necessarily sufficient for compliance with Article 102." ¶ 4004. According to the comment, in cases where domestic procedures applicable through assimilation fall short of international standards or standards of the Convention, the latter prevail. ¶ 4004. The latter reconciliation with standards of the Convention draws no objection, but the former observation concerning other "international standards" warrants greater attention than the comment gives. A clearer articulation of these standards and the theory by which they displace Article 102 and the Third Convention more generally would permit evaluation of this very broad claim.

The comment notes Article 102's compatibility with Article 85 of the Third Convention respecting trial for offenses committed prior to capture. ¶ 4006. It also indicates the term "sentence" refers to both the judgment and punishment. ¶ 4007. The comment then elaborates the term "same courts" refers to "courts that have competence and jurisdiction to try a member of the armed forces of the Detaining Power for the same offence." ¶ 4008. This elaboration would not seem to exclude a court-martial convened and for which panel (jury) members were selected specifically for the purpose of trying prisoners of war. The comment does not address the issue directly, which is a likely shortcoming considering the probable resort to courts-martial to try and sentence prisoners of war. However, the updated *Commentary* further observes, "Whatever arrangement is in place for members of the armed forces of the Detaining Power must also apply to prisoners of war . . . ." ¶ 4009. It seems the arrangements rather than the personnel must be the same, and yet the comment concludes, "The requirement that prisoners of war be tried by the same courts furthermore implies that no court may be established solely to render judgment against a prisoner of war." ¶ 4010. States that envision convening courts-martial or other military tribunals to hear cases involving prisoners of war may wish to consider and comment on this issue.

The updated *Commentary*, as elsewhere, wisely leaves unresolved the extent to which assimilation applies to civilian classes of prisoners of war and children captured as prisoners of war, although by the plain text of the Convention it seems clear no accommodations are required. ¶¶ 4017–4018.

ARTICLE 103

JUDICIAL INVESTIGATIONS AND CONFINEMENT AWAITING TRIAL

Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. In no circumstances shall this confinement exceed three months.

Any period spent by a prisoner of war in confinement awaiting trial shall be deducted from any sentence of imprisonment passed upon him and taken into account in fixing any penalty.

The provisions of Articles 97 and 98 of this Chapter shall apply to a prisoner of war whilst in confinement awaiting trial.

The comment indicates, although the phrase "judicial investigations" is more appropriate to civil-law systems, Article 103 applies equally to law enforcement and prosecutorial investigations associated with common law systems. ¶ 4019. Surveying the development of Article 103, the comment observes, "the drafters did not intend to establish a detailed code of penal procedure for prisoners of war." ¶ 4022. (citing Preliminary Documents submitted by the ICRC to the Conference of Government Experts of 1947, p. 161). Considering this observation is worthwhile. The observation is also a worthwhile basis for evaluating the comment's elaborations of the article.

The comment envisions, through assimilation, a limited incorporation of human rights law, asserting,

> Through the principle of assimilation, developments in international law since 1949, including human rights law, as

> far as they have been incorporated into the domestic legal system governing military personnel, will become applicable to prisoners of war, for example in terms of the relevant procedures for placement in and release from confinement awaiting trial. ¶ 4022 (citing commentary on Article 82, para. 3557, and Introduction, para. 34).

This is an interesting contribution to perennial debate concerning the role of international human rights law during armed conflict. The comment essentially concludes the law of war indirectly incorporates human rights law through the Third Convention's assimilative provisions. Of course, the international and indeed the human rights law character of these rights may have been laundered by their incorporation into domestic legal mechanisms. As a technical matter, the Detaining Power would simply be applying its domestic law in such a case. However, the observation appears sound to the extent it remains limited to human-rights provisions truly integrated into the domestic regimes that regulate military personnel.

The comment is not without difficulty, of course. For instance, the comment seems to suggest prisoners of war enjoy a right to complaints in the human rights law regime of the Detaining Power beyond the complaint procedures of the Convention itself to the extent the former are incorporated into domestic military law of the Detaining Power. States' consideration of this claim seems an important matter and views on the claim would be a welcome addition to the question.

The comment concludes the Article 103 requirements of impartiality and independence applicable to trial "should also apply to pretrial investigations and to the procedures for placement in pretrial confinement." ¶ 4027. The comment's "should" may indicate a hortatory view. The common law, and particularly military legal systems, do not feature independence as robustly as civil-law systems. For instance, at present, US commanders are considerably involved in military criminal justice pretrial investigations and in pretrial decision making, although there have been amendments that invest investigative power and trial referral in some cases to US military lawyers.

The comment also concludes rights to defense applicable under the Third Convention to trial "should" extend to pretrial investigation. ¶ 4027. Again, the view is hopefully hortatory. At this point, the view veers toward an effort to improve on rather than to reflect the Convention's regime of due process for prisoners of war.

The comment frames Article 103 as a general prohibition on pretrial confinement with included exceptions. ¶ 4031. The first exception operates in cases where the Detaining Power's own forces would be confined. ¶ 4032. The second recognizes national security interests. ¶ 4033. In this respect, the comment is an improvement on a previous comment's conclusions respecting similar language in Article 95. ¶ 3887 (suggesting, by resort to the term "and," the exceptions are cumulative rather than independent) *But see* ¶¶ 3888–89 (treating the exceptions as largely independent).

Turning to the Convention's preparatory phase, the comment indicates States rejected a proposal at the 1949 Diplomatic Conference of Geneva to delete the Article 103 national security exception. ¶ 4033. The comment acknowledges the "very general" nature of this exception and notes States hold "a degree of discretion" in its operation. ¶ 4033. Yet the comment emphasizes the term "essential," which refers to reasons that are "absolutely necessary." ¶ 4033. The comment relates further the Detaining Power must consider the fact of internment and whether lesser measures would suffice. ¶ 4033. Giving effect to the term "essential" and how it appears in Article 103 of the Convention and in the Third Convention more generally is important. It would be useful for the updated *Commentary* to survey resorts by the Third Convention to the terms necessary, absolutely necessary, essential, absolutely essential, and imperative. These terms might prove worth understanding during States' efforts at future diplomatic conferences.

The comment wisely, in light of preparatory work, avoids the question of solitary confinement as does Article 103. ¶ 4049.

ARTICLE 104

NOTIFICATION OF JUDICIAL PROCEEDINGS

In any case in which the Detaining Power has decided to institute judicial proceedings against a prisoner of war, it shall notify the Protecting Power as soon as possible and at least three weeks before the opening of the trial. This period of three weeks shall run as from the day on which such notification reaches the Protecting Power at the address previously indicated by the latter to the Detaining Power.

The said notification shall contain the following information:

(1) surname and first names of the prisoner of war, his rank, his army, regimental, personal or serial number, his date of birth, and his profession or trade, if any;

(2) place of internment or confinement;

(3) specification of the charge or charges on which the prisoner of war is to be arraigned, giving the legal provisions applicable;

(4) designation of the court which will try the case, likewise the date and place fixed for the opening of the trial.

The same communication shall be made by the Detaining Power to the prisoners' representative.

If no evidence is submitted, at the opening of a trial, that the notification referred to above was received by the Protecting Power, by the prisoner of war and by the prisoners' representative concerned, at least three weeks before the opening of the trial, then the latter cannot take place and must be adjourned.

The Article 104 clause, "as soon as possible and at least three weeks before" stands as a somewhat clumsy choice of phrasing on the part of the Convention's drafters. It seems, if notice can be provided more than three weeks prior, it must be provided earlier and if three weeks' notice is not possible, the trial must be delayed.

The introductory comment to Article 104 highlights the requirement of notice to a Protecting Power in case of trial of a prisoner of war. It observes, in addition to the Protecting Power, the prisoners' representative "must be similarly notified." ¶ 4050. A later comment also includes the prisoner of war in question as a beneficiary of the Article 104 notice requirement. ¶ 4062. It must be admitted, Article 104 is somewhat frustrating in that it doles out the various recipients of notification inconsistently and in a scattershot fashion. The article initially refers to the Protecting Power alone. It adds the prisoners' representative in the penultimate paragraph. Meanwhile, the final paragraph integrates the prisoner of war. Then, a separate provision applies to the prisoner of war in Article 105 as well. Where the notice to a Protecting Power includes a definite timeline, the prisoner of war notice regime is notably open-ended, merely requiring notice "in good time." The comment later explains the three-week notice period complements the one- and two-week periods for locating defense counsel and trial preparation, respectively, in Article 105(2) and (3). ¶ 4058.

ARTICLE 105

RIGHTS AND MEANS OF DEFENSE

The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter. He shall be advised of these rights by the Detaining Power in due time before the trial.

Failing a choice by the prisoner of war, the Protecting Power shall find him an advocate or counsel, and shall have at least one week at its disposal for the purpose. The Detaining Power shall deliver to the said Power, on request, a list of persons qualified to present the defence. Failing a choice of an advocate or counsel by the prisoner of war or the Protecting Power, the Detaining Power shall appoint a competent advocate or counsel to conduct the defence.

The advocate or counsel conducting the defence on behalf of the prisoner of war shall have at his disposal a period of two weeks at least before the opening of the trial, as well as the necessary facilities to prepare the defence of the accused. He may, in particular, freely visit the accused and interview him in private. He may also confer with any witnesses for the defence, including prisoners of war. He shall have the benefit of these facilities until the term of appeal or petition has expired.

Particulars of the charge or charges on which the prisoner of war is to be arraigned, as well as the documents which are generally communicated to the accused by virtue of the laws in force in the armed forces of the Detaining Power, shall be communicated to the accused prisoner of war in a language which he understands, and in good time before the opening of the trial. The same communication in the same circumstances shall be made to the advocate or counsel conducting the defence on behalf of the prisoner of war.

The representatives of the Protecting Power shall be entitled to attend the trial of the case, unless, exceptionally, this is held 'in camera' in the interest of State security. In such a case the Detaining Power shall advise the Protecting Power accordingly.

Before turning to the comment's contributions, a few introductory thoughts on Article 104 are in order. First, read in isolation, the article does not indicate its conditions of application. The event that gives rise to the article's obligations is not entirely clear without reference to its context within the Convention. It merely insists on the availability of various means of legal assistance. Of course, the article appears in the chapter on judicial proceedings and the term "defence" suggests a judicial context as well. Paragraph 3, moreover, refers to a "trial." But the Third Convention is usually more careful in this respect.

Second, Article 105 is another provision of the Third Convention that explicitly refers to prisoner of war "rights." This is a misnomer in a legal sense and is rare, though not unique, in the Convention in this respect. The practical significance of the Convention referring to a "right" rather than an obligation on the part of a Detaining Power does not appear to be significant or relied upon substantially by the comment.

Last, Article 105(4) refers to "in good time" with respect to notice of "Particulars of the charge or charges . . ." to the prisoner of war. But Article 104(3) prescribes "three weeks" notification of "the charge or charges" to the Protecting Power. Whether an interrelation can be made is not entirely clear.

The comment to Article 105 addresses the above-mentioned drafting oversight with respect to conditions of application. It reasonably concludes Article 105 applies to prisoners of war facing trial. ¶ 4075. It further reminds deprival of fair trial procedures, including deprival of assistance of counsel, may constitute a grave breach under Article 130 of the Convention. ¶ 4076.

The comment also curiously resorts to the principle of assimilation in its elaboration on Article 105. ¶ 4077. This characterization is strange because the article itself does not resort to the principle of assimilation. Rather, it includes specifically enumerated obligations. It later becomes clear the comment means to refer to Article 82 rather than to Article 105 with respect to assimilation of procedural protections in judicial or disciplinary proceedings. ¶ 4077. The comment helpfully adds, regardless

of what assistance assimilation by Article 82 may provide, access to counsel under Article 105 is applicable regardless of charge severity. ¶ 4084. This comment seems correct and clarifies the confusion the earlier reference to Article 82 assimilation may have introduced.

The Third Convention guarantees to prisoners of war, "defence by a qualified advocate or counsel of his own choice." The passage calls for some interpretation. By one reading the article can be satisfied by providing either a qualified advocate or by providing "counsel of . . . choice." By another reading, the advocate must be qualified and chosen by the prisoner of war. The comment lends some support to the latter view that prisoners of war must be provided counsel of their choice. ¶ 4085. Yet the comment also notes International Committee of the Red Cross experience indicates difficulty accommodating prisoner of war choice in this respect considering qualification standards applicable to providing representation in trial proceedings of the Detaining Power. ¶ 4085. In that regard, the comment observes, "The Detaining Power *should* therefore strive *as far as possible* to accommodate the accused prisoner's choice of counsel, even if this means easing some of those requirements." ¶ 4085 (emphasis added). Yet immediately thereafter, the comment identifies choice of counsel as "a fundamental guarantee."

The comment notes Article 105's silence with respect to self-representation by prisoners of war, but it asserts the customary international law of war includes an obligation to permit self-representation. ¶ 4086. The basis of this customary law claim may be worthy of further investigation. However, the comment with respect to the Convention's silence seems appropriate as does declining to extend such an obligation as a matter of treaty law or interpretation.

The comment dismisses any significance to the Convention's separate resort to both the terms "qualified advocate" and "counsel." ¶ 4087. It notes the French version uses the single term "*un avocat qualifié*." ¶ 4088.

Returning to the question of choice of counsel, the comment later seems to recommend a cumulative view, which is likely the soundest. That is, the counsel representing a prisoner of war must be both qualified and chosen. ¶ 4090. The comment considers the narrowing effect of the former requirement. That is, not all counsel of a prisoner of war's choosing will be qualified, in which case the Detaining Power cannot permit representation. Ultimately, the comment does not offer an unequivocal command with respect to counsel of choice. But neither does it concede ambiguity as it does to other articles of the Third Convention.

The comment addresses the costs of representation by again noting silence on the part of the Convention. ¶ 4093. It largely leaves the issue to Parties, noting circumstances in which cost might be borne by the Detaining Power, by the Protecting Power, or by the Power on which the prisoner of war depends. ¶ 4093. In this matter, the comment wisely respects the Convention's silence and leaves the issue to State discretion.

The comment highlights an interesting and inexplicable contrast concerning the obligation to provide interpretative services. It indicates the Detaining Power must interpret the prisoner of war's notice of charges pursuant to Articles 104, 105(4), and 107(1). But the comment clarifies interpretation in the conduct of a defense is not required unless the prisoner of war requests so. ¶ 4097.

The comment adopts an expansive notion of the phrase "competent interpreter." Competence, in the view of the comment, involves both facility with the language of the proceedings and a person "familiar with legal terminology and accustomed to acting as an interpreter during judicial proceedings." ¶ 4098. This reading is logical, though perhaps not extensively supported. The single source of support provided by the comment does not identify any source of its own other than a separate provision of the Third Convention relating to disciplinary proceedings. ¶ 4098.

