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THE STATUS, TREATMENT AND REPATRIATION OF DESERTERS UNDER INTERNATIONAL HUMANITARIAN LAW

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I. INTRODUCTION

1. The real issue

Although desertion is a phenomenon as old as war itself, it has taken on increased importance in recent years. There are several reasons for this. As war has been proscribed and is no longer deemed a lawful means of settling disputes among States, combatants are no longer viewed with quite so much detachment. They are no longer perceived merely as tools to carry out a policy, devoid of any responsibility for that policy, but as supporters of an ideology. In a «guerre-croisade» (1) (crusade war), not only nations or peoples are at war, but also opinions, ideologies or religions (2).

Hence the temptation, for a Detaining Power, to win captured enemy combatants over to the ideology they were fighting, and hence too the tendency, for combatants themselves, to embrace — with more or less conviction, or under more or less coercion — the ideology of the Power into whose hands they have fallen. For the Power on which they depend, and occasionally for the Detaining Power too, these combatants are «deserter».

The Detaining Power has another reason to label many captured combatants as «deserter». It believes that in this way, it can divest them of the protection to which prisoners of war are entitled under international law.

2. The legal issue

Any combatant who has fallen into the power of the adverse party is a prisoner of war.

The status and treatment of prisoners of war are provided for in the Third Geneva Convention relative to the Treatment of Prisoners of War (3) (hereinafter referred to as «the Third Convention»), to which 161 States are now party.

The Third Convention sets forth detailed regulations on the rights and duties of prisoners of war, on their material and psychological conditions of internment, discipline, penal and disciplinary sanctions, their repatriation and the transmission of information concerning them. It entitles delegates of the Protecting Power and of the International Committee of the Red Cross (ICRC) to visit prisoners of war and to interview them without witnesses (4). As the rules


2) In fact, «conventional» wars occurred only very rarely and then, only in the days of nation-states. In ancient times, in the Middle Ages and at the time of the Napoleonic Wars, war was just as «ideological» as nowadays.

3) 75 UNTS 135.

governing the status and treatment of prisoners of war are extremely comprehensive, the question whether deserters are prisoners of war has significant practical implications. If deserters are prisoners of war, they are entitled to full protection under the Third Convention, but must spend their whole captivity in the company of former comrades-in-arms who did not desert; they cannot be enlisted in the armed forces of the adverse party — even if they wish to be; their capture must be reported to the Power on which they depend, and as a rule, they must be repatriated at the end of active hostilities. All this may in fact be detrimental to them or their families still in the hands of the Power on which they depend and who unfortunately often have to fear discriminatory measures when that Power discovers the desertion.

If, on the other hand, deserters are not prisoners of war, the following questions arise: What rules are applicable to them? How does one differentiate between deserters and other combatants? How can a Detaining Power be prevented from shirking its obligations by labelling many captured combatants as «deserters»?

Unfortunately, these questions are not merely academic; they are problems with which the people who deal with the protection of victims of present armed conflicts are confronted every day. In International Humanitarian Law — i.e. basically the 1907 Hague Convention No. IV, (5) the Geneva Conventions of 1949 (6) and their 1977 Protocols I and II (7) — there are no provisions relating specifically to deserters. The Third Convention (8) and Protocol I (9) define neither the term «deserter» nor the status or treatment of deserters. Thus, only by interpreting International Humanitarian Law, taking into due consideration its


6) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, First Convention, 75 UNTS 31-83;
   Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, Second Convention, 75 UNTS 85-133;
   Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, Third Convention, 75 UNTS 135-285;


principles and objectives and by analysing State practice, can a solution be found for deserters.

3. General scope

Before dealing with the definition of a deserter, it would be appropriate to mention briefly some aspects of the problem which are beyond the scope of this study.

Except in situations of armed conflict, deserters are not covered by International Humanitarian Law, since it is applicable only in armed conflicts. They may, however, be protected by Human Rights Law, or even Refugee Law if they are entitled to refugee status (10).

In armed conflicts, deserters who stay in a territory controlled by their own armed forces — the armed forces from which they deserted — do not belong to the traditional categories of «protected persons»; they merely benefit from the fundamental guarantees set forth in Art. 75 of Protocol I, provided they deserted for reasons related to the armed conflict prevailing at the time.

In non-international armed conflicts, deserters are protected by International Humanitarian Law, albeit in the same way as any other person who does not take — or no longer takes — an active part in the hostilities. Under the terms of International Humanitarian Law, they are entitled to the same protection as other combatants captured in the course of an internal conflict.

Actually, the legal concept of desertion is in itself ill-suited to internal conflicts. Neither members of the governmental armed forces who defect to the insurgent forces, nor members of the insurgent forces who defect to the governmental forces can be called deserters. They are rather people who have made up their mind with respect to the internal conflict. Although they are often received with open arms by the forces to which they defect, International Humanitarian Law does not prohibit these forces from sentencing them solely because, prior to «deserting», they fought on the «wrong» side.

