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Prisoner of War Status and Nationals of a Detaining Power

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I. INTRODUCTION

As Ukraine finalized preparations for an expected spring 2023 counteroffensive in its international armed conflict against Russia, armed groups began launching a series of hostile, cross-border raids into Russian territory. Despite initial claims by Russia that Ukrainian forces were responsible for these incursions, they have now been attributed to the Liberty of Russia Legion (sometimes referred to as the Freedom of Russia Legion) and the Russian Volunteer Corps, two militias that largely act autonomously from Ukraine's armed forces.[1] From what is publicly available about them, and although the two armed groups have differing motivations for taking up arms, they are primarily composed of volunteer Russian nationals opposed to the Putin regime.

The composition of these forces begs the question of the status of their members under the law of armed conflict if they are captured or otherwise detained by Russian forces. Specifically, it renews the decades-old debate over whether a detaining State is obliged to recognize prisoner of war status for its own nationals under Article 4A of the 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War (Geneva Convention III), which is considered to reflect customary law.[2] The Convention is universally ratified, but there are two competing points of view on how Article 4A should be interpreted.

By the first, which the International Committee of the Red Cross (ICRC) supports, "any person in one of the categories enumerated in Article 4A of [Geneva Convention III] who falls into the power of the adversary State is in the power of the enemy, regardless of their nationality."[3] Thus, members

1. *Kyiv Denies Moscow's Claim of Ukrainian Saboteurs Crossing into Russia, Launching Attack*, CBC NEWS (May 22, 2023), https://www.cbc.ca/news/world/zaporizhzhia-nuclear-power-1.6851232.

2. Convention (III) Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]. On the customary status of the Convention, *see* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 79–82 (July 8) (citing Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 22 (Apr. 9)); Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704 (May 3, 1993) (introducing the Statute of the International Criminal Tribunal for the Former Yugoslavia).

3. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE THIRD GENEVA CONVENTION: CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR ¶ 965 (2020) [hereinafter 2020 COMMENTARY ON GENEVA CONVENTION III].

of these groups captured by Russian forces would be entitled to prisoner of war status. By the second view, one adopted by the United States,[4] "the term 'enemy' excludes a situation in which a person is interned by the same State of which they have citizenship."[5] This being so, captured members of the groups who are Russian nationals would not qualify as prisoners of war.

In this article, we take on the debate. Our inquiry begins with an assessment of Article 4A from the perspective of established principles for construing treaty provisions.[6] We then add context by examining scholarship and State practice regarding its prescriptions before and after the Convention's negotiation and adoption. Although we conclude that denying prisoner of war status to a national of the Detaining Power is the more supportable position, we end by highlighting the practical challenges of determining who qualifies as one.

Before proceeding, we must emphasize that our analysis is limited to the narrow question of whether nationality is a controlling factor in determining prisoner of war *status*.[7] We do not examine the related questions of when such individuals are liable to attack or whether they are entitled to combatant immunity.[8] Further, for the purpose of analysis, we presume that the forces involved could, in the event they are detained, fall into one of the categories enumerated under Article 4A but for their nationality. If not, the prisoner of war issue would never arise.[9]

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4. *See* OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL §§ 4.4.4.2, 9.3.2.1 (updated ed. July 2023) [hereinafter U.S. LAW OF WAR MANUAL].

5. 2020 COMMENTARY ON GENEVA CONVENTION III, *supra* note 3, ¶ 966.

6. Although the 1977 Additional Protocol I to the 1949 Geneva Conventions affects the determination of who is entitled to prisoner of war status for parties to that instrument, we largely limit our analysis to Geneva Convention III except to the extent the Protocol informs the Convention's interpretation. We acknowledge that Articles 43 and 44 of the Protocol substantially reformed the approach to determining combatants and, as a result, prisoners of war. Based on our understanding of those articles and their relationship to the Convention, and in consideration of the ICRC's accompanying *Commentary*, we do not interpret the Protocol to disturb the preexisting *individual* conditions that a detainee must satisfy to qualify as a prisoner of war.

7. We note that prisoner of war *status* is distinguishable from prisoner of war *treatment*.

8. *See, e.g.*, U.S. LAW OF WAR MANUAL, *supra* note 4, § 4.4.4.2; 2020 COMMENTARY ON GENEVA CONVENTION III, *supra* note 3, ¶ 972.

9. In our assessment, they most likely qualify under Article 4A(2). Although there is no indication that they have been formally incorporated into Ukraine's armed forces, they appear to meet all the conditions prescribed by that article, including that of "belonging to a

II. NATIONALITY UNDER GENEVA CONVENTION III

Much of the debate surrounding the relevance of nationality in determining prisoner of war status pertains to the absence of any express condition to that effect in the text of Article 4A, which prescribes the categories of persons who, having "fallen into the power of the enemy," are entitled to prisoner of war status.[10] There are six such categories:

> (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, fulfill 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,

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Party to the conflict." *See, e.g.*, Yulia Talmazan, *Who Are the Anti-Putin Groups Behind the Dramatic Raid Into Russia?*, NBC NEWS (May 26, 2023), https://www.nbcnews.com/news/world/belgorod-raid-russian-volunteer-corps-freedom-russia-legion-rcna86168.

10. Geneva Convention III, *supra* note 2, art. 4.

> 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.[11]

Manifest in these provisions is the question of what to make of the lack of reference to nationality. Indeed, the absence is even more pronounced considering that *none* of the relevant treaties preceding Geneva Convention III, such as the Regulations annexed to the 1899 Hague Convention (II) and the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the 1929 Geneva Convention Relative to the Treatment of Prisoners of War, explicitly prescribed nationality as a condition precedent to prisoner of war status.[12]

According to some commentators and the ICRC, the omission is dispositive. For them, membership in the armed forces or another group set forth in Article 4A is what matters for prisoner of war status.[13] If the drafters had intended to exclude nationals of a Detaining Power from the Convention's protections, they would have incorporated that condition into the article's

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11. *Id.*

12. Regulations Concerning the Laws and Customs of War on Land, annexed to Convention No. II with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403; Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539; Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343. As will be explained, although our interpretation is limited to Article 4A of Geneva Convention III, we believe the perpetuation of this omission throughout these preceding instruments counsels in favor of concluding that nationality is a condition precedent to prisoner of war status under Article 4A's provisions.

13. *See, e.g.*, 2020 COMMENTARY ON GENEVA CONVENTION III, *supra* note 3, ¶ 971; Manuel Galvis Martinez, *Defection and Prisoner of War Status: Protection Under International Humanitarian Law for Those Who Join the Enemy?*, 57 CANADIAN YEARBOOK OF INTERNATIONAL LAW 41, 52 (2019) (collecting sources); Susan Elman, *Prisoners of War Under the Geneva Convention (Based on* Public Prosecutor v. Koi *and Associated Appeals)*, 18 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 178, 181 (1969); A.P.V. ROGERS, LAW ON THE BATTLEFIELD 37 (3d ed. 2012).

text, as they did in other articles and conventions.[14] Because they did not, advocates of this view conclude that captured individuals falling into the six Article 4A categories are entitled to prisoner of war status irrespective of their nationality.