The comment also acknowledges the Convention's silence on presence at trial. However, it indicates inclusion of that obligation in the 1977 Additional Protocol I, Article 75 as evidence that presence at trial is "integral to the right to defend oneself." ¶ 4101. These circumstances suggest an opportunity for States to address silence rather than an invitation to incorporate what Additional Protocol I explicitly provides into the space left by the Convention's silence. It may be relevant to note Article 107(1) expressly anticipates announcement of a trial sentence outside the presence of a prisoner of war (indicating notice "shall also be sent to the accused prisoner of war in a language he understands, if the sentence was not pronounced in his presence"). The updated *Commentary* is usually more diligent about these sorts of cross-references and identifying accordance between articles.

Addressing notice, the comment observes, "The provision requires that the accused be notified 'in due time before the trial.'" To interpret this phrase, the comment refers to the language of Article 104, which requires notification be provided "as soon as possible and at least three weeks before the opening of the trial." ¶ 4106. It might be emphasized

the cross-reference in this case is only one of utility and not of equation or incorporation. Article 105 clearly adopts a more flexible standard than Article 104 for its particular and, as the updated *Commentary* notes, distinct notification requirement. *See* ¶ 4127.

ARTICLE 106

APPEALS

Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.

Although the text of the Convention does not, the comment to Article 106 includes all Article 105 rights with respect to trial as rights applicable to appeals. States' deliberations at the 1949 Democratic Conference of Geneva are cited in support of this view. ¶ 4141. Whether this resort to preparatory work is appropriate and justified should be considered. Appellate proceedings are, in many systems, fundamentally different from trials. For instance, oral hearings may be conducted out of presence of the convicted or not at all in some systems. Additionally, presentation of new evidence is forbidden on appeal in some systems. Incorporation of the entirety of Article 105 also seems unnecessary considering the Article 106 resort to assimilation for appellate procedures for prisoners of war. In fact, the comment later acknowledges the article's resort to assimilation. ¶ 4150.

As adopted, Article 106 does not guarantee appeal; rather, it only extends opportunities to appeal to prisoners of war detained by Powers that provide appeals to their own armed forces. Yet the comment resorts to developments since 1949 to conclude appeal is now "a fundamental procedural guarantee of international law that must be available to prisoner as war as well." ¶ 4152. The comment indicates a majority of States now provide rights of appeal in military criminal proceedings.

A number of concerns arise from the comment. First, the Convention is usually clear when it allows for or intends departure from its express resorts to assimilation. Article 106 includes no such exception or departure. Further, which regime of international law (human rights, customary international law of war, general international law, etc.) occasioned the

"developments" noted by the comment is unclear. Nor does the comment provide compelling evidence of State practice and subsequent agreement among States. It should be noted a mere majority of military systems providing appeal is not sufficient to establish custom. Moreover, even if the right to appeal is taken as an aspect of custom, including it as a guarantee of Article 106 is to expose States to potential grave breaches and that regime's obligations of universal prosecution and enforcement without clear intent on the part of States to do so.

ARTICLE 107

NOTIFICATION OF JUDGMENTS AND SENTENCES

Any judgment and sentence pronounced upon a prisoner of war shall be immediately reported to the Protecting Power in the form of a summary communication, which shall also indicate whether he has the right of appeal with a view to the quashing of the sentence or the reopening of the trial. This communication shall likewise be sent to the prisoners' representative concerned. It shall also be sent to the accused prisoner of war in a language he understands, if the sentence was not pronounced in his presence. The Detaining Power shall also immediately communicate to the Protecting Power the decision of the prisoner of war to use or to waive his right of appeal.

Furthermore, if a prisoner of war is finally convicted or if a sentence pronounced on a prisoner of war in the first instance is a death sentence, the Detaining Power shall as soon as possible address to the Protecting Power a detailed communication containing:

(1) the precise wording of the finding and sentence;

(2) a summarized report of any preliminary investigation and of the trial, emphasizing in particular the elements of the prosecution and the defence;

(3) notification, where applicable, of the establishment where the sentence will be served.

The communications provided for in the foregoing subparagraphs shall be sent to the Protecting Power at the address previously made known to the Detaining Power.

This comment indicates Article 107 "reinforces the right of appeal contained in Article 106." ¶ 4171. As the updated *Commentary* previously conceded, Article 106 includes no such explicit right. Rather, the article resorts to military assimilation, meaning should appeal exist for members of the Detaining Power's armed forces, the same appellate regime would apply to prisoners of war as well.

The comment insists the passage of Article 107 that anticipates a prisoner of war may not be present at trial does not diminish the updated *Commentary*'s earlier claim that prisoners of war have a right to be present at trial. ¶ 4176. (citing *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 512). As indicated above, a number of concerns attach to this claim. *See* analysis of ¶ 4152.

The comment seizes on Article 107 as an opportunity to remark on public trials. It asserts public trials are an obligation of many national systems and of the law of war. ¶ 4177. (citing 1977 Additional Protocol I, Article 75(4)(i)). *See also* the commentary on Article 130, ¶ 5282. Although the Geneva Conventions do not explicitly state so, this rule may, nevertheless, be implicit in Articles 84(2) and 105(5) of the Third Convention, Article 74(1) of the Fourth Convention, and common Article 3(1)(d). Here again, the updated *Commentary* makes general claims in the text that are too easily understood as applicable generally in relation to the Convention, only to reveal in footnotes their support comes from a treaty not universally ratified and the claims are intended to supplement the Convention only for States Parties to that Protocol. Moreover, the comment resorts to extra-Conventional developments to imply new meaning to the Convention. States should carefully consider, adopt, and advance legal positions on these claims.

ARTICLE 108

EXECUTION OF JUDICIAL PENALTIES: PREMISES AND ESSENTIAL SAFEGUARDS

Sentences pronounced on prisoners of war after a conviction has become duly enforceable, shall be served in the same establishments and under the same conditions as in the case of members of the armed forces of the Detaining Power. These conditions shall in all cases conform to the requirements of health and humanity.

A woman prisoner of war on whom such a sentence has been pronounced shall be confined in separate quarters and shall be under the supervision of women.

In any case, prisoners of war sentenced to a penalty depriving them of their liberty shall retain the benefit of the provisions of Articles 78 and 126 of the present Convention. Furthermore, they shall be entitled to receive and despatch correspondence, to receive at least one relief parcel monthly, to take regular exercise in the open air, to have the medical care required by their state of health, and the spiritual assistance they may desire. Penalties to which they may be subjected shall be in accordance with the provisions of Article 87, third paragraph.

This comment identifies Article 108 as an application of military assimilation. ¶ 4201. It observes prisoners of war "must serve their sentences in the same establishments and under the same conditions as members of the armed forces of the Detaining Power." ¶ 4201. It helpfully reminds prisoners of war may be sent to penitentiaries to serve judicial sentences, though not for disciplinary punishments. ¶ 4201.

The comment determines Article 108 operates to "avoid enemy personnel serving a sentence alongside ordinary criminal detainees of the same nationality as the Detaining Power." ¶ 4203. That this follows from assimilation is not entirely clear. That military members of a Detaining Power

serve sentences in civilian penitentiaries is foreseeable, and perhaps even the case. The advice to guard against discrimination or violence directed at prisoners of war is, of course, sound. The paragraph that follows anticipates incarceration of military personnel in civilian facilities. ¶ 4204–05. It also notes trends toward moving military justice to civilian systems.

In its favor, the comment is a principled reflection of efforts to account for developments since 1949. That is, the Conventions' resort to assimilation ensures the living nature of the Convention to a degree. Assimilation opens the door to developments outside the Convention, informing its meaning and content. Every development in concepts assimilated to prisoners of war—that does not run afoul of the Convention's own minimum standards, of course—passes through the Convention to prisoners held by the Power that adopted the development in question.

Last, the comment helpfully reminds Articles 5(1) and 88(5) provide protections relevant to prisoners of war serving judicial sentences. ¶ 4217.

PART IV: TERMINATION OF CAPTIVITY

SECTION I

DIRECT REPATRIATION AND ACCOMMODATION IN NEUTRAL COUNTRIES

Dr. Jean Pictet's 1960 *Commentary* includes a lengthy chapeau comment to Part IV, Section I of the Convention. That comment related the considerable difficulty encountered by efforts to secure agreements between States to directly repatriate or accommodate in neutral countries wounded and sick prisoners of war. p. 507–508. Dr. Pictet's comment indicates States ultimately "gave up the practice of accommodation in neutral countries" during the Second World War. p. 508. The updated *Commentary* does not reproduce Dr. Pictet's Part IV comment as a chapeau comment. It instead outlines the Third Convention's Section I coverage.

ARTICLE 109

DIRECT REPATRIATION AND ACCOMMODATION IN NEUTRAL COUNTRIES: GENERAL OBSERVATIONS

Subject to the provisions of the third paragraph of this Article, Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel, in accordance with the first paragraph of the following Article.

Throughout the duration of hostilities, Parties to the conflict shall endeavour, with the cooperation of the neutral Powers concerned, to make arrangements for the accommodation in neutral countries of the sick and wounded prisoners of war referred to in the second paragraph of the following Article. They may, in addition, conclude agreements with a view to the direct repatriation or internment in a neutral country of able-bodied prisoners of war who have undergone a long period of captivity.

No sick or injured prisoner of war who is eligible for repatriation under the first paragraph of this Article, may be repatriated against his will during hostilities.

The comment to Article 109 invokes a "balance" theory of the law of war, observing, "Article 109 strikes a balance between the need to intern military personnel and humanitarian considerations." ¶ 4245. The comment indicates the original purpose of the Article 109(3) prohibition on repatriating wounded and sick prisoners of war against their will was out of consideration for fear of political retribution. However, the comment declines to restrict the prohibition to such circumstances. Refusals of repatriation by seriously wounded or sick prisoners of war on any basis must be honored according to the comment. ¶ 4247. The comment hews well to the Convention's text, although it appears not to account for a clearly identified and narrower

object and purpose of the article, which is to guarantee to return prisoners to the Power on which they depend.

The comment reminds some captives may simultaneously benefit from the First and Third Geneva Conventions. ¶ 4256. The comment might have added simultaneous application of the First and Third Conventions is to be contrasted with the Fourth Convention, which expressly excludes persons protected by another of the 1949 Geneva Conventions from its "protected person" status. *See* 1949 Fourth Geneva Convention, Art. 4.

The comment helpfully reminds readers both Article 110 and an annexed Model Agreement include elaborations on conditions that may amount to being "seriously wounded or sick" for purposes of Article 109 as well. ¶¶ 4258, 4259. The comment also includes a cross-reference to the mixed medical commissions established by Article 112 of the Third Convention. ¶ 4261.

The comment admits insufficient State practice exists on the question of repatriating wounded prisoners of war who refuse medical treatment. ¶ 4265. It offers two possible interpretations of contrasting obligations. ¶¶ 4265–66. The comment advises a default outcome in favor of repatriation but, admirably, does not express a legal obligation in that respect. States should consider adopting and advancing positions on this important question.

The comment advises States agreed to no precise period of eligibility for accommodation in neutral States, although it indicates the International Committee of the Red Cross has advised three years may be sufficient to warrant transfer. The comment also indicates State practice is scarce on the question of what constitutes a "long period of captivity" for purposes of accommodation in a neutral country. ¶ 4289. Here is another wise decision to provide hortatory advice rather than to fabricate a firm rule or standard.

Last, the comment concedes the Article 109(3) prohibition on involuntary repatriation addresses only seriously wounded and sick prisoners of war. Still, the comment insists the prohibition extends to "able bodied" prisoners of war referred to in Article 109(1). ¶ 4302. This is a blatantly nonliteral reading of the article. The humanitarian logic of the interpretation may be sound, but it does not offer the nature or degree of support from subsequent State practice and agreement that would normally justify such a departure from plain meaning.

ARTICLE 110

CASES OF REPATRIATION AND ACCOMMODATION

The following shall be repatriated direct:

(1) Incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished.

(2) Wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished.

(3) Wounded and sick who have recovered, but whose mental or physical fitness seems to have been gravely and permanently diminished.

The following may be accommodated in a neutral country:

(1) Wounded and sick whose recovery may be expected within one year of the date of the wound or the beginning of the illness, if treatment in a neutral country might increase the prospects of a more certain and speedy recovery.

(2) Prisoners of war whose mental or physical health, according to medical opinion, is seriously threatened by continued captivity, but whose accommodation in a neutral country might remove such a threat.

The conditions which prisoners of war accommodated in a neutral country must fulfil in order to permit their repatriation shall be fixed, as shall likewise their status, by agreement between the Powers concerned. In general, prisoners of war who have been accommodated in a neutral country, and who belong to the following categories, should be repatriated:

(1) those whose state of health has deteriorated so as to fulfil the conditions laid down for direct repatriation;

(2) those whose mental or physical powers remain, even after treatment, considerably impaired.

If no special agreements are concluded between the Parties to the conflict concerned, to determine the cases of disablement or sickness entailing direct repatriation or accommodation in a neutral country, such cases shall be settled in accordance with the principles laid down in the Model Agreement concerning direct repatriation and accommodation in neutral countries of wounded and sick prisoners of war and in the Regulations concerning Mixed Medical Commissions annexed to the present Convention.

The comment to Article 110 commends consulting the Third Convention's Model Agreement on repatriation. ¶ 4307. The comment further indicates the phrase "repatriated direct" implies return without intervening stages of accommodation and "via the fastest route." ¶ 4309. This interpretation accounts well for the Convention's resort to the modifier "direct" where other references to repatriation do not include that term. It seems possible the term intends, instead, to refer to the Parties that carry out repatriation rather than the route taken. That is, it might be understood to require the Parties to conduct the evacuation themselves. However, the comment's interpretation is entirely reasonable in this case.

The Convention does not indicate a starting point for the one-year recovery period governing transfer to neutral territory. The comment identifies the date of injury or sickness as the starting point. This view is reasonable considering the Third Convention's Model Agreement reference to recovery "within one year from the date of the injury." ¶ 4311. Yet it seems a State might reasonably understand the one-year recovery period to begin on the date of capture. The latter interpretation would not require a Detaining Power to transfer a prisoner of war who was injured long before capture and, having nearly healed, would soon return to a condition permitting return to the battlefield.

ARTICLE 111

INTERNMENT IN A NEUTRAL COUNTRY

The Detaining Power, the Power on which the prisoners of war depend, and a neutral Power agreed upon by these two Powers, shall endeavour to conclude agreements which will enable prisoners of war to be interned in the territory of the said neutral Power until the close of hostilities.