The only provisions applicable to these «deserters» are the fundamental guarantees laid down in Art. 3 common to the four Geneva Conventions of 1949 and those of Protocol II, when the latter is in force.

Thus, the present paper will deal solely with the deserters who, in an international armed conflict, are in the hands of a Party other than the one they were supposed to serve.

II. DEFINITION

Before attempting to find solutions, we must agree on a definition of the term «deserter».

10) Deserters are not necessarily entitled to refugee status, cf. chapter III, 1, B, e.
1. An inapposite notion: the concept of «desertion» under municipal law.

Most national military codes give a detailed definition of deserters, to be able to punish them. But these definitions are not apposite in International Humanitarian Law. It is indeed hardly conceivable that municipal law, which varies from one country to another, should give a definition valid in International Humanitarian Law. But more important yet is the fact that in the various military codes, the concept of desertion is often very broad. In many countries, a large number of breaches of the military code of conduct constitute acts of desertion. For instance, the United States decided to regard as deserters the American soldiers interned in Korea who «converted to Communism» and refused to be repatriated (11), and, during the Second World War, the Soviet Union regarded as a deserter any Red Army officer taken prisoner by the Germans (12).

Such definitions are guided by military discipline and not by the victims' interest and, should they be taken over by International Humanitarian Law, they would divest prisoner-of-war status of any meaning whatsoever.

2. Suggested definition adapted to the requirements of international humanitarian law.

For the application of International Humanitarian Law, we suggest the following definition of a deserter who is in the hands of an adverse or neutral Power:

A deserter is a member of the armed forces who terminates individually and unilaterally his military service with the intention of escaping his military obligations. He acts upon his intent to sever his allegiance to the Power he was serving either by abandoning his forces to go to neutral or enemy-controlled territory or, in a combat situation, by abstaining from fighting immediately prior to falling into the power of the enemy and seizing the first opportunity to confirm to the Detaining Power his willingness to sever his allegiance to the Power on which he depends.

3. The various elements of the definition

A. The non-controversial elements

Both in the literature and in common parlance, the term «deserter» is used

11) Flory, RGDIP, p. 60.
to describe a wide variety of soldiers and other persons with military obligations. The first part of our definition nonetheless corresponds to the following generally accepted notions:

«A deserter is a member of the armed forces who terminates unilaterally his military service with the intention to renge on his military obligations» (13).

B. The additional elements we suggest

To distinguish deserters from other combatants who have fallen into the power of the adverse party, the definition requires additional elements which must be as objective and easily verifiable as possible:

a) implementation of the intent to sever allegiance

The difference between a deserter and other captured combatants is his intent to sever his allegiance to the Power on which he depends (14). Yet the intent as such does not suffice: it must be acted upon. Thus, our criterion is not merely subjective, for it requires a combination of both the intent and a voluntary act consistent with that intent.

aa) Consequently, a soldier who surrenders without a fight may not automatically be classified as a deserter. He expresses the wish to stop fighting, but not necessarily the intent to sever allegiance with the country he is serving. Any combatant who wants the enemy to cease committing belligerent acts against him has no choice but to show somehow that he no longer wishes to fight — unless of course he is wounded and has lost consciousness. Obviously, it is not for International Humanitarian Law to decide whether the soldier fails in his duty or whether his surrender is justified under the circumstances. Thus, a priori, a soldier who for any reason surrenders is not necessarily a deserter. He is a prisoner of war. Under Art. 4 of the Third Convention, surrender does not deprive a combatant of prisoner-of-war status (15).

bb) Besides, the fact that to be a deserter a combatant must act upon his intent to sever his allegiance means that a combatant who defends himself before being captured cannot be considered a deserter, irrespective of the assertions he may make afterwards.

b) The point in time when the intent to sever allegiance must be expressed

As a rule, a deserter voluntarily abandons his army and his act of desertion is absolutely obvious. A combatant who wishes to implement his decision to desert at the height of a battle is in a trickier situation, for a captured combatant is a prisoner of war and retains that status until his release and repatriation, by

virtue of Art. 5 (1) of the Third Convention which stipulates that «the Convention shall apply to the persons referred to in Art. 4 from the time they fall into the power of the enemy and until their final release and repatriation» and of Art. 7 of the Third Convention which lays down the principle of non-renunciation of the rights of prisoners of war. Thus, from a purely logical point of view, only someone who stopped fighting before falling into the power of the enemy can be deprived of prisoner-of-war status. In theory, a deserter should therefore make himself known as such at the time of falling into the power of the enemy (16).

In practice, in particular in a combat situation, the distinction between a combatant who surrenders and a real deserter may be difficult to draw. Art. 5 (2) of the Third Convention even stipulates that any member of the armed forces who falls into the power of an adverse Party — i.e. including deserters — shall be presumed to be a prisoner of war (17).

Thus, it is often only at a later stage, namely during his first questioning, that a deserter can identify himself as such (18) and be granted the appropriate status. But if he fails to do so at that first opportunity, a captured combatant cannot subsequently be regarded as a deserter, since a prisoner of war cannot have his status changed, whatever his wishes or assertions (19).