From a textual perspective, the position is appealing. Indeed, a similar interpretive premise underlies the separate and equally unsettled debate over whether persons who qualify *prima facie* as prisoners of war under Article 4A(1) forfeit that status if they fail to individually satisfy the conditions prescribed in subparagraph 4A(2) by, for example, fighting out of uniform.[15] In that debate, some States, including the United States, reject the premise that the conditions implicitly apply to members of the armed forces on the basis that, in part, the Convention does not explicitly condition Article 4A(1) status on them.[16]

The alternative view is that the mere absence of reference to nationality, standing alone, does not preclude its application as a condition for prisoner of war status. Similarly, in the aforementioned debate over whether the four conditions outlined in Article 4A(2) apply to Article 4A(1) captured personnel, some commentators, including one of the authors, are of the view that they are inherent in membership in the armed forces and therefore need not be expressly set forth. And the ICRC has repeatedly emphasized that the

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14. *See, e.g.*, Geneva Convention III, *supra* note 2, art. 16 ("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"); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals") [hereinafter Geneva Convention IV]; *see also* 2020 COMMENTARY ON GENEVA CONVENTION III, *supra* note 3, ¶ 971; Sean Watts, *Who is a Prisoner of War?*, ¶ 58, *in* THE 1949 GENEVA CONVENTIONS: A COMMENTARY (Andrew Clapham, Paola Gaeta & Marco Sassoli eds., 2015).

15. *See* Michael N. Schmitt & Christopher J. Koschnitzky, *The Regular Armed Forces, Uniforms, and Prisoner of War Status*, *in* PRISONERS OF WAR IN CONTEMPORARY CONFLICT 51, 60–75 (Michael N. Schmitt & Christopher J. Koschnitzky eds., 2023); Michael N. Schmitt & Christopher J. Koschnitzky, *Russian Troops Out of Uniform and Prisoner of War Status*, ARTICLES OF WAR (Mar. 4, 2022), https://lieber.westpoint.edu/russian-troops-out-of-uniform-pow-status/.

16. U.S. LAW OF WAR MANUAL, *supra* note 4, § 4.6.1.3 ("The text of the GPW does not expressly apply the conditions in Article 4A(2) of the GPW to the armed forces of a State. Thus, under the GPW, members of the armed forces of a State receive combatant status (including its privileges and liabilities) by virtue of their membership in the armed forces of a State.") (footnotes omitted).

"fixed distinctive sign" condition, usually satisfied through the wear of a uniform, applies to prisoner of war status despite the absence of any mention in Article 4A(1).[17]

Analogously, it is not unreasonable to cite nationality as an *implied* condition of prisoner of war status despite not being explicitly prescribed by Article 4A. The fulcrum upon which such an interpretation rests is whether a national of a Detaining Power can ever be considered, as a matter of law, to have "fallen into the power of the *enemy*," as that phrase is used in Article 4A's introductory text.[18]

We resort first, as we must, to treaty interpretation rules to assess the phrase's meaning. Article 31(1) of the Vienna Convention on the Law of Treaties provides, "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."[19] Those who would deny prisoner of war status to nationals of the Detaining Power suggest that, given that term's usual connotation, the Detaining Power cannot be considered the "enemy" of one of its own nationals.[20] The State on whose behalf a detained national is fighting is, therefore, legally irrelevant. That being so, it was unnecessary to reference the nationality condition expressly.

However, in its 2020 *Commentary* to Article 4, the ICRC suggests the term "enemy" instead refers to the relationship between the Detaining Power and its State adversary, not between the detainee and the Detaining Power.[21] By its interpretation, the enemy includes all individuals fighting on the side of

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17. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW r. 106 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005); 2020 COMMENTARY ON GENEVA CONVENTION III, *supra* note 3, ¶ 983.

18. Geneva Convention III, *supra* note 2, art. 4 (emphasis added).

19. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

20. *See, e.g.*, Prosecutor v. Prlić et al., Case No. IT-04-74-T, Trial Judgment vol. 3, ¶ 604 (Int'l Crim. Trib. for the Former Yugoslavia May 29, 2013); *see also* COMMENTARY TO GENEVA CONVENTION III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 88 (Jean Pictet ed., 1960) ("One must also consider applications to take the nationality of the occupying country; if such requests are granted, the applicants lose all entitlement to benefit by the Conventions, as they can no longer be considered as enemy nationals") [hereinafter 1960 COMMENTARY TO GENEVA CONVENTION III].

21. 2020 COMMENTARY ON GENEVA CONVENTION III, *supra* note 3, ¶ 964; *see also* René-Jean Wilhelm, *Can the Status of Prisoners of War Be Altered?*, 35 REVUE INTERNATIONALE DE LA CROIX-ROUGE 1, 34 (July & Sept. 1953) (original in French, English reprint available at: https://tile.loc.gov/storage-services/service/ll/llmlp/RC-Can-status-POWs-be-altered/RC-Can-status-POWs-be-altered.pdf).

the Detaining Power's adversary. Accordingly, no adverse inferences about the nationality of *individuals* may be drawn from the article's use of the term.

We find the former interpretation to be more persuasive, particularly in light of the term's context and given the treaty's object and purpose.[22] This is especially so considering Article 4's textual ambiguity and the observation in Jean Pictet's 1960 *Commentary* to Geneva Convention III, published by the ICRC, that the instrument is not "a complete collection of all the regulations applicable to prisoners of war."[23] As an example, it is widely recognized, including by the ICRC, that members of the armed forces acting as spies and saboteurs are not entitled to prisoner of war status even though Geneva Convention III does not mention this exclusion.[24]

"Context," as used in the Vienna Convention, refers primarily to the remainder of a treaty's text.[25] In that regard, other Geneva Convention III articles do not encompass a Detaining Power's nationals. Article 87 on prisoner discipline, for instance, provides,

> 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.[26]

In that same context, Article 100 similarly states,

> 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.[27]

This has led one distinguished commentator to contend that "the condition [of nationality] is firmly anchored in the text of Articles 87 and 100 of

22. VCLT, *supra* note 19, art. 31(1).
23. 1960 COMMENTARY TO GENEVA CONVENTION III, *supra* note 20, at 11.
24. 2020 COMMENTARY ON GENEVA CONVENTION III, *supra* note 3, ¶¶ 988, 990.
25. VCLT, *supra* note 19, art. 31(2).
26. Geneva Convention III, *supra* note 2, art. 87 (emphasis added).
27. *Id.* art. 100 (emphasis added).

Geneva Convention (III)."[28] Since both articles extend protection only to "prisoners of war" prescribed by Article 4A, a fair reading of the Convention in context is that nationals of the Detaining Power do not qualify for that status.

State *opinio juris* in the form of case law supports this interpretation. In the oft-cited 1967 judgment in the *Koi* appeal, for instance, the United Kingdom's Privy Council found that a Malaysian national fighting on behalf of Indonesia was not entitled to prisoner of war status while detained by Malaysian forces. In so holding, the Privy Council observed that Articles 87 and 100 "appear[] to rest on the assumption that a 'prisoner of war' is not a 'national of the detaining power.'"[29] It held that nationality barred prisoner of war status as a matter of customary international law.