This comment characterizes Article 111 as supplementing Articles 109 and 110 on wounded and sick prisoners of war. ¶ 4326. What the passage means by "supplementing" may be unclear. On further reading, the term seems to suggest independent operation, leaving Articles 109 and 110 to operate separately. To be clear, Article 111 does not read as a means to implement Articles 109 and 110. Unlike those articles, Article 111 is not qualified by or limited to any subcategory of prisoners of war. Rather, it speaks to prisoners of war more generally. Given it appears at the outset of the comment, this characterization may mislead the reader.

A later passage concedes the article's wider phrasing but then indicates application only to prisoners of war *not* covered by Article 109. ¶ 4330. The comment observes, "it covers only prisoners of war who are not wounded or sick and who have not undergone a long period of captivity." ¶ 4330. This is a reasonable interpretation in that those categories of prisoners of war must be repatriated to the Power on which they depend rather than accommodated in a neutral State.

The comment then helpfully summarizes the obligations of a neutral Power that interns prisoners of war pursuant to an Article 111 arrangement. ¶¶ 4337–4343.

ARTICLE 112

MIXED MEDICAL COMMISSIONS

Upon the outbreak of hostilities, Mixed Medical Commissions shall be appointed to examine sick and wounded prisoners of war, and to make all appropriate decisions regarding them. The appointment, duties and functioning of these Commissions shall be in conformity with the provisions of the Regulations annexed to the present Convention.

However, prisoners of war who, in the opinion of the medical authorities of the Detaining Power, are manifestly seriously injured or seriously sick, may be repatriated without having to be examined by a Mixed Medical Commission.

The comment explains the commissions addressed by Article 112 implement the accommodation and repatriation schemes of Articles 109 and 110 of the Third Convention. ¶ 4344. The comment also draws attention to Annex II to the Convention, which provides further detail and regulations on mixed medical commissions. ¶ 4345.

Consistent with the text of the article, the comment indicates mixed medical commissions must be established, "As soon as hostilities start, regardless of their intensity . . . ." ¶ 4352. Negotiating history appears to buttress this interpretation. ¶ 4351 (citing *Report on the Meeting of Neutral Members of the Mixed Medical Commissions of 1945*, p. 4). Yet in light of the low threshold of violence for commencement of international armed conflict, one wonders if State practice reflects the comment's view. Brief flare-ups of violence have been characterized as international armed conflict, yet compelling evidence that States have activated mixed military commissions in such cases does not exist. It seems possible the case can be made that subsequent practice and agreement permits States to monitor a situation and judge the likelihood of need for Article 112 commissions.

The comment helpfully summarizes select regulations from Annex II. ¶¶ 4353–54, 4358–4359, 4361–4362, 4365.

ARTICLE 113

PRISONERS ENTITLED TO EXAMINATION BY MIXED MEDICAL COMMISSIONS

Besides those who are designated by the medical authorities of the Detaining Power, wounded or sick prisoners of war belonging to the categories listed below shall be entitled to present themselves for examination by the Mixed Medical Commissions provided for in the foregoing Article:

(1) Wounded and sick proposed by a physician or surgeon who is of the same nationality, or a national of a Party to the conflict allied with the Power on which the said prisoners depend, and who exercises his functions in the camp.

(2) Wounded and sick proposed by their prisoners' representative.

(3) Wounded and sick proposed by the Power on which they depend, or by an organization duly recognized by the said Power and giving assistance to the prisoners.

Prisoners of war who do not belong to one of the three foregoing categories may nevertheless present themselves for examination by Mixed Medical Commissions, but shall be examined only after those belonging to the said categories.

The physician or surgeon of the same nationality as the prisoners who present themselves for examination by the Mixed Medical Commission, likewise the prisoners' representative of the said prisoners, shall have permission to be present at the examination.

Article 113 is peculiar. It first identifies categories of prisoners of war permitted to present themselves for evaluation by a mixed medical

commission. It then indicates all prisoners of war may present themselves as well. The latter prisoners of war only differ in priority of examination. As the comment indicates, Article 113 is essentially a system of priority rather than of entitlement or access, as its unofficial title suggests. ¶ 4374. Of course, priority anticipates delay or limited access, and historical experience vindicates the connection. The prospect of being granted accommodation in neutral territory or repatriation is simply too enticing for most prisoners of war to resist.

The comment addresses a coincidence between the Third Convention's Article 30 and 31 access to medical attention and its Article 113 presentation at a mixed medical commission. The comment concludes the latter is not a substitute for the former and the Detaining Power must make both available. ¶ 4371.

The comment includes several inferences not clearly included in the text of the article. It identifies, inherent in the Article 109 and 110 repatriation obligations, a further duty on the part of the Detaining Power to identify seriously wounded or sick prisoners of war. ¶ 4375. This seems a logical inference and connects clearly to the function of the mixed medical commission as well as the duties of medical attention described in Articles 30 and 31 of the Convention.

The comment further infers a Protecting Power's authority, though not mentioned in Article 113, to refer prisoners of war to a mixed medical commission. ¶ 4379. The logic of this conclusion is perhaps sound, but the comment provides no citation to State practice. Admittedly, practice in this respect would be sparse considering the rarity of States' resort to the Protecting Powers regime. But no citations to States' detention and legal doctrines are provided either. Why the comment goes so far interpretively, when the Protecting Powers regime is practically defunct, is unclear. Unless, perhaps, the goal is to reserve referral power for the International Committee of the Red Cross itself, which has often served in the role of Protecting Power.

Finally, the comment conditions the presence of a medical professional of the prisoner of war's nationality and the prisoners' representative on the consent of the prisoner of war. The comment bases the consent requirement on prevailing standards of medical ethics. ¶ 4383. This interpretation and others incorporating standards of medical ethics are not without difficulty. Whether notions of medical ethics are sufficiently uniform among the States Parties to the Convention to permit incorporation is unclear. Moreover, the actual text of Article 113

speaks unequivocally that presence "shall" be permitted by the Detaining Power. States should express clear views on this subject.

ARTICLE 114

PRISONERS MEETING WITH ACCIDENTS

Prisoners of war who meet with accidents shall, unless the injury is self-inflicted, have the benefit of the provisions of this Convention as regards repatriation or accommodation in a neutral country.

Article 114 is, at first reading, a broadly phrased obligation. It leaves enormous room for interpretation by States. The introductory comment to Article 114 interprets the scope of accidents covered to be those that result in "serious" wounding or sickness. It indicates a "less serious" injury need only be "potentially" accommodated in neutral territory, although the text of the article does not clearly indicate so. ¶ 4385. The comment appears to preserve the general function and scope of the Convention's accommodation and repatriation regimes in this respect. Yet, the first comment of the discussion section suggests a literal, all-inclusive meaning of "accident." It observes, "Article 114 covers all accidents that result in injury." ¶ 4388. It seems likely this comment is intended to indicate qualifying accidental injuries, no matter how incurred, are covered rather than, as the comment maintains, all injuries from all accidents qualify.

ARTICLE 115

PRISONERS SERVING A SENTENCE

No prisoner of war on whom a disciplinary punishment has been imposed and who is eligible for repatriation or for accommodation in a neutral country, may be kept back on the plea that he has not undergone his punishment.

Prisoners of war detained in connection with a judicial prosecution or conviction and who are designated for repatriation or accommodation in a neutral country, may benefit by such measures before the end of the proceedings or the completion of the punishment, if the Detaining Power consents.

Parties to the conflict shall communicate to each other the names of those who will be detained until the end of the proceedings or the completion of the punishment.

The updated *Commentary* generally does an excellent job cross-referencing connected provisions of the Convention. However, mention of the Article 115 exception to the accommodation and repatriation obligations of Articles 109 and 110 might have been made in those respective comments. As the comment observes, "the obligation to repatriate, or seek accommodation in a neutral country, does not prevail over the right of the Detaining Power to keep prisoners of war detained for the duration of criminal proceedings against them, or until the end of their sentences once they have been convicted." ¶ 4393.

The comment restricts Article 115(1) to prisoners of war who would be eligible for accommodation or repatriation by virtue of wounds or sickness. It does not, according to the comment, apply to any other prisoners of war. ¶ 4397. The reason is not entirely clear. The article is not clearly phrased to prevent such application. The consequence is prisoners of war serving mere disciplinary punishments might be held back from a general repatriation or accommodation arrangement. The supporting footnote indicates resort to

the term "accommodation" rather than "internment" justifies the reading. This seems supportable but should be featured in the comment itself rather than the supporting footnote. It seems only wounded and sick prisoners of war are "accommodated" in neutral territory, whereas other prisoners of war are said to be "interned" in neutral territory. This is at least a helpful tutorial on the terminology of the Convention.

The comment emphasizes only the judicial punishment of incarceration permits a Detaining Power to delay repatriation or accommodation. ¶ 4401. Fines or other measures do not justify delaying repatriation or accommodation in neutral territory. ¶ 4401. Here is another formalist or literal reading of the Convention that may be contrasted with other functionalist or implied readings.

The comment confirms, without condition or limit, the requirement to secure a Detaining Power's consent to repatriate or accommodate in neutral territory a prisoner of war serving a judicial sentence to confinement. ¶ 4402.

ARTICLE 116

COSTS OF REPATRIATION

The costs of repatriating prisoners of war or of transporting them to a neutral country shall be borne, from the frontiers of the Detaining Power, by the Power on which the said prisoners depend.

This comment indicates Article 116 expense allocations apply to both repatriation and to accommodation, although the article refers only to the former. ¶ 4408. The comment does not explain the extension, which would not ordinarily be remarkable except an earlier comment makes a clear distinction between repatriation and accommodation for another purpose. *See* ¶ 4397 and note 10. In that case, the updated *Commentary* excludes healthy prisoners of war from the Article 115 prohibition on holding back prisoners of war from repatriation or accommodation because internment, rather than accommodation, is the term applicable to healthy prisoners of war held in neutral territory. It seems consistency with the prior distinction would counsel not extending Article 116 beyond repatriation to accommodation of sickness or to internment in neutral territory. The term "transfer" may describe movements for the latter two arrangements. Article 48(4) of the Third Convention regulates the expense of transfers and allocates costs to the Detaining Power.

SECTION II

RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE CLOSE OF HOSTILITIES

Two chapeau comments emphasize Part IV, Section II of the Third Convention addresses release and repatriation generally as distinguished from "direct repatriation and accommodation or internment in neutral countries" for specific categories of prisoners of war during hostilities. ¶ 4431. Article 109, found in Part IV, Section I, addresses the latter subject.

ARTICLE 117

ACTIVITY AFTER REPATRIATION

No repatriated person may be employed on active military service.

Because repatriation refers not only to prisoners of war returned for reasons of wounds, sickness, or long service, whether the Article 117 prohibition on return to active military service applies to end-of-hostilities repatriations is unclear. Because the article appears in Section I dealing with "Direct repatriation and accommodation," Article 117 may only apply to the prisoners of war addressed in that section.

The comment helpfully indicates inclusion of the term "active" was debated in the Convention's preparatory work and survived a vote to delete it. ¶ 4416.

The comment concludes Article 117 applies only to repatriations "during hostilities" and to repatriations of the prisoners of war described in Articles 109 and 110 (those seriously wounded who are repatriated, those wounded who are accommodated in neutral territory then repatriated, and able prisoners of war who have undergone long captivity and are repatriated by agreement). ¶ 4417. On the question of health status and prisoner of war repatriations generally, the comment concludes, "only 'able-bodied' prisoners of war who have undergone a long period of captivity and are repatriated pursuant to an agreement based on Article 109(2) are covered by Article 117." ¶ 4419. According to the comment, able-bodied prisoners of war repatriated for other reasons are not prohibited from active military service by Article 117. This interpretation is nonliteral, though contextually cognizant. The comment acknowledges two military manuals' views in this same respect. ¶ 4420 and note 13.

The comment also acknowledges ambiguity concerning "active military service." The comment does not identify a definitive meaning but suggests, "Parties to a conflict would ideally clarify what they understand 'active military service' to mean." ¶¶ 4422–4423.

Although the article uses absolute terms, referring to all repatriated

prisoners, the comment does not detect an absolute prohibition on subsequent service. Instead, the comment concludes Article 117 limits the prohibition on service to the conflict in question. ¶ 4425. Here is another functionalist rather than literal reading. The approach considers the object and purpose of the article rather than dwelling on its literal terms. The comment considers the prohibition on service unnecessary following the close of hostilities. It may have been useful to showcase State practice in this respect. Former prisoners of war often continue their careers in the armed forces following repatriation or escape.

The comment also describes a notion of standing applicable to Article 117. The comment concludes only a former Detaining Power may avail itself of the Article 117 prohibition. It observes, "it is only the original Detaining Power and its allies that can avail itself of this provision." ¶ 4426. A State engaged in a distinct armed conflict in which a former prisoner of war participates has no ground under Article 117. ¶ 4426. This conclusion seems somewhat at odds with the International Committee of the Red Cross's claim respecting an *erga omnes* character of the Convention. It also sits uneasily with the updated *Commentary*'s broad interpretation of common Article 1 and its purported universal duty of external enforcement. Perhaps the International Committee of the Red Cross would not object to a third-party State enforcing a return to hostilities against a former Detaining Power.

The comment brings to attention the very limited enforcement opportunities available for breaches of Article 117. The prisoner of war who has returned to hostilities if recaptured regains prisoner of war status. No measures may be taken against them in this respect. Neither may the victim State impose criminal prosecution or reprisal. The matter is one exclusively between the States involved. ¶¶ 4427–4430. This fact will surely be valuable to States considering magnanimous humanitarian repatriations.

ARTICLE 118

RELEASE AND REPATRIATION

Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.

In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph.

In either case, the measures adopted shall be brought to the knowledge of the prisoners of war.

The costs of repatriation of prisoners of war shall in all cases be equitably apportioned between the Detaining Power and the Power on which the prisoners depend. This apportionment shall be carried out on the following basis:

(a) If the two Powers are contiguous, the Power on which the prisoners of war depend shall bear the costs of repatriation from the frontiers of the Detaining Power.

(b) If the two Powers are not contiguous, the Detaining Power shall bear the costs of transport of prisoners of war over its own territory as far as its frontier or its port of embarkation nearest to the territory of the Power on which the prisoners of war depend. The Parties concerned shall agree between themselves as to the equitable apportionment of the remaining costs of the repatriation. The conclusion of this agreement shall in no circumstances justify any delay in the repatriation of the prisoners of war.

At its outset, the comment reproduces the sole declaration filed by a State to the article: "The Republic of Korea interprets the provisions of Article 118, paragraph 1, as not binding upon a Power detaining prisoners of war to forcibly repatriate its prisoners against their openly and freely expressed will."