Consequently, it is not possible to become a deserter while in captivity (20). This is in keeping with the principle that prisoner-of-war status is inalienable, and with the humanitarian desire to reduce the risk of Detaining Powers trying to indoctrinate and manipulate prisoners of war during captivity.

State practice in the Korean and Vietnam wars was not always in conformity with that rule: the parties to these conflicts claimed they could exempt from prisoner-of-war status persons who had been classified as prisoners of war and who were subsequently willing to change their status (21).


17) Wilhelm, p. 683; Hasenclever, p. 155; also see Art. 45 (1) of Protocol 1.


19) Wilhelm, p. 536-543; Commentary, Third Convention, p. 89.


21) Rosas, p. 390.
However, as regards customary law, «too much significance should not be given to the practice adopted in the Korean and Vietnam wars, in view of the strong internal aspects involved in these conflicts» (22).

c) The need to express personally the intent to sever allegiance

Only an individual can express the intent to sever his allegiance to the Power on which he depends. An entire unit cannot possibly be considered a «unit of deserters» unless each and every individual has been given the opportunity to express personally his intent to sever his allegiance. An individual taking part in a mass capitulation is not necessarily a deserter — an assertion which concurs with the intent of the authors of the Third Convention (23) and reduces the risk of the provisions concerning prisoner-of-war status being rendered void by a derogation for deserters (24).

4. Must a distinction be drawn between deserters and defectors?

Before we deal with the question as to who, in practice, is deemed to be a deserter under the terms of our definition, we must consider whether a distinction must be made between deserters and defectors. Some authors distinguish between deserters in the strict sense — i.e. persons who simply want to escape military service and the dangers of the battlefield — and defectors who are motivated by ideological considerations (25).

However, opinions diverge as to the definition of «defector». For some proponents of the distinction, the term «defector» denotes a person who wants to join the enemy armed forces (26), and for others, it includes persons who seek refuge with the enemy for ideological reasons, but without necessarily intending to enlist in the enemy armed forces (27).

As for the effects of that distinction, there is no consensus among its proponents. Some state that deserters must be granted prisoner-of-war status, but that «it appears to be a generalized rule that a Detaining Power is not bound

22) Rosas, p. 392.
23) Commentary, Third Convention, p. 50; (see also infra 111, 1. A b).
24) Hasenclever, p. 155.
26) Eggin/Solf, p. 555, and probably Levie, POW, p. 77.
27) Rosas, p. 388.
to classify defectors as prisoners of war" (28). Others, on the other hand, are of the opinion that the distinction has no bearing on the status and that both deserters and defectors are entitled to prisoner-of-war status (29).

As far as International Humanitarian Law is concerned, the distinction has a significant drawback, in that it rests on a purely subjective factor: the reasons for desertion. It is difficult enough for a judge at national level to assess the subjective factors which must be taken into consideration in the qualification of an offence, and such assessments would be extremely hazardous, if not impossible, in armed conflict situations, for the subjective factors may be influenced by the parties and neither the Detaining Power nor the Protecting Power have the means, the dispassionateness or the time to single out and screen these subjective factors. The distinction should therefore be dropped.

The term «defector» may nonetheless be used to denote a special kind of deserter (within the meaning of this study): a defector is a deserter who voluntarily abandons his forces for the purpose of bearing arms on behalf of the enemy.

5. Persons qualifying as deserters within the meaning of our definition

It follows from the criteria discussed above that under International Humanitarian Law a member of the armed forces who has fallen into the power of the enemy may be considered a deserter only if:

a) he abandons his forces, secretly goes over to neutral or enemy territory, and states at the very first opportunity his intent to sever his former allegiance (30); or if

b) he falls into the hands of the enemy under ambiguous circumstances, i.e. not in a combat situation (for instance a spontaneous mass surrender which has not been caused by an enemy attack), and who states, at the very first opportunity, his intent to sever his former allegiance (31); or if

C) he falls into the power of the enemy in a combat situation, yet surrenders without putting up a fight and states at the very first opportunity his intent to sever his former allegiance (32).

However, a combatant who has put up a fight at the time of capture should not be regarded as a deserter, whatever he may assert later on.


29) Esgain/Solf, p. 555-563; Levie, POW, p. 77-80.

30) Also see Hasenclever, p. 155.

31) Also see Commentary, Third Convention, p. 549.

32) Also see Rosas, p. 391; Commentary, Third Convention, p. 549.
6. Ways of stating the intent to sever allegiance

The intent to sever allegiance — and we emphasize once again that such intent must not merely exist, but must also be acted upon — can be expressed in the following terms:

a) the presumed prisoner of war states that he wants to enlist in the armed forces of the Detaining Power; or
b) he states that he sought refuge with the Detaining Power to escape from his own army; or
c) he states that he no longer wants to have anything to do with the Power on which he hitherto depended and that he refuses to be interned with other members of the that Power’s armed forces.