Further support appears in the Pictet *Commentary*. It identified "two special factors" that a sentencing authority should consider when weighing a prisoner of war's punishment—"the absence of any duty of allegiance, since the prisoner is not a 'national' of the Detaining Power," and "the fact that the prisoner is in the hands of the Detaining Power as the result of circumstances independent of his own will."[30] Regarding the former, Pictet's language was unequivocal. The latter factor is also relevant, albeit less patently. In contrast to prisoners of the adversary's nationality, who may have little choice regarding whether to engage in hostilities against that State, it is difficult to envision legitimate circumstances in which those of the Detaining Power's nationality would be detained for reasons independent of the exercise of their own will, i.e., their decision to fight against their State of nationality.[31]

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28. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT ¶ 176 (4th ed. 2022).

29. *See* Public Prosecutor v. Koi (and Associated Appeals) [1968] AC 829, 857 (PC), 42 Int'l L. Rep. 441, 449 (appeal taken from Federal Court of Malaysia).

30. 1960 COMMENTARY TO GENEVA CONVENTION III, *supra* note 20, at 430.

31. We acknowledge there are some extraordinary circumstances in which nationals of the Detaining Power might engage in hostilities against that State against their will. In the current Russia-Ukraine conflict, for example, there have been reports of Ukrainian nationals in occupied territory who were conscripted by separatist republics to fight on behalf of Russian forces against their will. But forcibly conscripting nationals of the adversary to fight against their own State is a law of armed conflict violation and a war crime. That being so, we believe such circumstances should have little influence on how the Convention should be interpreted as a matter of law, though they may, and in many ways should, inform how States apply the Convention as a practical matter.

A minority of commentators, as well as the ICRC,[32] contest drawing such implications from Articles 87 and 100. For instance, one has argued,

> It is obvious that the descriptions about duty of allegiance and nationality were never intended by the drafters to qualify the definition of POWs given in Article 4 of the GC III, as this would inevitably be contrary to the protective nature of those provisions. These provisions just describe a feature (rather than a requirement) worthy of lenient treatment that is common among POWs. The fact that most POWs do not owe a duty of allegiance to their detaining power does not necessarily imply that those who owe such a duty should be taken out of the category of POWs.[33]

By this interpretation, the pertinent language in Articles 87 and 100 is merely a reminder that, although prisoners of war are subject to the "laws, regulations and orders in force in the armed forces of the Detaining Power" and may be disciplined thereunder, they are not entirely on par with them.[34] And the ICRC suggests that the articles simply "reflect a presumption . . . that in most cases prisoners of war will be nationals of the State on which they depend."[35]

But we struggle to understand why the drafters would have included procedural sentencing requirements that only apply to some prisoners of war. It seems to us that the drafters would not have used such unambiguous language if they intended only a presumption. An examination of the Convention's preparatory work, below, and State practice before the Convention's drafting, in Part III, further bolsters this conclusion.

According to Article 32 of the Vienna Convention on the Law of Treaties, "preparatory work of the treaty and the circumstances of its conclusion" may be resorted to as a supplementary means of interpretation to confirm the meaning attributed to its text pursuant to Article 31 or to resolve uncertainty. While references to nationality in the Convention's *travaux préparatoires* are few, the conference of government experts that met in 1947 identified

> [t]wo essential principles [that] should govern all clauses relating to proceedings and sentences concerning [prisoners of war] . . . namely: (a) *as a rule*, PW are not nationals of the DP, to which they owe no allegiance; [and]

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32. 2020 COMMENTARY ON GENEVA CONVENTION III, *supra* note 3, ¶ 971.

33. Tse Ka Ho, *The Relevancy of Nationality to the Right to Prisoner of War Status*, 8 CHINESE JOURNAL OF INTERNATIONAL LAW 395, 401 (2009).

34. *See* Martinez, *supra* note 13, at 67.

35. 2020 COMMENTARY ON GENEVA CONVENTION III, *supra* note 3, ¶ 971.

(b) as members of forces they owe a duty of obedience to their home country.[36]

Given their plain language and drafting history, Articles 87 and 100 provide strong support for distinguishing between those who are not nationals of the Detaining Power and those who are. They, therefore, weigh in favor of interpreting Article 4 as not extending prisoner of war status to nationals of Detaining Powers.

Although scholarship has primarily focused on the import of Articles 87 and 100, other provisions lend similar support to the premise that nationals of the Detaining Power are excluded from the Convention's protections. Article 7, for example, provides that "Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention."[37] While the relevance of this protective provision may not be evident on its face, the Pictet *Commentary* clarifies that it was included, in part, to prevent prisoners of war from forfeiting their protected status in the event they seek to become, either by their free will or due to coercion, nationals of the Detaining Power. The drafters were concerned that "if such requests are granted, the applicants lose all entitlement to benefit by the Conventions, as they can no longer be considered as *enemy* nationals."[38] Because "change of nationality deprives the person concerned of the protection accorded under the Convention,"[39] the ICRC was concerned about prisoners being pressured to change nationality. The Diplomatic Conference agreed with the concern, although it ultimately chose not to limit Article 7 to situations of coercion. In other words, Article 7 was included for the very reason that those with the Detaining Power's nationality did not benefit from prisoner of war status.

Beyond textual arguments, proponents of conferring prisoner of war status regardless of nationality look to the interrelationship between the 1949 Geneva Conventions for additional support.[40] This is appropriate, for as noted in Article 31(2)(b) of the Vienna Convention, "context" includes

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36. Int'l Comm. of the Red Cross, Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims 203 (1947), https://tile.loc.gov/storage-services/service/ll/llmlp/RC_report-1947/RC_report-1947.pdf (emphasis added).

37. Geneva Convention III, *supra* note 2, art. 7.

38. 1960 COMMENTARY TO GENEVA CONVENTION III, *supra* note 20, at 88 (emphasis added).

39. *Id.*

40. Tse, *supra* note 33, at 402–3.

"[a]ny instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." As the Conventions were drafted and adopted together, the other three have that status.

In this regard, Article 4 of Geneva Convention (IV) Relative to the Treatment of Civilian Persons in War (Geneva Convention IV) provides that "Persons protected by [the] Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are *not nationals*."[41] This provision has led some to conclude that, because nationals in that context are explicitly excluded from the protections of Geneva Convention IV, they must be entitled to a protected status as prisoners of war under Geneva Convention III. In their view, all so-called victims of war necessarily receive the protections of at least one of the 1949 Geneva Conventions.[42] Indeed, Geneva Convention IV's 1958 Pictet *Commentary* emphasizes that

> [e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such covered by the Third Convention; a civilian covered by the Fourth Convention or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in the enemy's hand can be outside the law.[43]

But this assertion presumes that a State's nationals are victims of war in the same sense as nationals of its adversary. In our view, nationals who take up arms *against* their State differ in kind from those who do so *on behalf of* it. Moreover, the other approach would afford more favorable treatment under Geneva Convention III to nationals who betray their State than that to which their loyal and law-abiding compatriots in occupied territory are entitled under Geneva Convention IV. If enemy nationals are not included in the "classes of civilian to whom protection against arbitrary action on the part of [that State is] essential in time of war,"[44] why should nationals who fight on the enemy's side be afforded a protected status if captured?