The comment then carefully distinguishes direct repatriations addressed by Articles 109–117 from repatriations addressed by Article 118. ¶ 4433. The comment emphasizes the entirely unilateral character of the Article 118 obligation. ¶¶ 4434, 4449. The comment then includes a helpful cross-reference to Article 5 respecting the beginning of application of the Convention and recalls the Detaining Power's option to defer repatriation of prisoners of war facing or serving judicial confinement. ¶ 4436.

The comment highlights the failure of the 1929 Geneva Convention's agreement-based system for repatriation after the Second World War. After States did not conclude agreements to effect repatriations, many prisoners of war languished in unnecessary conditions of internment. ¶ 4439. The comment leverages the 1949 Third Convention's abandonment of the 1929 Convention's agreement-based system to attribute a unilateral character to the former's repatriation regime. Although colorable, and accounting for a textual amendment, whether the characterization adequately distinguishes agreement or consent from performance is not clear. That is, where the 1949 Third Convention establishes standing agreement to repatriate rather than requiring *ad hoc* consent, it does not so clearly eliminate reciprocal observance or performance as a condition generally attendant to the functioning of treaties.

The comment highlights the negotiating history which includes multiple proposals to except nonconsenting prisoners of war from repatriation, all ultimately rejected. ¶ 4440.

Although the comment defines "release" and "repatriation" separately, it devotes most of its attention to the latter. The comment observes, "Release and repatriation are to be implemented simultaneously or consecutively. Whatever the case, the Detaining Power must do both: end the internment of prisoners of war and return them to the Power on which they depended before falling into its hands." ¶ 4447. The extent to which the former requires relaxation or even elimination of controls on liberty is not explored. It seems reasonable for the Detaining Power to maintain control over prisoners of war both in anticipation of and during the repatriation process. Doing so might both guarantee their safety and ensure the former Detaining Power is able to maintain accountability of

prisoners to be repatriated. State practice in this respect would have been a helpful feature for the comment.

The comment observes, "The obligation to release and repatriate is unilateral and exists independently for each Party holding prisoners of war. This means a Detaining Power must proceed with release and repatriation as required under Articles 118 and 119 even if the other Party has not reciprocated." ¶ 4448. It then concludes suspension of repatriation in response to another Party's failure to repatriate would amount to a prohibited reprisal against prisoners of war. ¶ 4449.

The Third Convention categorically prohibits reprisals against prisoners of war. *See* 1949 Third Geneva Convention, Art. 13. Yet reprisals, as distinguished from mere retorsions, involve resort to internationally unlawful acts. In an analysis that considers whether suspension of repatriation is an unlawful measure involving impermissible consideration of reciprocity, to claim suspension amounts to a reprisal amounts to question begging and assumes the subject of controversy, as reprisals themselves involve unlawful acts. For a State that considered the repatriation obligation subject to reciprocal observance by another State, suspension of repatriation would not involve an unlawful act and would therefore not amount to a reprisal. To be sure, a State could not suspend any other obligation of the Convention in response to failure by another State to repatriate. In this respect, reciprocity operates distinctly from reprisal—it must concern the same obligation whereas reprisals may involve breach of separate or unrelated obligations by the victim State.

The comment entertains a view that the Eritrea-Ethiopia Claims Commission has offered, contrary to the unilateral character of Article 118. The Commission concluded fully nonreciprocal, unilateral application of Article 118 may prove "unreasonable." (see Eritrea-Ethiopia Claims Commission, Prisoners of War, Eritrea's Claim, Partial Award, 2003, paras 148–149). The comment responds, however, "any suggestion that the application of Article 118 is dependent upon reciprocity is inconsistent with the wording and drafting history of the provision, is not supported by general State practice and would run counter to the protective purpose of the obligation to release and repatriate." ¶ 4451.

The reason the Convention's negotiating history is dispositive in this case but not in others is unclear. Further, the Eritrea-Ethiopia Claims Commission's work proved highly influential to the updated *Commentary* in other comments. The actions of the Parties to the conflict considered by the Commission seem precisely the sort of subsequent practice the Vienna Convention on the Law of

Treaties refers to and that the updated *Commentary* undertook to account for in its update. Recall, though the work at the Eritrea-Ethiopia Claims Commission reflected the Commission's own comments and findings, significant State practice was also behind the claims of the Parties. This is not to say the updated *Commentary* must take the Commission's or any other adjudicative or arbitral body's work "lock, stock, and barrel." However, explanation of selective citations to such authority would augment the persuasiveness of the comment. Additionally, though the comment cites State practice with respect to nonreciprocal repatriation, it buries that material in a footnote, perhaps because that view is precisely in line with the Commission's view. ¶ 4451 note 39. This practice by the updated *Commentary* is infrequent but concerning.

"Cessation of active hostilities"

Turning attention to the question of timing, the comment asserts the obligation to repatriate under Article 118, "arises as soon as active hostilities between the Detaining Power and the Power on which the prisoners depend have ceased." ¶ 4452. It observes further, "The expectation is that the prisoners will return to their normal lives and not rejoin hostilities against the Detaining Power." ¶ 4452. Whether this statement accurately captures the article and the arrangements involved is unclear. It seems States repatriating prisoners of war when rejoining hostilities does not remain a likely or even a possible outcome. Only a more certain or unequivocal termination of hostilities can guarantee repatriation will not augment the enemy's war effort. Moreover, considering the comment's previously offered understanding that recourse against recaptured prisoners of war who have been previously repatriated is nearly nonexistent, this reading of the article is difficult to support. *See* ¶¶ 4427–4430.

The comment elaborates on the term "hostilities." It excludes "activities of military forces such as troop movements and mobilizations along a border that do not involve any violence or force directed at the enemy." ¶ 4453. It will be interesting to reconsider this definition with respect to an apparently forthcoming International Committee of the Red Cross updated *Commentary* addressing targeting or military operations under 1977 Additional Protocol I to the 1949 Geneva Conventions. The comment indicates some degree of certainty or durability to an end of active hostilities is required when it observes, "The determination as to when active hostilities between two belligerent Parties have ceased with a sufficient degree of stability and permanence to activate the obligation to release and repatriate under Article 118(1) is context-specific." ¶ 4455. The comment seems to settle on the reasonable

view that "active hostilities may be considered to have ceased when there is no reasonable expectation of their resumption." ¶ 4455.

The comment indicates Article 109(3) does not address refusals by prisoners of war to accept repatriation. The comment relates a Korean War situation involving prisoners of war who did not consent to repatriation upon conclusion of an armistice by the Parties to the conflict. The comment notes the Parties resolved the controversy and the UN General Assembly also addressed the situation. ¶ 4467. The comment collects prisoner of war repatriation refusals in more recent conflicts as well. ¶ 4468. The comment implies these instances "must be understood as subject to an exception." ¶ 4469. The comment further invokes the concept of *non-refoulement* from international human rights law as a further basis for not repatriating prisoners of war who fear abuse upon their return. ¶ 4469. The supporting footnote's cross-reference makes clear the principle refers to human rights law. ¶ 4469, note 72.

On the question of the status of prisoners of war who remain in the territory of the Detaining Power, the comment concludes Fourth Geneva Convention protected person status applies until "'release, repatriation or re-establishment' take place." ¶ 4471 (citing Article 6(4)). The comment also cites the work of a prominent academic commentator in this respect. ¶ 4471 (citing Marco Sassòli, International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare, Edward Elgar Publishing, Cheltenham, 2019, p. 271). The comment indicates one State accepted this solution in practice; however, little if any evidence shows any State accepts such classification as a legal obligation under either the Third or Fourth Convention.

ARTICLE 119

DETAILS OF REPATRIATION PROCEDURE

Repatriation shall be effected in conditions similar to those laid down in Articles 46 to 48 inclusive of the present Convention for the transfer of prisoners of war, having regard to the provisions of Article 118 and to those of the following paragraphs.

On repatriation, any articles of value impounded from prisoners of war under Article 18, and any foreign currency which has not been converted into the currency of the Detaining Power, shall be restored to them. Articles of value and foreign currency which, for any reason whatever, are not restored to prisoners of war on repatriation, shall be despatched to the Information Bureau set up under Article 122.

Prisoners of war shall be allowed to take with them their personal effects, and any correspondence and parcels which have arrived for them. The weight of such baggage may be limited, if the conditions of repatriation so require, to what each prisoner can reasonably carry. Each prisoner shall in all cases be authorized to carry at least twenty-five kilograms.

The other personal effects of the repatriated prisoner shall be left in the charge of the Detaining Power which shall have them forwarded to him as soon as it has concluded an agreement to this effect, regulating the conditions of transport and the payment of the costs involved, with the Power on which the prisoner depends.

Prisoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offence.

Parties to the conflict shall communicate to each other the names of any prisoners of war who are detained until the end of the proceedings or until punishment has been completed.

By agreement between the Parties to the conflict, commissions shall be established for the purpose of searching for dispersed prisoners of war and of assuring their repatriation with the least possible delay.

Article 119 presents an example of approximate incorporation of other provisions of the Third Convention. The article requires conditions "similar to" those prescribed in Articles 46 through 48 of the Convention. On the earlier question of whether repatriation requires immediate or simultaneous "release" from all restraints on liberty, Article 118 specifically incorporates the confiscation regime of Article 18, thus indicating restraints on prisoners of war are envisioned even in the process of repatriation.

The comment notes Article 119(5) refers to "pending" criminal proceedings. The comment observes such proceedings "must already have started when the obligation to release and repatriate arises. Mere plans to start them in the future do not justify an exception to the repatriation obligation." ¶ 4513. The comment's reading is cramped but reasonable and certainly gives some practical effect to the term "pending." However, how a Detaining Power might handle a prisoner of war who commits a serious offense during repatriation is unclear. The Third Convention's general approach to this question would seem to suggest repatriation may be delayed. Moreover, the proceeding would be "pending" once the charge is filed against the prisoner of war, even if repatriation procedures were underway.

SECTION III

DEATH OF PRISONERS OF WAR

The chapeau comment to Part IV, Section III provides extensive cross-references to articles of the Third Convention dealing with related measures including winding up financial accounts, preparation of legal documents, and national information bureaus as well as relevant provisions of the First and Second Conventions.

ARTICLE 120

PRESCRIPTIONS REGARDING THE DEAD, INCLUDING WILL AND DEATH CERTIFICATES

Wills of prisoners of war shall be drawn up so as to satisfy the conditions of validity required by the legislation of their country of origin, which will take steps to inform the Detaining Power of its requirements in this respect. At the request of the prisoner of war and, in all cases, after death, the will shall be transmitted without delay to the Protecting Power; a certified copy shall be sent to the Central Agency.

Death certificates in the form annexed to the present Convention, or lists certified by a responsible officer, of all persons who die as prisoners of war shall be forwarded as rapidly as possible to the Prisoner of War Information Bureau established in accordance with Article 122. The death certificates or certified lists shall show particulars of identity as set out in the third paragraph of Article 17, and also the date and place of death, the cause of death, the date and place of burial and all particulars necessary to identify the graves.

The burial or cremation of a prisoner of war shall be preceded by a medical examination of the body with a view to confirming death and enabling a report to be made and, where necessary, establishing identity.

The detaining authorities shall ensure that prisoners of war who have died in captivity are honourably buried, if possible according to the rites of the religion to which they belonged, and that their graves are respected, suitably maintained and marked so as to be found at any time. Wherever possible, deceased prisoners of war who depended on the same Power shall be interred in the same place.

Deceased prisoners of war shall be buried in individual graves unless unavoidable circumstances require the use of collective

> *graves. Bodies may be cremated only for imperative reasons of hygiene, on account of the religion of the deceased or in accordance with his express wish to this effect. In case of cremation, the fact shall be stated and the reasons given in the death certificate of the deceased.*
>
> *In order that graves may always be found, all particulars of burials and graves shall be recorded with a Graves Registration Service established by the Detaining Power. Lists of graves and particulars of the prisoners of war interred in cemeteries and elsewhere shall be transmitted to the Power on which such prisoners of war depended. Responsibility for the care of these graves and for records of any subsequent moves of the bodies shall rest on the Power controlling the territory, if a Party to the present Convention. These provisions shall also apply to the ashes, which shall be kept by the Graves Registration Service until proper disposal thereof in accordance with the wishes of the home country.*

Article 120 is another provision that abandons assimilation of prisoners of war to the armed forces of the Detaining Power. The 1929 Geneva Convention Relative to the Treatment of Prisoners of War used assimilation of the regime applicable to armed forces of the Detaining Power to address the subject of prisoner of war testamentary issues and death-related issues.

The comment to Article 120 helpfully explains,

> provisions relating to burial and cremation in paragraphs 3–6 of Article 120 mirror to some extent those in Article 17 of the First Convention and Article 20 of the Second Convention. Whereas the last two provisions relate to combatants who died on the battlefield, Article 120 concerns prisoners of war who died while in the hands of another Power. ¶ 4527.

The comment also includes helpful research on testamentary dispensations for members of various States' armed forces. ¶ 4539. It highlights the 1961 Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions. The comment indicates Article 120 of

the Third Convention and the 1961 Convention work well together as the former incorporates the latter with respect to Powers on which a prisoner of war depends that are States Parties. ¶ 4544. Instances such as these, where the Third Convention explicitly incorporates other legal regimes, seem a sounder basis for resort to those other regimes of law than the complementarity often cited to incorporate *lex generalis* or other regimes.

With respect to timing of transmission, the comment includes a reasonable and contextual interpretation that might be employed more frequently. The comment observes,

> The wording underlines the importance of the timely transmission of the will: 'without delay', not 'without undue delay' or 'without unnecessary delay'. Nonetheless, the phrase has to be interpreted in the context in which the paragraph applies, namely armed conflict, and not as it might be in peacetime. Hence, the wording used is relative and does not specify an exact time frame, such as within 24 hours. ¶ 4547.

This is a persuasive and functional interpretation that wisely accommodates context rather than a formalist reading.

The comment again gives effect to the Convention's conditions and context, observing,

> The interment is to take place if possible according to the rites of the religion to which the deceased belonged. The inclusion of the phrase 'if possible' indicates that this obligation is not an absolute one; the situation may preclude the interment of the dead in this manner.' ¶ 4601 Accordingly, the phrase 'if possible' is to be read as meaning 'as far as possible', indicating that it is not a choice between all of the rites of the religion to which the deceased belonged and none of them. ¶ 4601.

ARTICLE 121

PRISONERS KILLED OR INJURED IN SPECIAL CIRCUMSTANCES

Every death or serious injury of a prisoner of war caused or suspected to have been caused by a sentry, another prisoner of war, or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power.