III. THE POSITION OF DESERTERS UNDER INTERNATIONAL HUMANITARIAN LAW

Having defined deserters, we shall now examine the provisions of International Humanitarian Law applicable to them. First, we shall analyse, in general terms, the status and treatment to be granted deserters in the power of the enemy or of a neutral State. We shall then broach two specific issues: the notification of the personal data of deserters in the power of the enemy to the Power on which they depend, and the repatriation of deserters.

As our definition does not include some categories of combatants often referred to as deserters, we shall also examine the provisions applicable to those categories.

1. Deserters who have fallen into the power of the adverse Party

A. Status

a) The literature

In the literature, the status and the treatment to which deserters are entitled is a highly controversial issue. Some authors contend that deserters are entitled to prisoner-of-war status (33), while the majority of them state that they are not (34). The Commentary on the Third Convention specifies that: «Although many countries, for instance Great Britain, treated the latter as prisoners of war, this


does not mean that they are entitled to that status» (35). This implies that although there is an established practice by some States to treat deserters as prisoners of war (36), there is no obligation, under customary law, to do so. Some authors too are proponents of this opinion (37), while others contend that by virtue of State practice, deserters are entitled to be treated as prisoners of war (38), at least if they are interned (39).

b) Deserters are not prisoners of war

As a rule, the deserters defined above are in uniform when they fall into the power of the enemy and will continue to be considered — at least by the Power on which they depend — as members of its armed forces.

Thus at first glance, it would appear compulsory, from a legal point of view, to grant them prisoner-of-war status. Under Art. 4 A(1) of the Third Convention, members of the armed forces who have fallen into the power of the enemy are to be considered and treated as prisoners of war, and Articles 5 and 7 specify that they will retain that status until their final release and repatriation and cannot renounce it.

Some authors, however, argue that in Art. 4 (A), the expression «fallen into the power of the enemy» clearly shows that it concerns combatants who pass into enemy hands not of their own free will but by a force beyond their control (40). Those who desert their own forces and give themselves up to the enemy do not, to their mind, qualify as prisoners of war within the meaning of Art. 4 (A) and are therefore not entitled to the rights conferred by the Third Convention (40). But this

35) Commentary, Third Convention, p. 549.


38) Castren, Erik. *The present law of war and neutrality*, Helsinki, 1954, p. 154; Schapiro, p. 323; Verri, Pietro. *Dizionario di diritto internazionale dei conflitti armati*, Roma, 1984, p. 33; at least for deserters: Greenspan, p. 99. One could also contend that although deserters are not entitled to prisoner-of-war status, they are entitled to the same treatment as prisoners of war. This seems to have been the view customarily adopted by the ICRC which requested that the treatment of deserters be similar to that of prisoners of war (except with respect to repatriation). The reason for this is that the ICRC could not leave deserters in a «legal vacuum», i.e. without legal protection. Since any interned enemy alien who is not a prisoner of war qualifies as an interned civilian (since the Fourth Geneva Convention of 1949 came into force), the ICRC's concern is now outdated.

39) Rosas, p. 391 and Flory, *POW*, p. 30/31 (but we must point out that this work was written in 1942, when the 1929 Conventions were in force and civilian-internee status did not yet exist).

40) Wilhelm, p. 682.

argument is too formalistic; it excludes too many combatants from prisoner-of-war status and does not reflect the intent of the 1949 Diplomatic Conference (42) which replaced the words «captured by the enemy» in Art. 1 of the 1929 Convention relative to the Treatment of Prisoners of War by «persons who have fallen into the power of the enemy» to increase the scope of the Third Convention of 1949 and to include, inter alia, «soldiers who became prisoners without fighting, for example following a surrender» and to prevent Detaining Powers from refusing to grant prisoner-of-war status to «surrendered enemy personnel» — as had happened during the Second World War (43).

On the other hand, the «travaux préparatoires» of the Third Convention do not reflect any specific intent to include deserters in the category of persons entitled to prisoner-of-war status. The Third Convention leaves the question open (44). Thus, it did not change in any way the customary practice whereby it was left to the discretion of states to grant or deny prisoner-of-war status to deserters (45) and contains no obligation to grant them such status (46).

To fail to give prisoner-of-war status to deserters on the grounds that they want to sever their allegiance is not counter to Art. 7 of the Third Convention which prohibits even voluntary changes in the status of prisoners of war (47); the persons concerned were already deserters when they fell into the power of the enemy and thus never had prisoner-of-war status.

No express rule of international law exists prescribing that deserters must be given prisoner-of-war status. Furthermore, neither the spirit nor the objective of International Humanitarian Law in general and of the Third Convention in particular advocate prisoner-of-war status for deserters.

Deserters would in fact be very exceptional prisoners of war, since they lack an essential attribute which influenced the entire concept and content of the Third Convention: unlike «standard» prisoners of war, they are not «une fraction de la puissance militaire de l'ennemi» (a part of the enemy’s military

42) Commentary, Third Convention, p. 50; Esgain/Solf, p. 558/559; Levie, POW, p. 78; Hasenclever, p. 153.