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41. Geneva Convention IV, *supra* note 14, art. 4.

42. Elman, *supra* note 13, at 183.

43. COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 51 (Jean Pictet ed., 1958) [hereinafter 1958 COMMENTARY TO GENEVA CONVENTION IV].

44. *Id.* at 45.

The conclusion that nationals of the Detaining Power are excluded from Geneva Convention III's protections is, consistent with Article 31(1) of the Vienna Convention, further informed by our understanding of the treaty's object and purpose. Unfortunately, Geneva Convention III's preamble provides no substantive guidance on its object and purpose. Seeking to fill this void, the ICRC asserts, "One may, however, deduce its object and purpose by considering the preamble to the 1929 Convention. Thus, the object and purpose of the 1949 Convention would also be 'to mitigate as far as possible, the inevitable rigours [of a war] and to alleviate the condition of prisoners of war.'"[45]

While we largely agree with this observation, it is difficult to reconcile fully, at least in the context in question, with the long-recognized general principle that international law rules are not meant to intrude upon the domestic affairs of States.[46] If, as the 1958 Pictet *Commentary* recognizes, the exclusion of a State's nationals from the protections of Geneva Convention IV is premised upon "remain[ing] faithful" to this principle, in that it does "not interfere in a State's relations with its own nationals,"[47] why would the opposite hold with regard to Geneva Convention III. After all, although we do not deny the trend in international law to increasingly expand the reach of its humanitarian protections, it remains at its core a body of law designed to preserve the interests of, and regulate interaction between, States. As the Privy Council reasoned in *Koi*, the Convention is "concerned with the protection of the subjects of opposing States and the nationals of other Powers in the service of either of them, and not directed to protect all those whoever they may be who are engaged in conflict and captured."[48]

Subsequent decisions by international tribunals further support this understanding of Geneva Convention III's scope. For instance, in its 2013 *Prlić* judgment, the International Criminal Tribunal for the Former Yugoslavia, in rejecting the argument that the Convention applies to a Detaining Power's nationals,[49] concluded that a "teleological interpretation seeking to establish

45. 2020 COMMENTARY ON GENEVA CONVENTION III, *supra* note 3, ¶ 144; *see also* Wilhelm, *supra* note 21, at 35; Elman, *supra* note 13, at 183–84; Martinez, *supra* note 13, at 68.

46. *See, e.g.*, U.N. Charter art. 2(7); 1958 COMMENTARY TO GENEVA CONVENTION IV, *supra* note 43, at 46.

47. 1958 COMMENTARY TO GENEVA CONVENTION IV, *supra* note 43, at 46.

48. Public Prosecutor v. Koi, *supra* note 29, [1968] AC at 857–58, 42 Int'l L. Rep. at 449.

49. Prosecutor v. Prlić et al., Case No. IT-04-74-T, Trial Judgment vol. 3, ¶¶ 600–5 (Int'l Crim. Trib. for the Former Yugoslavia May 29, 2013).

the objective of the Third Convention unambiguously leads to the conclusion that only those persons belonging to the armed forces of a Party *other than* the detaining Party are concerned."[50] Thus, nationals of a Detaining Power "cannot be considered to 'have fallen into the power of the enemy' within the meaning of the Third Geneva Convention."[51] The Appeals Chamber confirmed the interpretation as correct in its 2017 judgment.[52]

But even if Geneva Convention III prisoner of war status, which reflects customary law, does not extend prisoner of war status to nationals of the Detaining Power, the question remains whether the 1977 Additional Protocol I does so for nationals of States that are Party to Additional Protocol I. We believe not. In their 1982 commentary on the instrument, Michael Bothe, Karl Josef Partsch, and Waldemar Solf, all of whom were instrumental actors during the Diplomatic Conference, cited "nationals of the Detaining Power" among those categories of individuals who are not entitled to prisoner of war status or treatment, but are instead, according to Article 45(3) of the instrument, entitled to certain other protections set forth in Article 75.[53] Michael Bothe produced a revised edition in 2013 that maintained the position.[54]

The ICRC's 1987 *Commentary* on Article 45(3) was less direct but impliedly took the same view. It noted that in international armed conflict,

> a person of enemy nationality who is not entitled to prisoner-of-war status is, in principle, a civilian protected by the Fourth Convention, so that there are no gaps in protection. However, things are not always so straightforward in the context of the armed conflicts of Article 1 (General principles and scope of application), paragraph 4, as the adversaries can have the same nationality. . . . This is one of the reasons why the paragraph under consideration here provides that in the absence of more favourable treatment in

50. *Id.* ¶ 603.

51. *Id.* ¶ 604.

52. Prosecutor v. Prlić et al., Case No. IT-04-74-A, Appeal Judgment, ¶ 359 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2017).

53. MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 262 (1982).

54. Although the revised edition was in great part a reprint, Bothe noted, "Where information contained in the first edition would be incorrect or misleading because of new developments, indications concerning these developments have been added." MICHAEL BOTHE, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at xv, 296 (2d rev. ed. 2013).

> accordance with the Fourth Convention, the accused is entitled at all times to the protection of Article 75 of the Protocol (Fundamental guarantees).[55]

Article 1(4) extended classification as an international armed conflict to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination." In most cases, the "peoples" to which the provision refers would be nationals of the State against which they are fighting. This being so, the commentary would not have been necessary but for the premise that individuals of the Detaining Power's nationality do not enjoy prisoner of war status. In other words, Article 45(3) was intended, in part, to address precisely that situation, thereby lending credibility to our understanding of the protected status's scope.

Considering the totality of these considerations, the better interpretation of Geneva Convention III's Article 4 and its customary law counterpart is that it does not encompass nationals of the Detaining Power. In reaching this conclusion, we rely on the ordinary meaning given to the treaty's language, the Convention's context and structure, and its object and purpose.

III. SUPPORTING SCHOLARSHIP AND STATE PRACTICE

Beyond treaty interpretation, the prevailing and long-held view of international law scholars and the practice of States before Geneva Convention III was adopted in 1949 was that nationals of the Detaining Power were not entitled to prisoner of war status. For instance, Emmerich de Vattel, the preeminent eighteenth-century international legal scholar, observed in *The Law of Nations* that States often discriminated against their own nationals in the ranks of the enemy.

> Fugitives and deserters, found by the victor among his enemies, are guilty of a crime against him; and he has undoubtedly a right to put them to death. But they are not properly considered as enemies: they are rather perfidious citizens, traitors to their country; and their enlistment with the enemy cannot obliterate that character, or exempt them from the punishment they have deserved.[56]

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55. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 1761 (Yves Sandoz et al., 1987) (footnotes omitted).