A communication on this subject shall be sent immediately to the Protecting Power. Statements shall be taken from witnesses, especially from those who are prisoners of war, and a report including such statements shall be forwarded to the Protecting Power.

If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all measures for the prosecution of the person or persons responsible.

This comment characterizes Article 121 as complementary to the Third Convention's Article 13 protection from acts of violence. ¶ 4644. It also recites Article 42 limits on the use of force against prisoners of war as relevant to investigations of deaths. ¶ 4651. The comment does not assign a definitive meaning to "serious injury" in light of failed efforts to settle the meaning of the term at the negotiations that formed the Convention. ¶¶ 4655–4656. Here is an admirable respect for the limits of consensus among the Parties and the dearth of subsequent practice and agreement.

The same, however, cannot be said of the comment's treatment of the term "enquiry." The comment enumerates relatively elaborate conditions derived from general international law, human rights bodies, and from private commentaries on the subject. ¶¶ 4661–72. Across fifteen separate citations, no direct citation is to State practice or military detention doctrine or any source from States indicating incorporation of the cited

developments into prisoner of war doctrine. Nor does the article itself bear, as others do, indicia of intent to incorporate other legal regimes by means of assimilation or other importation as was the case with Article 119. The best approach to these comments may be to take them as hortatory rather than reflecting obligations under the Convention.

PART V

INFORMATION BUREAUX AND RELIEF SOCIETIES FOR PRISONERS OF WAR

Part V of the Convention deals chiefly with informational and reporting issues that present comparatively fewer interpretive issues than preceding parts.

ARTICLE 122

NATIONAL INFORMATION BUREAUX

Upon the outbreak of a conflict and in all cases of occupation, each of the Parties to the conflict shall institute an official Information Bureau for prisoners of war who are in its power. Neutral or non-belligerent Powers who may have received within their territory persons belonging to one of the categories referred to in Article 4, shall take the same action with respect to such persons. The Power concerned shall ensure that the Prisoners of War Information Bureau is provided with the necessary accommodation, equipment and staff to ensure its efficient working. It shall be at liberty to employ prisoners of war in such a Bureau under the conditions laid down in the Section of the present Convention dealing with work by prisoners of war.

Within the shortest possible period, each of the Parties to the conflict shall give its Bureau the information referred to in the fourth, fifth and sixth paragraphs of this Article regarding any enemy person belonging to one of the categories referred to in Article 4, who has fallen into its power. Neutral or non-belligerent Powers shall take the same action with regard to persons belonging to such categories whom they have received within their territory.

The Bureau shall immediately forward such information by the most rapid means to the Powers concerned, through the intermediary of the Protecting Powers and likewise of the Central Agency provided for in Article 123.

This information shall make it possible quickly to advise the next of kin concerned. Subject to the provisions of Article 17, the information shall include, in so far as available to the Information Bureau, in respect of each prisoner of war, his surname, first names, rank, army, regimental, personal or serial number, place and full date of birth, indication of the Power on which he depends, first name of the father and maiden name of the mother, name and

address of the person to be informed and the address to which correspondence for the prisoner may be sent.

The Information Bureau shall receive from the various departments concerned information regarding transfers, releases, repatriations, escapes, admissions to hospital, and deaths, and shall transmit such information in the manner described in the third paragraph above. Likewise, information regarding the state of health of prisoners of war who are seriously ill or seriously wounded shall be supplied regularly, every week if possible.

The Information Bureau shall also be responsible for replying to all enquiries sent to it concerning prisoners of war, including those who have died in captivity; it will make any enquiries necessary to obtain the information which is asked for if this is not in its possession.

All written communications made by the Bureau shall be authenticated by a signature or a seal.

The Information Bureau shall furthermore be charged with collecting all personal valuables, including sums in currencies other than that of the Detaining Power and documents of importance to the next of kin, left by prisoners of war who have been repatriated or released, or who have escaped or died, and shall forward the said valuables to the Powers concerned. Such articles shall be sent by the Bureau in sealed packets which shall be accompanied by statements giving clear and full particulars of the identity of the person to whom the articles belonged, and by a complete list of the contents of the parcel. Other personal effects of such prisoners of war shall be transmitted under arrangements agreed upon between the Parties to the conflict concerned.

This comment to Article 122 notes inconsistent practice by States, including cases in which national information bureaus have not been established at all. ¶¶ 4691, 4704. Further explanation or analysis of the legal significance of these practices seems called for, particularly whether these subsequent practices amount to breaches of the Convention or whether they appear

to have tempered the mandatory character of Article 122. Indications of agreement by States on either of these points would better inform understanding of the current state of Parties' obligations under Article 122.

The comment repeats an earlier observation that, "The obligation to institute a national information bureau is also binding on 'neutral or non-belligerent Powers.'" ¶ 4705. The comment concludes, "there is no substantive difference between the terms 'neutral' and 'non-belligerent'; both refer to a State that is not a Party to an international armed conflict." ¶ 4705. This conclusion does not clearly do justice to emerging distinctions between truly neutral States and States that adopt nonbelligerent or qualified approaches to armed conflicts.

The relevance to application of the Third Convention may be significant. A footnote to the comment indicates, "The expression 'neutral or non-belligerent Powers' is used instead of 'neutral Power' on two occasions in the Third Convention (Articles 4B(2) and 122)." ¶ 4705, footnote 29. This footnote is notable in that the Convention does not refer to nonbelligerent States in the sections on accommodation or internment of wounded or long-serving prisoners of war. The distinction is logical in that a nonbelligerent Power, as distinct from a neutral Power, may have aligned itself with one or another side of an armed conflict such that accommodation or internment of prisoners of war would not appeal to a Party opposing the belligerent with which the nonbelligerent State is aligned.

The comment later helpfully reminds the Third Convention extends the obligations of the national information bureaus to any place prisoners of war are held, not merely those held in the territory of the Detaining Power. ¶ 4706.

The comment identifies a situation in which States' failure to implement the Conventions' Protecting Powers regime may obviate what is otherwise an obligation to report information to Protecting Powers. The comment observes, "In principle, the bureau is obliged to transmit the information listed in Article 122(4)–(6) to the Power concerned through the intermediary of the Protecting Power, if there is one, and the Central Tracing Agency." ¶ 4736. The comment may have adopted this conclusion because the International Committee of the Red Cross, which has often acted in the place of the Protecting Powers, also runs the Central Tracing Agency.

The comment offers a surprising rejection of a seemingly absolute provision of Article 122. The comment insists, with respect to the information reporting requirement,

> Nevertheless, the absolute character of the obligation has to be reconciled with protection against the transmission of information that might be detrimental to the individual concerned and/or their family. Prisoners of war who fear that the information they provide might be used against them or their families may request that it be withheld from the Powers concerned. ¶ 4737.

This conclusion is based on the works of private authors rather than on any evidence of State practice and agreement. This sort of balancing of interests seems best performed by States. States should evaluate the comment's conclusion carefully and publish their own views.

The comment concludes availability of modern technologies to facilitate registration processes does not relieve the Parties of their obligation to send the original capture card to the Central Tracing Agency. ¶ 4746 (citing GC III, Article 70). It will be interesting to learn whether State practice will reflect this conclusion. States may wish to publicize in advance of actual practice whether they share this conclusion and intend to keep hard copies of cards and forward them by post or other physical means of delivery.

ARTICLE 123

CENTRAL TRACING AGENCY

A Central Prisoners of War Information Agency shall be created in a neutral country. The International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned the organization of such an Agency.

The function of the Agency shall be to collect all the information it may obtain through official or private channels respecting prisoners of war, and to transmit it as rapidly as possible to the country of origin of the prisoners of war or to the Power on which they depend. It shall receive from the Parties to the conflict all facilities for effecting such transmissions. The High Contracting Parties, and in particular those whose nationals benefit by the services of the Central Agency, are requested to give the said Agency the financial aid it may require.

The foregoing provisions shall in no way be interpreted as restricting the humanitarian activities of the International Committee of the Red Cross, or of the relief Societies provided for in Article 125.

This comment offers an important point of practice, indicating although Article 123 directs a "neutral country" to the task, the International Committee of the Red Cross has historically organized and carried out the functions of the Central Tracing Agency. ¶ 4806. The comment also indicates, "the Agency has sought to adapt to circumstances arising from hostilities and violence, even if at times this has involved going beyond what is strictly prescribed by the text of the law, while respecting its spirit." ¶ 4806.

The comment includes a lengthy historical section that recounts activities of the Central Tracing Agency in various conflicts since 1870. ¶¶ 4809–13. The section seems out of proportion with the historical

sections of comments on other articles. Its utility to the main audience of the updated *Commentary*, practitioners, is not clear.

The comment helpfully presents the information that the First, Second, and Third Conventions authorize the Central Tracing Agency to collect information on prisoners of war. ¶ 4831. It also alerts practitioners and Parties to additional information the Central Tracing Agency collects beyond that authorized by the Conventions. ¶¶ 4831–4832.

Article 123(2) directs the Central Tracing Agency to transmit the information it receives "to the country of origin of the prisoners of war or to the Power on which they depend." The comment does not interpret whether the receiving State is guided by the nationality of the prisoner of war. Rather it interprets the article's resort to "or" as authorizing the Central Tracing Agency to exercise its own discretion as to whom to inform. The comment asserts, "the Agency has sought to adapt to circumstances arising from hostilities and violence, even if at times this has involved going beyond what is strictly prescribed by the text of the law, while respecting its spirit." ¶ 4806.

The comment further asserts, "notifying the country of origin requires the prisoner's consent, and prisoners of war are under no obligation to reveal their country of origin to the detaining authorities." ¶ 4835. This understanding is not overwhelmingly clear from the text of Article 123, particularly with respect to the latter assertion. The possibility that States intended to receive notice when their own nationals were detained as prisoners of war during armed conflict is very real, particularly when the State of the prisoner's nationality is not a Party to the conflict. They may very well have devised the Central Tracing Agency to assist that effort.

The comment further alerts practitioners and States to the Central Tracing Agency's practice of informing families rather than States of the information it receives. ¶ 4836. The comment observes, "in practice, and for strictly humanitarian purposes, the Agency transmits information directly to the family, with the knowledge of the relevant authorities or upon the family's request." ¶ 4836. This also is not strictly in accord with the text of Article 123. The comment provides no citation to the practice of States or to any agreement by States on this point. It may be interesting to know whether any State has objected. It would also be helpful to know how the Central Tracing Agency would respond to a State's request for the information the article requires the Agency to transmit to it.

The succeeding paragraph highlights a distinction with respect to the transmission obligations of the Central Tracing Agency under the Fourth Geneva Convention. That Convention does not require the Central Tracing

Agency to transmit information where transmission would be detrimental to the person concerned. GC IV, Article 140(2). The comment then confirms, "In principle, the Agency is obliged to transmit the information required by the Convention to the country of origin or to the Power on which the prisoner depends." ¶ 4838. Yet still the updated *Commentary* insists,

> [T]he absolute character of the obligation has to be reconciled with protection against the transmission of information that might be detrimental to the individual concerned and/or their family. Prisoners of war who fear that the information they provide might be used against them or their families can therefore request that it be withheld from the Powers concerned. In such cases, the Agency has followed the same practice for all protected persons, whether military or civilian, extending to both the exception expressly provided for the latter. ¶ 4840.

Here is a nonliteral reading of the Convention. State comments and reactions seems appropriate in this case.

The comment claims a further exception to Article 123, asserting, "the Agency itself may suspend the transmission of information in cases where the Power on which the persons depend systematically uses the information to harm the persons concerned or their families, such as to make accusations of desertion or to intimidate or persecute families." ¶ 4841. The comment also claims Central Tracing Agency authority to suspend transmission if information is used for propaganda purposes. No citation to authority accompanies either interpretation.

ARTICLE 124

EXEMPTION FROM CHARGES OF NATIONAL INFORMATION BUREAUX AND THE CENTRAL TRACING AGENCY

The national Information Bureaux and the Central Information Agency shall enjoy free postage for mail, likewise all the exemptions provided for in Article 74, and further, so far as possible, exemption from telegraphic charges or, at least, greatly reduced rates.

This comment helpfully discusses the article's intersection with Article 74 respecting costs of prisoner of war correspondence and relief shipments. ¶ 4872.

ARTICLE 125

FACILITIES FOR RELIEF SOCIETIES AND OTHER ORGANIZATIONS ASSISTING PRISONERS OF WAR

Subject to the measures which the Detaining Powers may consider essential to ensure their security or to meet any other reasonable need, the representatives of religious organizations, relief societies, or any other organization assisting prisoners of war, shall receive from the said Powers, for themselves and their duly accredited agents, all necessary facilities for visiting the prisoners, distributing relief supplies and material, from any source, intended for religious, educational or recreative purposes, and for assisting them in organizing their leisure time within the camps. Such societies or organizations may be constituted in the territory of the Detaining Power or in any other country, or they may have an international character.

The Detaining Power may limit the number of societies and organizations whose delegates are allowed to carry out their activities in its territory and under its supervision, on condition, however, that such limitation shall not hinder the effective operation of adequate relief to all prisoners of war.

The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times.

As soon as relief supplies or material intended for the above-mentioned purposes are handed over to prisoners of war, or very shortly afterwards, receipts for each consignment, signed by the prisoners' representative, shall be forwarded to the relief society or organization making the shipment. At the same time, receipts for these consignments shall be supplied by the administrative authorities responsible for guarding the prisoners.

Article 125(1) begins with an eye-catching and seemingly broad concession to military necessity and other needs of the Detaining Power.

It observes, "Subject to the measures which the Detaining Powers may consider essential to ensure their security or to meet any other reasonable need . . . ." The subjective perspective of the assessment—that of the Detaining Power—is also clear from the article's resort to the term "may consider."

The comment to Article 125 limits application to "relief/assistance" activities. It asserts the article has no application to "protection activities." ¶ 4881. Precisely what protection activities involve and how they are distinct from relief and assistance may require elaboration.

The comment observes no organization other than the International Committee of the Red Cross has resorted to Article 125. ¶ 4882. Although the comment indicates desuetude (expiration of a legal obligation owing to disuse) does not result, it would be interesting to know whether States have contested application of Article 125 to such organizations or simply whether no such organizations have offered services. If the former, the beginnings of a colorable case for desuetude might be made.

The comment helpfully reminds, "Article 125 does not spell out a requirement for these organizations to be 'impartial' and 'humanitarian' in the sense of Article 9 [addressing activities of humanitarian organizations under the Third Convention]." ¶ 4886. It also reminds "Article 126 [addressing Protecting Powers] is inapplicable to any of the three types of societies covered by Article 125." ¶ 4889.