46) Commentary, Third Convention, p. 549; Shields Delesser, p. 189, note 74; Hasenclever, p. 154; probably Wilhelm, p. 681/682; a detailed analysis of State practice (see: Schapiro, p. 310-322) shows that deserters were not treated as prisoners of war, at least at the time of repatriation.

strength) \(^{48}\). Hence the specific justification for interning prisoners of war, namely to prevent them from continuing or resuming the fight, does not apply in the case of deserters.

Furthermore, the whole purpose of the Third Convention is to protect soldiers in the enemy's power and ensure due regard for their honour (Art. 14) and their ranks and badges (Art. 40, 43-45, 49). They are soldiers subject to military law (Art. 82-88) and above all loyal to the Power on which they depend (Art. 87, 91, 107) \(^{49}\). However deserters do not want to be soldiers (at least not in the forces of the Power on which they depend) and are no longer in the hands of that Power which could constrain them to serve in its army. Usually, they will not want their names and personal data to be notified to the Power on which they depend and at any rate will have no desire to be repatriated. They may even want to serve in the enemy armed forces. But if they are prisoners of war, their Detaining Power cannot fulfil these wishes without committing a breach of the Third Convention \(^{50}\). Thus, many provisions of the Third Convention - e.g., those relating to the Protecting Power which «represents» the Power on which a prisoner of war depends — presume a priori that there is a bond of allegiance between the prisoner of war and the Power on which he depends \(^{51}\).

It is difficult to see how they could apply to deserters who want to sever that bond.

Although International Humanitarian Law does not put the Detaining Power under any obligation to grant deserters prisoner-of-war status, it would be erroneous to assert that the Detaining Power is not entitled to do so. The option to grant deserters prisoner-of-war status may be regarded as a customary right \(^{52}\), even though it should not be encouraged owing, as mentioned above, to the inappropriateness of such status.

c) **Deserters are protected civilians**

International Humanitarian Law protects all persons in the power of the adverse Party. If deserters do not have prisoner-of-war status, they are protected by the Fourth Convention relative to the Protection of Civilian Persons in Time of War: as stated in Art. 4, the Fourth Convention protects all «persons who, at a given moment and in any manner whatsoever» find themselves, in case of a conflict, in the power of an adverse Party and are not protected by another Convention. Thus, deserters are protected civilians \(^{53}\) and as such may be visited

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48) Flory, *RGDP*, p. 56.
49) Wilhelm, p. 682.
50) By virtue of Art. 7 of the Third Convention, prisoners of war cannot renounce their rights.
51) Wilhelm, p. 682.
52) Shields Delessert, p. 189, note 74; *Commentary, Third Convention*, p. 549.
53) The following authors expressly agree that deserters are civilians: Esgain/Solf, p. 556; Baxter, p. 496/497.
by delegates of the Protecting Power and of the ICRC who can check, in an
interview without witnesses, whether they really are deserters.\(^{54}\)

Another question which may be raised is whether deserters are entitled to
refugee status. We shall deal with it further on.

To preclude any misunderstanding, we must stress again that deserters take
on civilian status only when they sever their allegiance. Up to that point in time,
they are combatants entitled to commit belligerent acts which as such may not be
held against them later on. Besides, as previously mentioned, combatants who
commit belligerent acts at the time of falling into the power of the enemy are not
deserters, but prisoners of war, irrespective of their attitude after their capture.

B. Treatment to be granted to deserters

When a deserter falls into the power of the enemy in a combat situation, it
may be difficult to distinguish him from other captured combatants. Under those
circumstances, should any doubt arise as to his status, he must be treated as a
prisoner of war until such time as his real status as a deserter, i.e. a civilian, has
been determined by a competent tribunal.\(^{55}\) Once his status has been determined
or if there has never been any doubt about it, a deserter is a protected civilian
within the meaning of International Humanitarian Law and as such, he is
entitled to the following treatment:

a) He may be interned if the security of the Detaining Power makes it
absolutely necessary\(^{56}\) (which is often the case, since it is difficult, at least at the
outset, to draw the distinction between a genuine deserter and a spy). In that
case, he will be a civilian internee whose status is governed by the regulations set
forth in Art. 79-135 of the Fourth Convention and reflects his position much
more accurately than prisoner-of-war status. Although the treatment prescribed
for civilian internees is to a large extent modelled on that of prisoners of war, it
discards the rules meant specifically for soldiers. Besides, granting such status
would be a fair reflection of the prevailing practice, since deserters have usually
been accorded treatment similar to that of prisoners of war.

b) Coercive enlistment of enemy civilians in the armed forces of the
Detaining Power is forbidden\(^{57}\). On the other hand, it is a generally accepted
rule that the Detaining Power may accept a deserter’s voluntary offer to enlist in
its armed forces\(^{58}\). This rule is particularly relevant for defectors who wish to

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\(^{54}\) Art. 143 (5) of the Fourth Convention.

\(^{55}\) Art. 5 (2) of the Third Convention.