56. EMER DE VATTEL, THE LAW OF NATIONS, bk. III, ch. VIII, § 144 (1758).

This explanation was echoed almost verbatim a century later by another prominent international legal scholar and former Union forces commander during the U.S. Civil War, General Henry Halleck, in his classic 1874 work *Elements of International Law and Laws of War*.[57] No doubt he was influenced by a similar provision in the 1863 Lieber Code. Despite recognizing relatively broad categories of persons entitled to prisoner of war status in subsequent articles, Article 48 of that instrument precluded those who betrayed their service to the Union from enjoying the privileges afforded to other combatants.

> Deserters from the American Army, having entered the service of the enemy, suffer death if they fall again into the hands of the United States, whether by capture, or being delivered up to the American Army; and if a deserter from the enemy, having taken service in the Army of the United States, is captured by the enemy, and punished by them with death or otherwise, it is not a breach against the law and usages of war, requiring redress or retaliation.[58]

These sources admittedly bear a stronger relevance to the inability of those who fought against their country to claim the privilege of combatant immunity. Still, they nonetheless indicate that long before the adoption of Geneva Convention III, States did not consider traitors and defectors as similarly situated with others fighting on the enemy's side.

Other classic works are more on point. For instance, in his 1905 treatise, *International Law* (and subsequent editions by other scholars[59]), Lassa Oppenheim explained that the rule pertains to more than combatant immunity.

> The privileges of members of armed forces cannot be claimed by members of the armed forces of a belligerent who go over to the forces of the enemy and are afterwards captured by the former. They may be, and always are, treated as criminals. The same applies to traitorous subjects of a belligerent who, without having been members of his armed forces, fight in the armed

57. HENRY W. HALLECK, ELEMENTS OF INTERNATIONAL LAW AND LAWS OF WAR, ch. XVIII, § 24 (1874).

58. U.S. Department of War, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, art. 48, Apr. 24, 1863.

59. *See, e.g.*, OPPENHEIM'S INTERNATIONAL LAW § 86 (Hersch Lauterpacht ed., 7th ed. 1952), which was cited in *Koi*.

> forces of the enemy. Even if they appear under the protection of a flag of truce, deserters and traitors may be seized and punished.[60]

The passage plainly indicates that *none* of the privileges of combatancy, prisoner of war status included, may be claimed by a national who has fallen into the power of their own State. More importantly, this is how States have addressed the situation. Indeed, the Privy Council's judgment in *Koi* and the U.S. Department of Defense's current *Law of War Manual* cite Oppenheim's position as authority for confirming that prisoner of war status is not extended to a Detaining Party's nationals.[61]

Pre-1949 U.S. military manuals likewise denied such nationals the benefits of combatant status. For instance, the Army's 1914 and 1940 editions of the *Rules of Land Warfare* provided that "deserters, subjects of the invading belligerent, and those who are known to have violated the laws and customs of war" are precluded from claiming the privileges attendant to participants in a *levee en masse*.[62] Although that section of the manuals addresses a particular class of combatant and focuses on the loss of combatant immunity, there is no indication that the approach was so limited. Instead, read in context, the better interpretation is that the enumerated individuals are denied all benefits that those who qualify as combatants, like members of a *levee en masse*, enjoy. Those privileges include prisoner of war status.[63]

These illustrative examples support the view that customary law did not afford prisoner of war status to detaining State nationals at the time the Geneva Conventions were being negotiated. If Article 4 had done so, it would have represented a change in the law of armed conflict. Even those who suggest today that prisoner of war status should be extended irrespective of nationality concede that "the historical precedents . . . show a tendency of states to deny [prisoner of war] status" to those who take up arms against

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60. LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 86 (1905).

61. Public Prosecutor v. Koi, *supra* note 29, [1968] AC at 856, 42 Int'l L. Rep. at 448; U.S. LAW OF WAR MANUAL, *supra* note 4, at 111, n.86.

62. OFFICE OF THE CHIEF OF STAFF, U.S. WAR DEPARTMENT, RULES OF LAND WARFARE ¶ 38 (1914), https://www.fichl.org/fileadmin/_migrated/content_uploads/US_Army_Manual_Law_of_Land_Warfare_1914.pdf [hereinafter 1914 RULES OF LAND WARFARE]; U.S. WAR DEPARTMENT, FIELD MANUAL 27-10, RULES OF LAND WARFARE ¶ 11 (1940), https://collections.nlm.nih.gov/bookviewer?PID=nlm:nlmuid-14110060R-bk [hereinafter 1940 RULES OF LAND WARFARE].

63. The manuals addressed such status as a combatant right. *See, e.g.*, 1914 RULES OF LAND WARFARE, *supra* note 62, ch. 3.

their own armed forces.[64] Moreover, with respect to the argument that Article 4A's silence as to nationality is dispositive, we think it is especially probative that this customary law consensus predominated irrespective of the fact that the 1899 and 1907 Hague Regulations and the 1929 Geneva Convention Relative to the Treatment of Prisoners of War similarly did not prescribe nationality as an express condition for prisoner of war status.

Beyond application of the rules of treaty interpretation and pre-1949 indications of customary status, the weight of evidence since 1949 also favors denying detaining State nationals prisoner of war status. Indeed, in contrast to the suggestive character of some of the evidence predating the Conventions, that which emerged thereafter is more direct and unambiguous.

In terms of guidance to U.S. forces, the Army and Marine Corps' *The Commander's Handbook on the Law of Land Warfare* explicitly provides that "[t]he special privileges international law affords lawful combatants do not apply between nationals and their own State. For example, provisions of [Geneva Convention III] recognize that nationals of the detaining power are not [prisoners of war] (art. 87)."[65] The U.S. Department of Defense's *Law of War Manual* provides further specificity:

> Deserters who are subsequently captured by their own armed forces are not [prisoners of war] because they are not in the power of the enemy and because the privileges of combatant status are generally understood not to apply, as a matter of international law, between nationals and their State of nationality.[66]

Similarly, regarding defectors, it observes that persons

> serving in the forces of the enemy who are captured by the State to which they originally owed an allegiance generally would not be entitled to [prisoner of war] status because the privileges of combatant status are generally understood not to apply, as a matter of international law, between nationals and their State of nationality.[67]

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64. Martinez, *supra* note 13, at 56.

65. HEADQUARTERS, DEPARTMENT OF THE ARMY, HEADQUARTERS, UNITED STATES MARINE CORPS, FM 6-27/MCTP 11-10C, THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE ¶ 1-53 (2019); *see also* U.S. LAW OF WAR MANUAL, *supra* note 4, § 4.4.4.2.

66. U.S. LAW OF WAR MANUAL, *supra* note 4, § 4.5.2.5.

67. *Id.* § 4.5.2.6; *see also id.* § 9.3.2.1.