The comment highlights Article 125, unlike Article 9 respecting impartial humanitarian organizations, does not refer explicitly to "consent of the Parties to the conflict concerned." ¶ 4895. Yet the comment finds in the security and "other reasonable need[s]" passages of Article 125, circumstances in which a Detaining Power may reasonably reject relief. ¶¶ 4896–4897. Here is perhaps further evidence that the limits on consent imagined in emerging interpretations of Article 9 of the Third Convention are unfounded. Article 125 stands as an example of the Convention not requiring consent but tending to the Detaining Power's interests otherwise. Thus, where some readings of Article 9 condition the prerogative of consent, the Convention does so more clearly in other places, undermining the integrity of interpretations that imply such limits in other places.

The comment observes the Convention permits the Detaining Power to impose measures of control on the delivery of relief under Article 125. The source appears to be based on a logical conclusion that the power to reject includes the power to control. An interesting textual and interpretive

comparison can also be made with 1977 Additional Protocol I, Article 70 which explicitly acknowledges such measures. Yet the Article 125 reference to "measures which it may consider essential" seems adequate support for the comment's conclusion. ¶ 4899.

Finally, the comment identifies the textual sources of the "special position of the International Committee of the Red Cross in this field," including Articles 9, 123, and 126. ¶ 4903.

PART VI: EXECUTION OF THE CONVENTION

SECTION I

GENERAL PROVISIONS

ARTICLE 126

SUPERVISION BY THE PROTECTING POWERS AND THE ICRC

Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be, particularly to places of internment, imprisonment and labour, and shall have access to all premises occupied by prisoners of war; they shall also be allowed to go to the places of departure, passage and arrival of prisoners who are being transferred. They shall be able to interview the prisoners, and in particular the prisoners' representatives, without witnesses, either personally or through an interpreter.

Representatives and delegates of the Protecting Powers shall have full liberty to select the places they wish to visit. The duration and frequency of these visits shall not be restricted. Visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure.

The Detaining Power and the Power on which the said prisoners of war depend may agree, if necessary, that compatriots of these prisoners of war be permitted to participate in the visits.

The delegates of the International Committee of the Red Cross shall enjoy the same prerogatives. The appointment of such delegates shall be submitted to the approval of the Power detaining the prisoners of war to be visited.

The comment to Article 126 emphasizes International Committee of the Red Cross access to prisoners of war and to places they occupy is independent of the Protecting Power role or the Committee filling that role, as it frequently does. ¶¶ 4937–4938.

The comment also highlights an important distinction, noting,

> The express right to visit prisoners of war must also be distinguished from the right of humanitarian initiative enshrined in common Article 9. While a proposal made by the ICRC based on its right of humanitarian initiative may or may not be accepted by the concerned Parties, an ICRC request, based on Article 126, to visit a place where prisoners of war are held must be accepted. ¶ 4940.

The same distinction, however, is worth noting with respect to interpreting Article 9 of the Third Convention. The updated *Commentary*'s insistence that States' prerogative to withhold consent is somehow limited seems less tenable in light of the Article 126 absence of a consent requirement.

Illustrating the practices of its sponsoring organization, the comment includes a citation to a memorandum the International Committee of the Red Cross submits to Parties at the beginning of international armed conflicts. ¶ 4941 note 19. *See* ICRC, 'Conflict in Iraq: Memorandum to the belligerents', *International Review of the Red Cross*, Vol. 85, No. 850, June 2003, pp. 423–428.

The comment helpfully indicates International Committee of the Red Cross delegates are analogous to Protecting Power delegates rather than to Protecting Power representatives. Representatives are diplomats or consular staff who need not be approved by the Detaining Power. Delegates of both the Protecting Power and the International Committee of the Red Cross may only serve subject to the approval of the Detaining Power. ¶¶ 4946–47.

The comment gives effect to States dropping the 1929 Geneva Convention's visitation notice requirement. ¶ 4955. But the comment notes the practice of providing notice, nonetheless. Here is an example of the updated *Commentary* giving effect to such a textual amendment.

The comment indicates, "Only imperative military necessity would allow a visit to be exceptionally postponed." ¶ 4954 (citing ¶¶ 4968–4976). The comment later interprets "imperative" to mean "exceptional"—security concerns that are routine to armed conflict or detention facilities generally do not qualify. ¶ 4969. The comment further observes, "'imperative' refers to an absolute constraint of such vital importance that it leaves the Party in question with no choice." ¶ 4973.

Last, the comment, which concludes the obligation to permit International Committee of the Red Cross visits attaches "at the very

beginning of captivity," does not clearly account for the difficulty of permitting access at such early stages, particularly at the point of capture. ¶ 4959. Such access may even have the effect of delaying evacuation of prisoners of war from a combat zone pursuant to Article 19 of the Convention.

ARTICLE 127

DISSEMINATION OF THE CONVENTION

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population.

Any military or other authorities, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions.

This comment emphasizes, "the scope of Article 127 must not be reduced to an obligation to post and distribute the text of the Convention. The formulation 'disseminate . . . so that the principles thereof may become known' has a wider meaning than 'publish the text' or 'make it available.'" ¶ 5040. According to the comment, the obligation to disseminate also involves a duty to foster study and understanding of the Third Convention. ¶ 5040.

ARTICLE 128

TRANSLATIONS. IMPLEMENTING LAWS AND REGULATIONS

The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof.

The comment to Article 128 helpfully notes States' prevailing practice of publishing laws and regulations through official gazettes, thus making them publicly available. However, the comment maintains the Article 128 obligation to communicate official translations between belligerents through the bodies mentioned persists. ¶ 5072.

The comment also reminds readers other materials should be communicated as well, including:

> . . . measures adopted under Article 4 (determination of those considered as members of the armed forces and authorization and identification of persons accompanying the armed forces); Article 17(3) (identification of members of the armed forces); Article 21(3) (laws and regulations concerning release on parole); Article 43 (notification of ranks); Article 120(6) (establishment of a graves registration service); Article 122(1) (establishment of an information bureau); and Article 129 (legislation on penal sanctions for grave breaches and measures for the suppression of other violations). ¶ 5080.

PENAL SANCTIONS

The 1960 Pictet *Commentary* includes a lengthy comment on historical background that precedes the comment on the articles of the Convention dedicated to enforcement. The updated *Commentary* does not include such a chapeau comment.

ARTICLE 129

PENAL SANCTIONS

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the present Convention.

The updated *Commentary* relocates much of the historical information from Dr. Jean Pictet's 1960 *Commentary* to early comments on Article 129. These historical comments, however, run to excess, providing a history of war crimes generally rather than of the Conventions' treatment of the subject.

The comment acknowledges an important distinction between a State's *prerogative* to prosecute breaches or enforce the Convention versus any *obligation* to do so. Article 129 clearly encompasses and envisions both. The

comment observes, "the grave breaches regime imposes on States Parties the obligation to either prosecute or extradite alleged offenders, regardless of their nationality, as opposed to a right to do so recognized in international law in connection with alleged perpetrators of war crimes." ¶ 5087.

The comment also emphasizes the imperative nature of the obligation to enact domestic legislation for an effective penal regime. The comment observes, "There is no doubt that this represents a clear and imperative measure for all States Parties, to be acted upon already in peacetime." ¶ 5105. In this respect, the comment contrasts with the 1929 Geneva Convention's obligation to merely "propose" such measures to a legislature. ¶ 5105.

Yet whether this obligation has been carried out in this way since its adoption is unclear. Many States have not enacted domestic legislation that fully implements Article 129. This is particularly the case with respect to universal jurisdiction. This seems an especially important subject on which to survey subsequent State practice and agreement. The comment's omission in this respect is glaring, as it surveys State practice on other subjects related to the article such as incorporation of "general principles of international criminal law." ¶ 5111. Moreover, it appears the International Committee of the Red Cross has already collected much of this information in its National Practice database. *See* International Committee of the Red Cross, "National Implementation of International Humanitarian Law," https://ihl-databases.icrc.org/en/national-practice/national-implementation-of-ihl.

Article 129 refers to only two forms of liability: ordering and commission. The comment's historical section indicates other theories of liability were considered but rejected at the Diplomatic Conference of Geneva. ¶ 5101. The point is helpful to efforts to construct regimes of liability, emphasizing the Convention itself is not a source of support or an obligation for other forms of liability such as complicity or co-perpetration. A later paragraph of the comment, however, judges an evolution in practice with respect to forms of liability. The comment observes,

> Practice has evolved since the adoption of the 1949 Geneva Conventions, and it is generally recognized today that individuals are not only criminally responsible for committing or ordering the commission of grave breaches and other serious violations of humanitarian law, but also for assisting in, facilitating or aiding and abetting the commission of such crimes. They are also criminally responsible for planning or instigating their commission. ¶ 5120.

The comment wisely declines to extend its view of compulsory universal jurisdiction to these unenumerated forms of liability. It instead advises, "States Parties should therefore consider extending all those forms of criminal responsibility to grave breaches and other war crimes in their domestic legislation." ¶ 5121. States holding a contrary view—a view that the Convention's grave breaches regime extends to forms of liability not mentioned in Article 129—should record and publicize their view.

The comment recites a "principle of equal application of the law." ¶ 5109. Here is still a further principle identified by the Convention. How, precisely, that principle relates to Article 129 is not entirely clear. The same comment offers more principles, including, "the principle of individualization of the sentence and the principle of proportionality between the severity of the punishment and the gravity of the offence." ¶ 5109.

Combined with its interpretation that Article 129 states an imperative obligation, the comment pairs an understanding that universal jurisdiction must be included in States' implementing legislation. The comment observes,

> States Parties must be able to prosecute all persons who have committed or ordered the commission of grave breaches, regardless of their nationality. It is commonly accepted, therefore, that alongside the other bases of criminal jurisdiction, universal jurisdiction over grave breaches must be included in the implementing legislation. It is imperative that States Parties implement legislation of universal reach. ¶ 5112.

It observes similarly, "The effective implementation of these obligations requires that each State Party, as mentioned above, has previously extended the universality principle to the list of grave breaches in its national legislation." ¶ 5129.

The comment notes a variety of approaches taken by States implementing Article 129. ¶ 5113. It identifies four options. ¶¶ 5114–5117. None of these, however, includes the seemingly partial implementation that many States have adopted. Here is an example of the updated *Commentary* perhaps holding the line on literal or formal application despite somewhat glaring subsequent State practice to the contrary. The comment acknowledges, "At the time of writing, information on national implementing legislation can be found for more than 125 out of the 196 States Parties." ¶ 5124. Still, the

comment does not fully develop the legal significance of the fact that over 70 States Parties are, by the updated *Commentary*'s interpretation, not in compliance with Article 129. It seems the article may well have taken on a hortatory rather than mandatory character by now.

The comment observes, "Subsequent practice has shown that States Parties undoubtedly understand Article 129 as providing for universal jurisdiction. More than 115 national laws have extended this form of jurisdiction to the list of grave breaches." ¶ 5131. However, the comment seems not to fully address the more important point of interpretation. The question seems to demand greater consideration—particularly when only 115 of 196 States Parties have incorporated universal jurisdiction—of whether Article 129 really compels adoption of that regime. The last statement subtly suggests Article 129 is evidence that a State has a right to exercise universal jurisdiction. However, just how many of the 115 States Parties have actually *exercised* universal jurisdiction or extradited under Article 129 is unclear. Later, the comment itself concedes, the grave breaches regime has "been largely inoperative for decades." ¶ 5169.

The comment grants some rollback in light of State practice. It observes,

> A literal interpretation of Article 129(2) could therefore imply that each State Party must search for and prosecute any alleged perpetrators the world over, regardless of their nationality. Such a literal interpretation has not been widely shared by States Parties in the last 60 years. The practice since 1949 shows that some States, while having extended the principle of universal jurisdiction to grave breaches, have made prosecution conditional on the presence, temporary or permanent, of the alleged offender in the territory of the State Party. ¶ 5132.

But the comment's concession seems not fully reflective of State practice. Many States seem not to have even gone so far as to legislate universal jurisdiction, much less put it into practice out of a sense of obligation. Additionally, beyond what States Parties have enacted as national legislation, the practice of enforcement measures reflecting universal jurisdiction is limited.

For those still keeping track, the comment identifies still more principles, including "the principles of legality and specificity" with respect to formation of implementing legislation for Article 129. ¶ 5115.

The comment includes a highlight of the drafting history of Article 129. The drafters adopted the phrase "handing over" rather than proposing to use the term "extradite." Considering obstruction and delays in extradition involving judicial proceedings, the drafters devised an administrative or executive process of transfer to speed enforcement during and after armed conflict. ¶ 5145. The comment concedes, however, subsequent practice has gravitated toward resort to "extradition" in the judicial sense. ¶ 5145. Here the updated *Commentary* abandons relatively clear negotiating history and original intent. Why it does so in this case and not many others is not clear.

Again, in a somewhat frustrating pattern of organization, the comment then concedes the grave breaches regime may not have operated as originally envisioned. It observes,

> On paper the grave breaches regime amounts to a watertight mechanism, which should have been an effective means of countering serious violations of the Conventions and the impunity of war criminals throughout the world. Grave breaches can be prosecuted on the basis of various titles of jurisdiction, such as territoriality, active and passive personality, the protective principle or universality. States Parties have, however, made little use of this mechanism, which was ground-breaking at the time. ¶ 5154.

The comment records the first instance of resort to universal jurisdiction took place only in 1994. ¶ 5154. Meanwhile, the succeeding comment to Article 130 indicates, States "have not often followed through on the obligation to either prosecute or extradite perpetrators of the grave breaches listed in Article 130." ¶ 5174. Ultimately, rather than admit the law has evolved, the updated *Commentary* issues a call to action for compliance. ¶ 5156–58.

The comment reminds readers Article 129 does not only address grave breaches. Article 129(3) requires States Parties to "take measures necessary for the suppression of all acts contrary to the present Convention other than the grave breaches . . . ." The comment characterizes this passage as "a far-reaching provision" but indicates States "may take a wide range of measures' and 'will determine the best way to fulfil these obligations." ¶ 5162. It seems a sound interpretation. Article 129(3) is extraordinarily open-ended in comparison with Article 129(1) and (2). The comment might have gone further to clarify these measures need not be those identified for grave

breaches; however, the succeeding comment implies as much.