\(^{56}\) Art. 42 (1) of the Fourth Convention.

\(^{57}\) Art. 23 of the 1907 Hague Convention No. IV; Art. 147 and 40 of the Fourth Geneva Convention.

\(^{58}\) Hasenclever, p. 155.
bear arms on behalf of the enemy and tallies with the established practice of States to accept the services of defectors\(^{(59)}\). If the Detaining Power utilizes the services of a defector who really does want to enlist, such defector is thenceforth protected by International Humanitarian Law only as a combatant. Should he subsequently fall into the power of the armed forces from which he has defected, he may be tried for desertion and treason. It is widely maintained that in that case, he is not even entitled to prisoner-of-war status \(^{(60)}\). Yet it may also be argued that he falls into the categories listed in Art. 4 of the Third Convention and must therefore be granted prisoner-of-war status \(^{(61)}\), which would not exempt him from being tried for desertion, but would secure for him «due process of law» in conformity with the judicial guarantees set forth in the Third Convention.

c) The Detaining Power may also choose to grant their freedom to deserters, as indeed to any civilian nationals of the adverse party who are in its territory. In that case, such deserters may:
- leave the territory of the «Detaining» Power and go to a third country (if they find one willing to admit them); or
- stay in the territory of the «Detaining Power» , with the following alternative: they do not apply for refugee status; in this case they are entitled to benefit by the provisions of Art. 39 (means of existence) and Art. 40 (employment) of the Fourth Geneva Convention; they apply for refugee status there.

d) Since deserters do not, in fact, enjoy the protection of any government, they are refugees in the meaning of Art. 44 of the Fourth Convention. By virtue of this article they may not be treated as enemy aliens exclusively on the basis of their nationality de jure of an enemy State. But if the Detaining Power has other reasons to regard them as enemy aliens, they will enjoy the protection of Arts. 35, 46 and 143 of the Fourth Convention.

e) The fact that deserters are refugees within the meaning of Art. 44 of the Fourth Convention does not necessarily imply that they are entitled to refugee status as provided for in instruments of international law such as the Convention relating to the Status of Refugees of 28 July 1951 \(^{(62)}\) and the Protocol relating to the Status of Refugees of 31 January 1967 \(^{(63)}\).

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62) UNTS No. 2545, Vol. 189, p. 137.

The definition of the term refugee given in those instruments is in fact more limited in scope (64) than that given in Art. 44 of the Fourth Convention: under International Refugee Law, deserters are not refugees merely because they fear, in their own country, prosecution and punishment for desertion; they must show that they would suffer disproportionately severe punishment on account of discriminatory criteria. Refugee Law does not regard punishment for desertion as persecution, however genuine the underlying conviction which led to desertion, unless the military action in which the deserter refuses to participate is condemned by the international community as contrary to basic rules of human conduct.

If a Power induces enemy soldiers to desert, one may contend that it is under an obligation to grant them asylum by virtue of the principle of estoppel (65) — a general principle of international law (66).

Finally, there exists no international prohibition to grant asylum to deserters, irrespective of the considerations which prompted them to desert (67).

2) Status and treatment of prisoners of war who want to sever their allegiance whilst in captivity.

Prisoners of war who, whilst in captivity, make known their desire to sever their allegiance to the Power on which they depend are often regarded as deserters by that Power and sometimes also by the Detaining Power. Yet they do not fall within our definition of a deserter. By virtue of the Third Convention, they are prisoners of war (Art. 4); they cannot renounce that status (Art. 7), but retain it until the end of hostilities (Art. 5) (68), even if they are not interned. They are entitled to the same treatment as the other prisoners of war and cannot renounce the rights secured to them by the Third Convention. This principle is extremely important in that it removes a possible additional incentive for the Detaining Power to indoctrinate prisoners of war (69). Even if they are volunteers,


67) Doehring, Deserters, p. 153; Hingorani, Prisoners of War, p. 185/186; even the USSR admitted this in its 1945 Protocol with Switzerland (see infra, note 86).

68) Levie, POW, p. 77/78; Draper, The Red Cross Conventions, p. 54; only in respect of deserters in a strict sense: Rosas, p. 391/392.

69) A Detaining Power has little incentive to induce prisoners of war to sever their allegiance if afterwards, it cannot use their services and must go on affording them prisoner-of-war status.
they may not be enlisted in the enemy armed forces (70).

As tension may arise between these two categories of prisoners of war, and as the Detaining Power is bound to safeguard the lives, health and dignity of prisoners of war, it should accommodate them in separate quarters (71) or take any other adequate precaution. This is a fairly common practice anyway (72).

The matter is nevertheless extremely delicate in view of the consequence such a separation may have for the prisoner of war after his repatriation and of the risk of adverse distinctions — prohibited by International Humanitarian Law (73) — which such a differentiation in treatment may entail.

3) Deserters in a neutral country

A) The distinction between deserters and military internees

Members of the armed forces of parties to a conflict may, for various reasons, end up in neutral territory. They may have retreated from the enemy; they may be there for reasons beyond their control, for instance because they inadvertently crossed the border or because their plane crashed; they may also be there because they want to escape from their own country’s control.