Manuals of other countries adopt the same approach. For instance, the United Kingdom's 2004 *Joint Service Manual of the Law of Armed Conflict*, although acknowledging the issue is unsettled,[68] expressly declines to recognize prisoner of war status for defectors who fight on behalf of an enemy State: "Deserters in the military law sense become prisoners of war if they are captured. On the other hand, defectors from the enemy are considered not to be entitled to be treated as prisoners of war."[69] Similarly, Denmark's 2020 *Military Manual on the International Law Relevant to Danish Armed Forces in International Operations* provides, "The adversary's *deserters* may claim prisoner-of-war status if they are deprived of liberty. By contrast, *defectors* will not be entitled to this status if they have defected before they were deprived of liberty." It defines a "defector" as a "person who leaves his or her country's armed forces and joins the opposing side."[70] New Zealand's *Manual of Armed Forces Law* is in accord.[71]

State domestic judicial practice further supports this position. The Privy Council's aforementioned judgment in the *Koi* appeal is the most well-known example. Recall that the court rejected the argument that a detaining State must afford prisoner of war status to its nationals under Article 4 of Geneva Convention III. Although acknowledging that "Article 4 of the Convention is general in its terms and on its face is capable of including the nationals of the Detaining Power who are captured by that Power," the court ultimately concluded that the Convention assumes that a prisoner of war cannot be a national of a Detaining Power.[72] The court observed that the inference coincided "with commonly accepted international law."[73] As noted earlier, it cited Oppenheim's classic treatise. However, it took care to refer to the edition by Sir Hersch Lauterpacht, which "was published in 1951 after Aug. 12, 1949, the date of the Geneva Conventions, and in their lordships' opinion correctly states the relevant law."[74]

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68. UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT § 8.116.1, n.340 (2004) ("It is not clear whether captives of the nationality of the detaining power are entitled to PW status").

69. *Id.* § 8.14.

70. DANISH MINISTRY OF DEFENCE, MILITARY MANUAL ON INTERNATIONAL LAW RELEVANT TO DANISH ARMED FORCES IN INTERNATIONAL OPERATIONS 483 (2016).

71. *See, e.g.*, 4 NEW ZEALAND DEFENCE FORCE, DM 69 (2 ed), MANUAL OF ARMED FORCES LAW: LAW OF ARMED CONFLICT § 12.2.3(h) (2017, as amended in 2019).

72. Public Prosecutor v. Koi, *supra* note 29, [1968] AC at 853, 42 Int'l L. Rep. at 445.

73. *Id.* at 857, 42 Int'l L. Rep. at 449.

74. *Id.* at 856, 42 Int'l L. Rep. at 448. As the text between the editions is the same, the implication is that Lauterpacht, who went on to become a judge on the International Court

In reaching a similar conclusion, we do not ignore those distinguished experts who believe the case was wrongly decided, especially since Geneva Convention III is silent on the issue of nationality.[75] Interestingly, several commentators adopting that position, including the late Howard Levie, a recognized expert on prisoners of war, as well as the ICRC, rely on U.S. judicial decisions, including pre-Geneva Convention III case law, as support for the proposition that Detaining State nationals can enjoy prisoner of war status.[76] They point in particular to *In re Territo*.[77]

The case involved the capture and detention by the United States of Gaetano Territo, a U.S. citizen fighting for Italy during World War II. In 1946, he petitioned for a writ of habeas corpus claiming that, as a U.S. citizen, his detention was illegitimate.[78] The trial court denied the petition, concluding that he was lawfully detained as a "prisoner of war under the Geneva Convention [of 1929]" and that it was "immaterial to the legality of petitioner's detention as a prisoner of war by American military authorities whether petitioner is or is not a citizen of the United States of America."[79] In 1946, the Court of Appeals for the Ninth Circuit affirmed: "We have reviewed the authorities with care and we have found none supporting the contention of petitioner that citizenship in the country of either army in collision necessarily affects the status of one captured on the field of battle."[80]

Upon reflection, we believe reliance on *Territo*—albeit understandable—is out of place. To begin with, the legal issue before the courts was whether the United States could legally *detain* one of its nationals consistent with the law of armed conflict. Neither court was ever asked to decide whether a U.S. citizen was entitled to prisoner of war *status*. As the Privy Council correctly

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of Justice, did not believe an update was necessary despite the introduction of the 1949 Geneva Conventions.

75. Among them was the late Major General A.P.V. Rogers, former Director of U.K. Army Legal Services. A.P.V. ROGERS, LAW ON THE BATTLEFIELD 36–37 (3d ed. 2012).

76. *See, e.g.*, Elman, *supra* note 13, at 182; Tse, *supra* note 33, at 408–9; Martinez, *supra* note 13, at 53, 62, 77; 2020 COMMENTARY ON GENEVA CONVENTION III, *supra* note 3, ¶ 968; Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 INTERNATIONAL LAW STUDIES 1, 75–76 (1977).

77. *In re* Territo, 156 F.2d 142 (9th Cir. 1946).

78. *Id.* at 142–43.

79. *Id.* at 144. A writ of habeus corpus refers to a legal procedure by which a detainee comes before a court to challenge the legality of their detention. *See* Legal Information Institute, *Habeas Corpus*, CORNELL LAW SCHOOL (last updated Mar. 2022), https://www.law.cornell.edu/wex/habeas_corpus.

80. *Territo*, 156 F.2d at 145.

observed in *Koi*, the pertinent legal question in *Territo* "was whether the petitioner's restraint by the authorities as a prisoner of war was justified or whether he was entitled to a writ of habeas corpus."[81] That being true, "[t]he citizenship of the petitioner was immaterial to the decision. His *detention* did not depend on whether or not he was a citizen of the United States of America."[82] It is likewise telling that in *Hamdi v. Rumsfeld,* the U.S. Supreme Court characterized the Ninth Circuit's holding as simply clarifying that "the military detention of [a] United States citizen [is] lawful,"[83] a matter distinguishable from the conferral of *status* under the law of armed conflict. In our view, the extraneous language unnecessary to the holding in *Territo* was dicta, not an expression of *opinio juris*.

Moreover, the factual circumstances of that case counsel in favor of disregarding it for purposes of determining whether nationality bears on prisoner of war status. The petitioner was a dual Italian-American citizen born in 1915 in West Virginia to Italian parents.[84] He lived there for five years before moving with his father to Italy, where he resided until his capture. Indeed, he did not even know he had been born in the United States until he was twenty-four years old, three years after serving an initial enlistment in the Italian Army. Upon capture, he told U.S. authorities that his permanent residence was in Italy, where he lived with his wife and child. Only once he was sent to the United States to effectuate his wartime detention did he inform his captors that he was born in America.[85] Despite this, the United States intended to repatriate him to Italy.[86]

Bad facts, it is said, tend to make bad law. Mindful of that precaution, we see little reason to conclude that, under the case's unique facts, the United States knowingly acted contrary to its own military manual in effect at the time.[87] Moreover, in situations of dual nationality, as in *Territo*, it is uncertain how prisoner of war status should be resolved given the principle of the

81. Public Prosecutor v. Koi, *supra* note 29, [1968] AC at 858, 42 Int'l L. Rep. at 449.

82. *Id.* at 858, 42 Int'l L. Rep. at 449–50 (emphasis added).