The comment finally addresses the question of application to non-international armed conflict. It notes States rejected addressing individual criminal enforcement of common Article 3 ¶ 5170 (citing *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 49; see the view expressed by the Rapporteur of the Special Committee: "The Special Committee voiced a definite opinion that the dispositions of the Conventions were, on principle, not applicable to civil war, and that only certain stipulations expressly mentioned would be applicable to such conflicts." *Ibid*. pp. 36–37). The comment also notes States never considered Article 129 would apply to conflicts regulated by common Article 3. ¶ 5170 and note 206 (citing Fourth Report drawn up by the Special Committee of the Joint Committee, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 114–118, where the fact that the grave breaches regime is only applicable to the gravest violations in international conflict is made clear). The updated *Commentary* ultimately concludes the regime does not apply to non-international armed conflict nor has a custom developed in that sense. ¶ 5171.

ARTICLE 130

GRAVE BREACHES

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

The comment to Article 130 indicates the Convention's list of offenses is exhaustive rather than illustrative. ¶¶ 5172, 5182. It also reiterates grave breaches only arise in international armed conflict. ¶¶ 5173, 5186.

The comment notes, when the 1949 Diplomatic Conference of Geneva adopted the Third Convention, it did not consider or address elements of the offenses identified in Article 130, leaving these matters to States individually. ¶ 5185. The comment notes, however, extensive work in this regard by international criminal courts. The comment is wisely cautious about attributing generally binding force to their work. It indicates, "They can serve as useful guidelines with regard to the standards States could apply when implementing Article 130 in their domestic legal systems and prosecuting alleged offenders." ¶ 5185.

The approach of characterizing international criminal law developments as guidance rather than as binding aspects of the Convention itself is maintained with respect to later comments on applicable *mens rea*. ¶ 5200. The comment further notes a lack of uniformity in approaches and holdings. ¶ 5202. Similarly, when the comment examines matters addressed by the International Criminal Court's Rome Statute, it carefully characterizes that doctrine as merely reflecting obligations under that regime. ¶¶ 5212, 5214, 5244.

However, when the comment turns its attention to the material elements and *actus reus* of the various grave breaches, it couches its conclusions in terms of the meaning of the Convention itself. ¶¶ 5216, 5226. Other refinements

are couched in terms of the judgments of courts and as guidance. ¶¶ 5220, 5222, 5249. States and their practitioners should approach this comment carefully in this respect. States may wish to review and adopt or reject positions the comment identifies with tribunals concerning elements of offenses listed in Article 130.

The comment emphasizes not all otherwise qualifying crimes during international armed conflict are grave breaches. A grave breach must involve a nexus to the armed conflict or conduct of hostilities. ¶ 5186. The comment offers general considerations as factors taken into account by tribunals evaluating belligerent nexus. ¶ 5190. The comment might have gone further to understand belligerent nexus in the context of the Third Convention. That is, because most interactions between a Detaining Power and prisoners of war take place in a camp setting, the comment might have explored and advised what circumstances do and do not satisfy the nexus requirement. A survey of State practice in this respect would have been particularly helpful. For instance, it would be helpful to better understand whether any interaction between a guard and a prisoner of war could be determined to lack belligerent nexus. The same question arises with respect to parole situations.

Last, the comment identifies a further principle: in this case, "a well-established principle that a Detaining Power may not oblige protected persons to take up arms against the Power on which they depend." ¶ 5271. Whether this notion is better stated as an obligation of conduct or a rule rather than a principle seems worth consideration.

ARTICLE 131

RESPONSIBILITIES OF THE CONTRACTING PARTIES

No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

Article 131 immediately follows the Third Convention's novel provisions on individual responsibility for breaches. The comment, however, helpfully clarifies Article 131 concerns the matter of State responsibility rather than individual criminal responsibility with respect to grave breaches. ¶ 5289. It also includes the interesting fact that only a plurality of members of the Joint Committee at the 1949 Diplomatic Conference of Geneva voted to adopt Article 131. ¶ 5290.

The comment asserts the term "any liability" includes both State responsibility for the internationally wrongful act of grave breaches of the Convention and the obligations of Article 129 to search for and prosecute or extradite alleged perpetrators of grave breaches. ¶¶ 5292. Thus, in the comment's view, a High Contracting Party may absolve neither responsibility for grave breaches nor responsibility for failure to meet Article 129 obligations. The conclusion is difficult to discern from the plain language of the article. Article 131 prohibits absolution from "any liability." Yet Article 131 clearly concerns only liability for "breaches referred to in the preceding Article." Article 129 is not the preceding article to Article 131 and the "preceding article," Article 130, does not include a State's failure to search for and prosecute or extradite as a grave breach.

The comment declines to mention, as the text of Article 129 indicates, simple breaches mentioned in Article 129(3) are not within the ambit of Article 131. Again, only breaches identified in Article 130 are covered by the liability scheme of Article 131. Thus, the non-grave breaches addressed in Article 129(3) do not seem subject to the Article 131 prohibition on absolution.

The comment identifies a principle involving, "the responsibility of States Parties for grave breaches committed by their armed forces or

persons acting under their authority or command, and the requirement for the responsible State to make full reparation for the loss or injury caused by grave breaches." ¶ 5294. The comment grounds this clumsily labeled principle in the 1907 Hague Convention IV, 1977 Additional Protocol I to the 1949 Geneva Conventions, the 1999 Second Protocol to the 1954 Hague Convention and the 2005 General Assembly Resolution, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of IHL*, as well as customary international law. The comment does not identify the 2005 document as a nonbinding UN General Assembly product in the comment or the footnote. Practitioners' efforts to evaluate the comment would be aided by a clearer citation in this respect.

ARTICLE 132

ENQUIRY PROCEDURE

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

A lengthy introduction to the comment elaborates quite generally on Parties' obligations to investigate violations of the Convention, reciting obligations derived from other portions of the Third Convention. ¶ 5298–5301. Turning to Article 132, the comment indicates only situations involving a contested violation of the Convention implicate that article's procedures. ¶ 5301. With respect to procedures, the comment notes the policy of the International Committee of the Red Cross is *not* to serve as an umpire in enquiry procedures. ¶ 5301.

The comment correctly notes the enquiry procedure of Article 131 extends to,

> 'any alleged violations of the Convention', it means first that the procedure is not limited to specific categories of violations, such as those reaching a minimum threshold of seriousness. Other provisions on investigation into violations of international humanitarian law do include limitations in their material scope of application. For instance, the Geneva Conventions (and Additional Protocol I) have elaborated a specific system governing individual criminal responsibility,

> which applies only to the 'grave breaches' expressly listed in these instruments. ¶ 5310.

The comment adds, if a single Party to a conflict requests an enquiry, the procedures of Article 132 "shall" be initiated. ¶ 5315–5316. But it then quickly concedes unilateral activation is, in fact, theoretical. ¶ 5315. The comment reminds readers the article requires the "interested Parties" to decide together on the procedures of the enquiry and notes the enormous difficulty of securing such an agreement. ¶ 5317.

The comment also notes the Article 132(2) provision respecting appointment of an umpire. Yet the comment concludes, "it does not create a strict legal obligation, as it only suggests that the Parties to the conflict 'should' make use of the services of the umpire." ¶ 5323.

The comment finally notes no enquiry organized under Article 132 has *ever* taken place. ¶ 5324. This important observation is buried somewhat. Surely the article's lengthy introduction had room to alert practitioners to this fact earlier and to consider a situation of desuetude more clearly with respect to the article's compulsory provision.

SECTION II

FINAL PROVISIONS

ARTICLE 133

LANGUAGES

The present Convention is established in English and in French. Both texts are equally authentic.

The Swiss Federal Council shall arrange for official translations of the Convention to be made in the Russian and Spanish languages.

The comment to Article 133 explains the purpose of authentication through which States indicate the treaty's language reflects its definitive intentions. ¶ 5344. The comment acknowledges some divergence between the English and French texts. ¶ 5351. This comment may have been a useful place to identify and compile the various translational dilemmas between the equally and simultaneously authentic English and French versions of the Convention. A footnote, however, identifies divergent text in select cases including, Article 3, fn. 277, on Article 13, para. 1573, on Article 32, para. 2306, on Article 56, para. 2806, and on Article 129, para. 5161. ¶ 5352 n. 12.

ARTICLE 134

RELATION TO THE 1929 CONVENTION

The present Convention replaces the Convention of July 27, 1929, in relations between the High Contracting Parties.

The comment to Article 134 helpfully notes the 1949 Conventions reflect an overall "revision" of the 1929 Conventions rather than a mere amendment. ¶ 5364. It also observes, "The universal ratification of the 1949 Geneva Conventions also means that the 1929 Convention cannot be revived if a State Party decides to denounce the Third Convention, as the earlier Convention has been effectively terminated." ¶ 5369.

ARTICLE 135

RELATION TO THE 1899 OR 1907 HAGUE CONVENTIONS

In the relations between the Powers which are bound by the Hague Convention respecting the Laws and Customs of War on Land, whether that of July 29, 1899, or that of October 18, 1907, and which are parties to the present Convention, this last Convention shall be complementary to Chapter II of the Regulations annexed to the above-mentioned Conventions of the Hague.

As distinct from its relationship to the preceding 1929 Geneva Convention Relative to the Treatment of Prisoners of War, the 1949 Third Geneva Convention *complements* the 1899 Hague Convention (II) and 1907 Hague Convention (IV) Regulations, Chapter II provisions on prisoners of war. ¶ 5371. The comment advises the 1899 and 1907 Hague instruments "must be interpreted and implemented in conjunction with the new rules established in the Third Convention." ¶ 5371. Although the comment does not indicate this, the Hague Regulations also include a Chapter II on spies. Clearly, however, considering context, the Third Convention's Article 135 reference to Chapter II should be understood to apply to the chapter on prisoners of war.

The comment characterizes the arrangement of Article 135 as "an exception to the rules found in Article 30(2) and Article 59 of the 1969 Vienna Convention on the Law of Treaties." ¶ 5375. Articles 30(2) and Article 59 provide:

> **Article 30. – Application of successive treaties relating to the same subject matter**
>
> . . .
>
> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

. . .

Article 59. – Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:

   (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

   (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

The Convention's relationship with the Vienna Convention on the Law of Treaties is noted earlier in this *Companion*. *See* Summary of Analysis. As a technical matter, the Vienna Convention is not strictly applicable to the 1949 Third Convention. Article 4 indicates the Vienna Convention "applies only to treaties which are concluded by States after the entry into force of the present Convention . . . ." The Third Convention predates the Vienna Convention on the Law of Treaties in this respect by more than 30 years. Still, many rules of the Vienna Convention may apply to interpretation and operation of the Geneva Conventions as a matter of custom that preceded the Vienna Convention or that has since evolved with retroactive application.

The comment seems correct with respect to precluding the effects of both Vienna Convention on the Law of Treaties Article 30(2) and Article 59. Yet the comment does not offer significant explanation or elaboration of this characterization. The characterization of an exception seems incorrect with respect to the former provision. Practitioners familiar with these provisions of the Vienna Convention may be confused by the comment's indication of Article 135 as an exception. Those not practiced in the Vienna Convention would surely benefit from elaboration on the comment's characterization of Article 135 under treaty law.

Vienna Convention on the Law of Treaties Article 59 expresses what is essentially a later-in-time rule with respect to treaties "relating to the same subject matter . . . ." That article indicates a later-in-time treaty terminates an earlier treaty on the same subject in either of two circumstances: 1) if that later treaty bears evidence of the Parties' intent that it should govern or 2) when the provisions of a later treaty are incompatible such that they "are not capable of being applied at the same time as the earlier treaty."

Although the 1949 Convention addresses the same subject matter as Chapter II of the Hague Conventions, the Third Convention does not meet either of the circumstances described in Vienna Convention on the Law of Treaties Article 59. In fact, Article 135 states precisely the opposite of each, characterizing the Third Convention as complementary to the Hague instruments. Although the comment characterizes Article 135 as an exception to Vienna Convention on the Law of Treaties Article 59, a more accurate statement may be the Third Convention does not meet the criteria for the later-in-time rule and Article 59 is simply inapplicable with respect to the Hague and Geneva Conventions.

Like Article 59, Article 30 of the Vienna Convention on the Law of Treaties also addresses treaties relating to the same subject matter. Paragraph 2 states, "When a treaty specifies that it is subject to, or that it is not to be considered incompatible with, an earlier or later treaty, the provisions of that other treaty prevail." Article 135 does not intend the Hague instruments to "prevail" over the Third Convention and in that respect avoids the effect of Article 30(2). Yet whether the Third Convention is subject to or incompatible with the Hague Conventions is not specified in precise terms. Again, rather than reflecting an exception to Article 30(2), it may be more accurate to say Article 30(2) does not apply to Third Convention Article 135.

Addressing the significance of the article characterizing the Geneva and Hague Conventions as "complementary," the comment notes "the Hague Regulations continue to apply alongside the Third Convention . . . ." ¶ 5375.

Putting complementarity into practice, the comment concludes issues addressed by the Hague Regulations but not by the Third Convention continue to be regulated by the former. ¶ 5375. For instance, the Hague instruments address prisoners of war who wish to work on their own account as well as the practice of bringing before courts paroled prisoners of war recaptured bearing arms, but the Third Convention addresses neither.

The comment concludes the Hague and Geneva Conventions operate simultaneously with respect to issues addressed in both instruments. ¶ 5377. The comment identifies two subjects on which simultaneous regulation

presents a conflict. First, the Hague Regulations permit confinement as a security measure whereas the Third Convention permits confinement only as a penal or disciplinary measure. ¶ 5377. The comment does not offer a resolution of this conflict.

Second, the comment notes the Hague Regulations' resort to assimilation to the Detaining Power's armed forces for working pay, quarters, food, and clothing of prisoners of war, whereas the Third Convention abandons military assimilation in these respects. In this case, the comment indicates the Third Convention must prevail when Hague assimilation would result in treatment less favorable than the minimums prescribed by the Third Convention. ¶ 5378. The comment includes no survey of State practice in either respect despite many States finding themselves Parties to both instruments.

ARTICLE 136

SIGNATURE

The present Convention, which bears the date of this day, is open to signature until February 12, 1950, in the name of the Powers represented at the Conference which opened at Geneva on April 21, 1949; furthermore, by Powers not represented at that Conference, but which are parties to the Convention of July 27, 1929.

This comment reminds readers Article 136 deals only with signature. It does not address ratification or accession. ¶ 5381. The comment further reminds signature entails an obligation not to "defeat the object and purpose of the treaty." ¶¶ 5382, 5393. The comment also explains signature served as a means for authenticating the text of the Convention. ¶ 5387. Many States apparently delayed signature to a second signing ceremony to permit them to examine the text a final time. ¶ 5390.

ARTICLE 137

RATIFICATION

The present Convention shall be ratified as soon as possible and the ratifications shall be deposited at Berne.