Through their presence in neutral territory, the combatants belonging to the third category are implementing intent to sever their allegiance to the Power on which they depend. They are deserters. Yet deserters may also be found among the persons of the first two categories. They may be acknowledged as deserters if, at the first opportunity they have to do so, they express their intent to sever their allegiance.

All other combatants in all these three categories, including those who manifest their desire to sever their allegiance whilst in captivity and those who refuse to be exchanged or repatriated (74), are and remain military internees within the meaning of Art. 11 of the 1907 Hague Convention No. V respecting the Rights and Duties of Neutral Powers and Persons in case of War on Land (75).

70) Art. 7 of the Third Convention, and Wilhelm, p. 537-540.

71) Such a separation is not a breach of Art. 22 of the Third Convention: Commentary, Third Convention, p. 185.


73) Art. 16 of the Third Convention.


75) Cf. Levie, Documents, p. 81.
virtue of Art. 4B(2) of the Third Geneva Convention, they must be treated as prisoners of war.

A neutral Power may also have on its territory escaped prisoners of war who, obviously, are not deserters. Under the Hague Convention No. V the neutral Power must leave them at liberty, but if it allows them to remain in its territory, it may assign them a place of residence (76).

During the Second World War, some neutral countries made a distinction between deserters and defaulters, the latter term being used to denote «men having left an army they did not consider that of their country» (77). This was the case of certain Alsatians enlisted in the German army. Under International Humanitarian Law — which cannot take into account the various considerations which motivate deserters — defaulters are to be treated as deserters which, after all, is in accordance with their wishes, since they will thus eventually be able to leave the neutral country and enlist in the forces of an adverse Power.

B) Status of deserters in a neutral country

Deserters, according to our definition, are not covered by the Third Convention (nor are they covered by the Hague Convention No. V) (78) and are therefore not protected, in neutral territory, by International Humanitarian Law, because, unlike the Third Convention, the Fourth Convention is not applicable in neutral territory. Alien civilians in neutral territory are usually under the diplomatic protection of the Power on which they depend.

As that diplomatic protection is out of the question for deserters, the only protection afforded them is that provided by International Refugee Law, insofar as they qualify as refugees.

However, neutral Powers, like adverse Powers, are not subject to any rule of international law prohibiting them to apply the Third Convention to deserters and to treat them in the same way as the other military internees. During the Second World War, Switzerland, for instance, treated deserters, defaulters and escaped prisoners of war as military internees (79).

76) Cf. Art. 13 of the Hague Convention No. V. During the Second World War, Switzerland interned all escaped prisoners of war because it considered that owing to its neutrality, it had to prevent members of belligerent armed forces admitted in neutral territory from taking part again in the hostilities: see advisory opinion given by Prof. Schindler (sen.) as quoted by Bonjour, Edgar. Geschichte der Schweizerischen Neutralität, (hereinafter referred to as Bonjour) Vol. 6, Basel, 1970, p. 63/64.


78) Steiner, p. 84.

79) See ICRC Report, Vol. I, p. 565; but as regards deserters, Switzerland was aware of the fact that this was not an obligation under international law (cf. Bonjour, Vol. 6, p. 63). Internment was rather a measure dictated by considerations of internal law and order (cf. Steiner, p. 85/86).
C) The right to be admitted into a neutral country

According to the obligation of «non-refoulement» provided for in International Refugee Law, neutral Powers may not expel or return («refouler») a deserter who qualifies for refugee status under International Refugee Law (80).

In fact, neutral Powers usually go beyond their prescribed obligations in this respect, owing to the dangers deserters would face in wartime if they fell back into the power of their own authorities. For that reason, during the Second World War, Switzerland admitted all deserters, whereas it turned down many civilian asylum seekers (81).

D) Internment

Whereas a neutral state is obliged to intern members of the armed forces of belligerent States if they enter the neutral territory (82), such a duty does not exist regarding deserters (83) who are simply aliens in neutral territory and may be interned or left in liberty like any other civilian refugee (84). The only instance where an obligation may arise for a neutral Power to intern a deserter is if such deserter is a defector trying to reach enemy territory via the neutral territory. The obligation would ensue from a teleological interpretation of the Hague Convention No. V (85).

E) Right of asylum

A neutral Power may extend asylum to deserters and military internees, and is under no obligation to repatriate them against their will (86).


82) Art. 11 of the 1907 Hague Convention No. V.

83) Doehring, Deserter, p. 155; Oppenheim/Lauterpacht, p. 722; Steiner, p. 84; during the Second World War, Switzerland nevertheless interned them (cf. Bonjour, Vol. 7, p. 111/112 and supra, note 79 but was under no obligation to do so.

84) Steiner, p. 84.

85) Steiner, p. 84; only if he enters the neutral territory as part of a unit or group: Oppenheim/Lauterpacht, p. 722.