83. Hamdi v. Rumsfeld, 542 U.S. 507, 524 (2004); *see also* Memorandum from John C. Yoo, Deputy Assistant Attorney General, to Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, at 3 (June 27, 2002), https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memodetentionuscitizens06272002.pdf.

84. *See* Doe v. Mattis, 889 F.3d 745, 761 (D.C. Cir. 2018); *see also* Ronald D. Rotunda, *The Detainee Cases of 2004 and 2006 and Their Aftermath*, 57 SYRACUSE LAW REVIEW 1, 13 n.73 (2006).

85. *Territo*, 156 F.2d at 143.

86. *Id.* at 144; *see also Doe*, 889 F.3d at 761.

87. *See* 1940 RULES OF LAND WARFARE, *supra* note 62, ch 2, ¶ 11.

sovereign equality of States.[88] Thus, we strain to see how *Territo* stands for the proposition some observers claim.

Other U.S. cases are also sometimes pointed to as "directly contraven[ing] the conclusion" that a State may deny prisoner of war status to its nationals.[89] In *Ex Parte Quirin*, the U.S. Supreme Court observed, "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war."[90] And in *Hamdi v. Rumsfeld*, it similarly explained, "There is no bar to this Nation's holding one of its own citizens as an enemy combatant."[91] And John Walker Lindh, colloquially known as the "American Taliban," was a U.S. citizen detained in Afghanistan by U.S. forces while fighting for the Taliban.[92]

One commentator has asserted that these cases "unequivocally show that it has always been the stand of the United States that the law of war does not prevent a citizen of the detaining power from claiming his right to [prisoner of war] status."[93] Another similarly claims that *Hamdi* "reaffirmed the rule that nationality does not alter the status of enemy combatants" and further characterizes *Quirin*, *Hamdi*, and *Lindh* as inconsistent with the *Law of War Manual* and other U.S. practice.[94]

But, as a threshold matter, the detainees did not qualify as prisoners of war for reasons unrelated to their nationality. In *Qurin*, for instance, the U.S. citizen (Haupt) was not entitled to that status because he was captured behind enemy lines out of uniform and charged with, among other offenses, spying.[95] Accordingly, he was one of the "familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war."[96] The detainees in *Hamdi* and *Lindh* were not entitled to prisoner of

88. For more on this principle, *see* Juliane Kokott & Lauri Mälksoo, *States, Sovereign Equality*, MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (last updated Mar. 2023), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1113.

89. *See, e.g.*, Martinez, *supra* note 13, at 61–62.

90. *Ex Parte* Quirin, 317 U.S. 1, 37–38 (1942).

91. Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004).

92. United States v. Lindh, 212 F. Supp. 2d 541, 545 (E.D. Va. 2002).

93. Tse, *supra* note 33, at 409.

94. Martinez, *supra* note 13, at 53, 62.

95. *Quirin*, 317 U.S. at 23.

96. *Id.* at 31; *see also* Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956) ("In the application of the law of war to various offenses thereunder, both the executive and judicial

war status because, as members of the Taliban, the United States did not recognize that they belonged to a *group* that qualified for that status as a threshold matter. Their citizenship was accordingly immaterial; they would not have qualified even had they not been U.S. nationals.[97] Much like *Territo*, therefore, these cases are not compelling evidence regarding the question at issue—the impact of *nationality* on qualification for prisoner of war status.

Finally, since 1949, distinguished scholars who are undeniably "the most highly qualified publicists" and whose "teachings" therefore qualify as "subsidiary means for the determination of rules of law," have opined that a Detaining Power's nationals cannot enjoy prisoner of war status.[98] For instance, writing in 1959, Morris Greenspan noted, "deserters and subjects of a belligerent who serve in the armed forces of the enemy cannot claim the status of prisoners of war when they fall into the hands of their own country."[99] A decade later, Richard Baxter concluded that "[t]he view that nationals of the Detaining Power are not entitled to treatment as prisoners of war finds widespread support in the views of the authorities."[100] As to renowned contemporary scholars, Yoram Dinstein maintains that "lack of duty of allegiance to the Detaining Power" is a condition for lawful combatancy and, therefore, prisoner of war status.[101] And Marco Sassoli observes that "[u]nder the wording of Convention III" nationality should be "irrelevant." Nevertheless, he recognizes that "[t]he majority view in military manuals, a judicial precedent, and scholarly writings is that [nationals of the detaining State] do not have

branches of the government have recognized a clear distinction between a lawful combatant subject to capture and detention as a prisoner of war, and an unlawful combatant, also subject to capture and detention, but in addition 'subject to trial and punishment by military tribunals for acts which render their belligerency unlawful' ") (quoting *Quirin*, 317 U.S. at 31).

97. *Lindh*, 212 F. Supp. 2d at 558.

98. Statute of the International Court of Justice art. 38(1)(d), June 26, 1945, 59 Stat. 1055.

99. MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 99 (1959).

100. Richard R. Baxter, *The Privy Council on the Qualifications of Belligerents*, 63 AMERICAN JOURNAL OF INTERNATIONAL LAW 290, 292 (1969).

101. DINSTEIN, *supra* note 28, ¶ 160.

POW status,"[102] while maintaining "that they must be treated in accordance with Convention III."[103]

In sum, our interpretation of Article 4A, including its ordinary meaning, context, and object and purpose, is that Detaining Powers are not obliged to recognize prisoner of war status for their own nationals. This understanding, we believe, enjoys the weight of both scholarly literature and State practice on point in support. What is less clear, however, are the nuances of *how* a State should determine when a detainee is to be considered one of its nationals within this context.

IV. FURTHER CLARITY NEEDED

As noted in Part II, applying the standard rules of treaty interpretation supports a conclusion that captured Detaining Power nationals do not enjoy prisoner of war status under Geneva Convention III. Moreover, Part III illustrated that the prevailing understanding of such status at the time the convention was being negotiated and since is to the same effect. Those who argue to the contrary tend to cite evidence bearing directly only on the issue of whether nationals may be detained in the first place, not whether nationality precludes their status as a prisoner of war. The positions of various States, including the United States, align with ours.

Yet, the law is not without its ambiguities. One merits mention here—the scope of the term "nationality." As mentioned, the term neither appears in the relevant treaty law nor is there any definitive definition of it in the law of armed conflict. Emblematic of the challenge it poses is the aforementioned *Territo* case, in which the detainee was a dual national with extremely weak ties to the detaining State and strong ones to its adversary. There is, unfortunately, little guidance on how to address such a situation vis-a-vis prisoners of war. Nor is the notion of nationality well-settled in other law of armed conflict contexts or even some other bodies of international law.

Geneva Convention IV, for example, only extends its protections to individuals "who, at a given moment and in any manner whatsoever, find

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102. Marco Sassòli & Eugénie Duss, *Prisoners of War (POWs) in Proxy Warfare: The Application of Geneva Convention III to Organized Armed Groups Detaining POWs of Territorial States or Detained as POWs by Territorial States*, *in* PRISONERS OF WAR IN CONTEMPORARY CONFLICT 3, 19 (Michael N. Schmitt & Christopher J. Koschnitzky eds., 2023).