A record shall be drawn up of the deposit of each instrument of ratification and certified copies of this record shall be transmitted by the Swiss Federal Council to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

The comment to Article 137 explains the legal significance of ratification. ¶ 5397. It also distinguishes ratification following signature from accession, which does not involve previous signature of a treaty. ¶ 5400. The comment helpfully cross-references Article 139 on accession to the Convention. ¶ 5400.

The comment notes the article's resort to the imperative term "shall be ratified as soon as possible . . . ." However, it concludes ratification following signature remains a matter of choice for States. Signature does not commit a State to ratification. The comment notes the final ratification by a signatory took place in 1976, long after adoption of the Convention. ¶ 5406. Here is another counter-textual interpretation but one potentially supported by State practice.

Although Article 137 does not address the subject, the comment considers the issue of reservations by States. ¶ 5411. The comment generally incorporates the 1969 Vienna Convention on the Law of Treaties regime for reservations notwithstanding that instrument's inapplicability to the Convention. For example, the comment considers reservations invalid if not submitted at the time of ratification or accession. ¶ 5412. By contrast, States may withdraw reservations at any time. ¶ 5417. The comment might have offered a more complete collection of examples of this practice by States with respect to the Convention. Further comments might have been offered respecting the Convention's susceptibility to reservations. The

law of treaties recognizes some treaties do not permit reservations. The Convention does not appear to be such a treaty; therefore, that rule is not a basis for rejecting otherwise validly submitted and accepted reservations to the Convention.

ARTICLE 138

COMING INTO FORCE

The present Convention shall come into force six months after not less than two instruments of ratification have been deposited.

Thereafter, it shall come into force for each High Contracting Party six months after the deposit of the instrument of ratification.

The comment to Article 138 identifies the first two Parties that ratified the Convention as Switzerland and Yugoslavia on March 31, 1950 and April 21, 1950, respectively. The Convention thus entered force for these Parties on October 21, 1950. ¶ 5429. It entered force for all other Parties six months after their respective ratifications. ¶ 5429.

The comment includes a cross-reference to the Article 141 waiver of the six-month entry-into-force waiting period for ratifications submitted "before or after the beginning of hostilities or occupation." ¶ 5432.

ARTICLE 139

ACCESSION

> *From the date of its coming into force, it shall be open to any Power in whose name the present Convention has not been signed, to accede to this Convention.*

The comment observes, "Ratification is only possible for States fulfilling the conditions for signature set out in Article 136, whereas any State which has not signed the Convention may accede to it." ¶ 5437. The comment also clarifies the Article 139 reference to "any Power" is restricted to States as understood by international law. ¶ 5438. It observes questions of statehood may be evaluated as a preliminary matter by the Convention's depository; however, ultimately statehood must be conclusively determined by the States Parties to the Convention. ¶ 5438. The comment compiles an interesting catalog of questions concerning statehood and ratifications submitted by various entities. ¶¶ 5442–5445.

The comment also addresses the question of succession to treaties by new governments or regimes of existing Parties to the Convention. The comment highlights debate concerning the customary status of the 1978 Vienna Convention on Succession of States in respect of Treaties which at present enjoys ratification by only 23 States Parties. ¶ 5450. The comment observes,

> under the Convention automatic succession is set forth as the default rule in the case of a uniting of States or the separation of parts of a State, i.e. the creation of a new State outside the context of decolonization. But it is not clear to what extent the distinction drawn in the Vienna Convention reflects the practice of States. ¶ 5451.

In this respect, the comment identifies contrary positions taken on automatic succession by the International Criminal Tribunal for the former Yugoslavia (supporting automatic succession of the Geneva Conventions) and the Eritrea-Ethiopia Claims Commission (rejecting automatic

succession of the Geneva Conventions). ¶ 5453.

The comment adds, "At the time of writing, of the 196 States party to the Convention, 55 have become party by way of succession, mostly out of decolonization processes." ¶ 5459.

ARTICLE 140

NOTIFICATION OF ACCESSIONS

Accessions shall be notified in writing to the Swiss Federal Council, and shall take effect six months after the date on which they are received.

The Swiss Federal Council shall communicate the accessions to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

The Convention, at Article 137, indicates ratifications shall be "deposited." The comment acknowledges accessions are, according to Article 140, not deposited. Instead, accession merely requires the depositary be "notified." A literal reading and the considerations of giving effect to text might suggest formal instruments need not be transmitted or delivered in the case of accession. Nonetheless, the comment observes notification of accession under Article 140 requires the instrument of notice "contain the same basic elements as an instrument of ratification . . . ." ¶ 5466.

By contrast, the same comment gives effect to a separate textual distinction between Articles 137 and 140. With respect to ratifications, Article 137 requires the depositary to create a record and to transmit copies to other States. Article 140 does not require the depositary to do so with respect to accessions. In this case, the comment seizes on and gives effect to the textual difference. The comment observes, "while it draws up records of ratifications and sends them to States Parties, [the depositary] does not follow this procedure for accessions." The comment justifies the practice, noting, "Besides the fact that establishing such records of accessions is not foreseen by the Convention, it is neither a task of . . . depositaries' in this regard." ¶ 5469. Thus, here we find in the same comment to a brief article, starkly contrasting approaches to textual distinctions in the Convention.

The comment also extends application of the article's procedures on accessions to successions. ¶ 5462. The comment offers no basis for the extension; nor, however, can a basis for objection to the practice be imagined.

ARTICLE 141

IMMEDIATE EFFECT

The situations provided for in Articles 2 and 3 shall give immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation. The Swiss Federal Council shall communicate by the quickest method any ratifications or accessions received from Parties to the conflict.

The comment explains Article 141 dispenses with the six-month waiting period for either ratification or accession to take effect when the Party in question is presently a belligerent Party to an international armed conflict, belligerent occupation, or an armed conflict not of an international character. ¶ 5478. The comment also helpfully presents examples of the Convention taking immediate effect pursuant to Article 141. ¶ 5482.

ARTICLE 142

DENUNCIATION

Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties.

The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release and repatriation of the persons protected by the present Convention have been terminated.

The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

Paragraph 4 of Article 142 is somewhat confusing. It indicates a denunciation by a High Contracting Party has no effect on the obligations of another Party "to the conflict." The paragraph also does not refer specifically to the obligations of the Convention, but instead to those of the so-called Martens Clause. Yet pursuant to paragraph 3, denunciations have no effect until peace is concluded even for the denouncing Party.

The paragraph may envision a situation in which a Party to a conflict denounces the convention, concludes a separate peace, and a year passes, giving effect to the denunciation. In that case, the remaining Parties to the

conflict are bound by the Convention. However, the article refers to residual obligations rather than those of the Convention. Moreover, Article 142 is a peculiar place to include a reference to the Martens Clause. If, as the first clause of the reference indicates, a Party's denunciation has no effect on the obligations of other Parties, the reason reference to the Martens Clause is called for is unclear. Moreover, positioning the Martens Clause in this passage, rather than as a freestanding statement as it appears in other instruments, suggests the Martens Clause only applies in the case of a denunciation of the Convention.

In this vein, the comment indicates, delegates at the 1949 Diplomatic Conference of Geneva questioned the need for this passage. ¶ 5516, n. 29 (citing *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 25: "Mr. Castrén (Finland) felt that the last sentence of the last paragraph was redundant, for it was obvious that denunciation of an international treaty had no effect on the other international obligations of the denouncing party.")

The comment acknowledges the High Contracting Parties' right to withdraw from the Convention unilaterally. ¶ 5499. It then observes, "The legal effect of the denunciation is that the denouncing State is no longer bound by the provisions of the Convention denounced." ¶ 5499. The phrasing of this passage may suggest the possibility of a provision-specific denunciation. That is, it might be read to indicate a State would no longer be bound by those provisions of the Convention it denounced. This is not the most likely meaning, nor does it seem legally feasible, but rephrasing would preclude the suggestion to less well-initiated readers. A comment emphasizing denunciation of the Convention is an 'all or nothing' prospect would accomplish this.

The comment observes treaties "that do not contain a denunciation clause" can be terminated in response to a material breach. *See* Vienna Convention Art. 56. Though the comment also notes treaties of a humanitarian character cannot be terminated or suspended pursuant to material breach under 1969 Vienna Convention on the Law of Treaties, Article 60(5). ¶ 5501. However, that the Convention is not an Article 56 treaty is worth recalling. Through Article 141, the Third Geneva Convention clearly anticipates denunciation. It thus seems to lie entirely outside the regime noted by the comment. Additionally, as noted previously, Vienna Convention on the Law of Treaties Article 4 renders that treaty nonretroactive. That is, it does not apply to treaties concluded prior to the Vienna Conventions' entry into force. Because the 1949 Third Convention was adopted over 30 years prior to the Vienna Convention

on the Law of Treaties' entry into force, the latter is inapplicable as a matter of treaty law. Moreover, not all States Parties to the Third Convention are States Parties to the Vienna Convention on the Law of Treaties. To assert the Vienna Convention on the Law of Treaties' Article 60(5) regime of termination and suspension is reflected in customary international law applicable to the 1949 Third Convention is possible. Much of the Vienna Convention on the Law of Treaties is thought to reflect binding custom. However, the comment should clarify this point. As published, the comment merely cites to Article 60(5) itself. A sounder approach would collect the State practice and *opinio iuris* required to clearly establish Article 60(5) reflects custom and applies, as asserted by the comment.

Addressing the temporal conditions offered in Article 142, paragraph 3, the comment adopts a seemingly counter-textual reading. ¶ 5511. Article 142 indicates the one-year waiting period does not apply when a denunciation is made "at a time when the denouncing Power is involved in a conflict." Thus, that the relevant timing of the paragraph's rule is the time of denunciation is clear. That is, the Convention looks to the timing of the denunciation to determine the point at which it takes effect. Should a Power denounce the Convention while involved in an armed conflict, the Convention continues to bind the denouncing Power until that Power is no longer involved in the conflict.

By contrast, should a Power denounce the Convention while at peace, the denunciation takes effect one year later. Thus Article 142 would merely apply to the one-year waiting period for a denouncing Power that later found itself involved in an armed conflict subsequent to its denunciation.

A comparison with the language of the 1929 Geneva Convention, which the 1949 Third Convention replaces, confirms this understanding. As the comment concedes, Article 142 is a departure from the 1929 Convention which stated, "a denunciation shall not take effect during a war in which the denouncing Power is involved." 1929 Geneva Convention relative to Prisoners of War, Art. 96(3). But the 1929 Convention went further. It also observed, "the present Convention shall continue binding, beyond the period of one year, until the conclusion of peace and, in any case, until operations of repatriation shall have terminated." This latter passage was not incorporated into the Third Convention's Article 142.

Returning to a situation in which a denouncing Power finds itself involved in a conflict later, during the one-year waiting period, the 1929 Convention would suspend the effect of denunciation until the end of that

conflict. By contrast, the 1949 Convention, owing to its abandonment of the 1929 formula, simply gives effect to the one-year waiting period, even if the denouncing Power's involvement persists.

The comment rejects this reading. The comment insists the "object and purpose" of Article 142 demand the effect of denunciation be delayed to the end of a conflict in any case. Moreover, the comment observes, "There is no indication in their drafting history that the 1949 Conventions should contain a narrower rule on the issue than the one in the corresponding Article of 96(3) of the 1929 Geneva Convention on Prisoners of War." ¶ 5511. Last, the comment notes 1977 Additional Protocol I clearly resolved the "ambiguity" of Article 142 in favor of delaying the effect of denunciation in all cases of armed conflict. ¶ 5511.

None of these arguments is persuasive. First, the object and purpose of Article 142 must surely account for the language of the article itself, which clearly differentiates denunciation during conflict from denunciation prior to conflict. That Article 142, as drafted, has the object of permitting a State to denounce application of the Convention to future conflicts, though not conflicts in which the State is currently involved, has a certain logic. Second, surely a survey of the negotiating history must include alterations in language to a preceding treaty. It seems disingenuous to say the negotiating history lacks evidence of a narrowing effect when the language that emerged from that process indicates precisely that. Additionally, in other comments, the updated *Commentary* has noted the unchanged incorporation of provisions from the 1929 Convention. Last, that States would adjust the corresponding provision of a subsequent treaty does not confirm symmetry between the language of a preceding treaty as the comment suggests. On the contrary, it strongly indicates distinct meanings of the differing passages.

The comment acknowledges the disputed meaning of the Martens Clause, which states,

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience. ¶ 5523.

The comment wisely offers a minimal interpretation that "the Martens Clause can be seen as a reminder of the continued validity of customary international law beside treaty law. The expression 'usages established between civilized nations' in the Martens Clause is generally understood as equivalent to customary international law." ¶ 5529. However, the comment later expands, characterizing the Martens Clause as a rebuttal of sorts to the international law *Lotus* principle, observing, "the Martens Clause should also be regarded as expressly preventing the *argumentum e contrario* that what is not explicitly prohibited by treaty law is necessarily permitted." ¶ 5530.

The comment could be regarded as hortatory considering its resort to the term "should." The comment raises the question of whether it intends to reject the *Lotus* principle generally or whether it merely intends to remind the reader, in the case of the *ius in bello*, customary and other conventional sources of law remain in effect. The comment might have achieved its objective of giving substantive content to the Martens Clause without undermining the *Lotus* principle as broadly as it seems to. For instance, a substantive Martens Clause may coexist with the *Lotus* principle in that the former simply stands as a source of the "Restrictions upon the independence of State [that] cannot . . . be presumed." The Case of the S.S. Lotus, 1927 P.C.I.J. (ser. A) No. 10 (7 Sep.).

ARTICLE 143

REGISTRATION WITH THE UNITED NATIONS

The Swiss Federal Council shall register the present Convention with the Secretariat of the United Nations. The Swiss Federal Council shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to the present Convention.

The comment explains the article's connection to UN Charter Article 102(1), "[e]very treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force [24 October 1945] shall as soon as possible be registered with the Secretariat and published by it." ¶¶ 5535, 5539.

The comment, consistent with the view taken on Article 140 in paragraph 5462, includes notice of successions, though not addressed by Article 143. In this vein, the comment also extends Article 143 to reservations and amendments to the Convention, yet it does so only as a recommendation. ¶ 5547. The comment offers no basis for the extensions; nor, however, can a basis for objection to the practice be imagined.

TESTIMONIUM AND SIGNATURE CLAUSE

IN WITNESS WHEREOF the undersigned, having deposited their respective full powers, have signed the present Convention.

DONE at Geneva this twelfth day of August 1949, in the English and French languages. The original shall be deposited in the Archives of the Swiss Confederation. The Swiss Federal Council shall transmit certified copies thereof to each of the signatory and acceding States.

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