103. MARCO SASSÒLI, INTERNATIONAL HUMANITARIAN LAW: RULES, CONTROVERSIES, AND SOLUTIONS TO PROBLEMS ARISING IN WARFARE ¶ 8.85 (2019); *see also* Sassòli & Duss, *supra* note 102, at 19.

themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[104] Although the term nationals is not defined in Article 44, the 1958 Pictet *Commentary* suggests it does not encompass those, such as refugees, who flee "their homeland and no longer consider[] themselves, or [are] no longer considered, to be nationals of that country."[105]

But neither the Convention nor the *Commentary* shed much light on *how* these determinations should be made. For instance, the *Commentary* observes,

> Such cases exist, it is true, but it will be for the Power in whose hands they are to decide whether the persons concerned should or should not be regarded as citizens of the country from which they have fled. The problem presents so many varied aspects that it was difficult to deal with it fully in the Convention.[106]

A smattering of references in the *Commentary* to those who "enjoy the protection of [a] government" suggests that States may resort to the law of diplomatic protection to frame the concept.[107]

Within that context, the International Court of Justice, for its part, has articulated a searching, case-by-case standard for determining nationality that is highly fact-dependent.

> According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may

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104. Geneva Convention IV, *supra* note 14, art. 4.

105. 1958 COMMENTARY TO GENEVA CONVENTION IV, *supra* note 43, at 47.

106. *Id.*

107. Geneva Convention IV, *supra* note 14, art. 44; 1958 COMMENTARY TO GENEVA CONVENTION IV, *supra* note 43, at 47. "Diplomatic protection" refers to "the procedure employed by the State of nationality of the injured person to secure protection of that person, and to obtain reparation for the internationally wrongful act inflicted." Int'l Law Comm'n, *Draft Articles on Diplomatic Protection, with Commentaries*, ¶ 2 of commentary to art. 1, U.N. GAOR Supp. No. 10, U.N. Doc. A/61/10 (2006), *reprinted in* 2006 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, vol. II, pt. 2, at 24 [hereinafter *Draft Articles on Diplomatic Protection*]; John Dugard, *Diplomatic Protection*, MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (last updated June 2021), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1028; Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment on Preliminary Objections, 2007 I.C.J. 582, ¶ 39 (May 24).

> be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.[108]

From the court's phrasing, one could imply that, as a matter of international law and within a particular legal context, a person can have only one legitimate nationality.

Other interpretations are less constraining. The International Law Commission, for example, summarized its understanding in the 2006 *Draft Articles on Diplomatic Protection*. For the Commission, an individual's nationality refers to the State whose "nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States or in any other manner, not inconsistent with international law."[109] This begs the question of how to handle conflicts between nationalities, such as in the *Territo* case, when nationality is a factor in making a legal determination.

According to the Commission, the prevailing nationality in such cases depends on which is dominant. The *Draft Articles* suggest a non-exhaustive list of factors to consider when making this determination that includes:

> habitual residence, the amount of time spent in each country of nationality, date of naturalization (i.e., the length of the period spent as a national of the protecting State before the claim arose); place, curricula and language of education, employment and financial interests; place of family life; family ties in each country; participation in social and public life; use of language; taxation, bank account, social security insurance; visits to the other State of nationality; possession and use of passport of the other State; and military service.[110]

Regardless of which approach one takes, the result in *most* cases would likely be the same.[111] But what of situations where the relationship with two

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108. Nottebohm (Liech. v. Guat.) Second Phase, Judgment, 1955 I.C.J. 4, 23 (Apr. 6).

109. *Draft Articles on Diplomatic Protection*, *supra* note 107, art. 4. Determining nationality is the province of each individual State, and the conditions listed are not exhaustive but instead illustrative of linkages that a State may find helpful in determining who qualifies for its nationality. *See id.* commentary to Draft Article 4, ¶¶ 1–4.

110. *Id.* commentary to Draft Article 7, ¶ 5.

111. For example, as is evident, both would overwhelmingly favor Italy as the predominant nationality in *Territo*. Although the basis for the United States' practice in that case remains uncertain, its treatment of a dual national was at least consistent with these approaches.

or more States is in relative equipoise? After all, it is up to the custodial State to determine an individual's nationality, and these inquiries are inherently subjective.

Complicating matters, various interpretations of the Conventions imply that the law of diplomatic protection may not be the only source for determining nationality. For example, in *Tadic*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia interpreted Article 4 of Geneva Convention IV to include as protected persons those "who, while having the nationality of the Party to the conflict in whose hands they find themselves, are refugees and thus no longer owe allegiance to this Party and no longer enjoy its diplomatic protection."[112]

This phrasing, and the distinction between nationality and allegiance in particular, intimates that an individual's *de jure* nationality may differ from the concept and application of nationality as it applies under the Geneva Conventions. Thus, in the *Tadic* tribunal's view, "the lack of both allegiance to a State and diplomatic protection by this State [is] regarded as more important than the formal link of nationality," especially considering the dynamic character of modern international armed conflicts and the oft-mixed composition of the parties and forces involved.[113] It further noted that

> [i]n such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.[114]

As is apparent from these illustrations, there is little definitive guidance or consensus on how nationality should be determined or applied in other contexts within the law of armed conflict, let alone with respect to prisoners of war. Related concerns pervade as well. For example, if the determination of nationality is the exclusive province of States, what safeguards are in place to prevent arbitrary determinations? To what extent may an individual unilaterally sever his nationality or allegiance to a State? And in the event of an "internationalized" armed conflict, how should the nationality of members

112. Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 164 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) (emphasis added). The tribunal gave the example of "German Jews who had fled to France before 1940, and thereafter found themselves in the hands of German forces occupying French territory." *Id.*

113. *Id.* ¶ 165.

114. *Id.* ¶ 166.

of armed groups, presumably of the same nationality as their adversaries but under the control of another State, be determined? These and other related issues demonstrate that further clarity in the law is necessary and, we believe, essential.

V. CONCLUDING THOUGHTS

The view that nationality is irrelevant to prisoner of war status is not unreasonable. That it is propounded by the ICRC is, moreover, not to be taken lightly. Nevertheless, we believe a stronger case can be made for excluding captured nationals of a Detaining Power from being entitled to that status under Article 4A of the Geneva Conventions and customary law. This interpretation is supported by the application of firmly established rules of treaty interpretation, represents the prevailing (albeit not universal) opinion of distinguished scholars, and reflects the position taken by several States, including the United States.

Yet, taking this position generates uncertainty, for it raises questions as to who should be treated as a national of the Detaining Power and the relationship between notions of nationality and allegiance. Unfortunately, although the involvement of groups such as the Liberty of Russia Legion and the Russian Volunteer Corps in the armed conflict in Ukraine serves as a testament to the issue's continued importance, neither States nor scholars recently have engaged in much relevant discourse about it. Ambiguity, therefore, remains. Accordingly, it is essential to remember that in cases of doubt as to the status of detainees under Article 4 of Geneva Convention III, they enjoy the Convention's protection until a competent tribunal determines their appropriate status pursuant to Article 5 of that instrument.