86) This rule was even recognized by the USSR in a Protocol it concluded with Switzerland on 10 September 1945, as quoted by Bonjour, Vol. 6, p. 68. Later on, Switzerland nevertheless repatriated all the Soviet military internees, even against their will [cf. Reichel, D. «L'internement et le
4) Transmission of information regarding deserters

A) Transmission of information in general

The provisions on the transmission of information are among the most beneficial innovations of International Humanitarian Law in that war separates families, and the separation is more complete for prisoners of war and civilian internees than for anyone else. Uncertainty about the fate of a relative missing in action is much more difficult to bear than the news of his capture by the enemy, or sometimes even of his death. That is the reason why International Humanitarian Law provides that prisoners of war must be enabled to write a capture card immediately upon capture (87), and civilian internees an internment card (88). In addition, the Detaining Power, or rather the National Information Bureau it must institute for the purpose, is under the obligation to give the adverse Party all relevant information regarding enemy combatants in its power and arrested civilians (89).

Capture cards and internment cards comprise two parts, one of which is forwarded directly to the families, and the other to the Central Information Agency whose creation in a neutral country, if necessary at the ICRC’s suggestion, is provided for in Art. 123 of the Third Convention and in Art. 140 of the Fourth Convention. That Agency is now, in practice, always the Central Tracing Agency, which is a permanent service set up in Geneva as a department of the ICRC. Its function is to collect all the information it may obtain through official or private channels regarding prisoners of war and persons protected by the Fourth Convention, and to transmit it to their country of origin and in addition, for prisoners of war, to the Power on which they depend. Consequently, the relevant information concerning protected persons must be forwarded to the adverse Power through the intermediary of both the Agency and the Protecting Power.

B) Transmission of prejudicial information regarding prisoners of war

The whole system for the transmission of information, created in the interest of protected persons and their families, may prove dangerous for the victims of some present-day conflicts: in modern «militant crusades», combatants captured...
alive by the enemy are regarded sometimes as «deserters», often as cowards, and are virtually always suspected of not having done everything in their power to avoid capture. Consequently, the transmission of information concerning them to the Power on which they depend may be harmful not only for those combatants, but, unfortunately, also for their relatives still in the hands of the Power on which they depend and possibly liable to harassment.

To avoid that, one could conceivably abstain from transmitting information concerning those combatants who so desire. But the option not to give notification of a certain number of captured combatants might well seriously prejudice the right of all other captured combatants to have their families and the Power on which they depend informed of their fate. It would furthermore increase the number of persons thought to be missing by their families and the Power on which they depend, lead the Parties to be more suspicious of each other, and enable the Detaining Power to cause captured combatants to disappear on the allegation that they refused to have their personal data transmitted.

As can be seen, there is no straightforward solution for this problem. International Humanitarian Law contributes towards a solution only in respect of the capture cards, in that it stipulates that every prisoner of war must «be enabled» to write one, which implies that he is entitled to refuse. However, as far as notification by the Detaining Power is concerned, the wording of the Geneva Conventions does not allow for any derogation to the obligation to send notification. Thus, notification of the personal data of all prisoners of war must remain the rule. An exception to the rule can be considered only if the Power on which the persons concerned or their families depend systematically uses the information it receives to harm them. In that case, it would be using its right to be notified — which was created for the benefit of the victims — to the latter’s detriment, and that would constitute an abuse of rights which would release the Detaining Power of its obligation to send notification of captured combatants to the adverse Party. But even so, one should demand that the Central Prisoners of War Information Agency be notified of all captured persons, which would prevent the Detaining Power from committing any abuse.

C) Transmission of information regarding deserters.

Although for deserters, the problem of divergent or even conflicting interests is the same as for other prisoners of war who do not wish the Power on

90) Art. 70 of the Third Convention and Commentary, Third Convention, p. 343.

91) The prohibition of an abuse of rights, i.e. the exercise of a right for an end different «from that for which the right was created», is generally recognized in international law. Cf. Alexandre C. Kiss, «Abuse of Rights», in: Encyclopedia of Public International Law, Instalment 7, Amsterdam 1984, p. 1-5.
which they depend to be notified of their capture, the solution, from a legal viewpoint, is easier, because deserters are civilians.

a) Art. 106 of the Fourth Convention provides that every civilian internee must «be enabled» to send an internment card. He therefore remains entirely free to do so or not (92). Usually, a deserter would be well-advised not to. Should be nevertheless wish to send one, the Detaining Power or the ICRC must draw his attention to the fact that the internment card will probably go through the hands of the Power on which he depends before reaching his family, and that the Power on which he depends will know that he is a deserter, since he sent an internment card — meant for civilians — although he was a member of the armed forces.

b) By virtue of Art. 137 (2) of the Fourth Convention, National Information Bureaux are not to transmit information if such «transmission might be detrimental to the person concerned or to his or her relatives». This means that National Information Bureaux will refrain from transmitting such information to the Protecting Power. But even in such a case, they must transmit it to the Central Information Agency with an indication of its confidential nature (93). National Bureaux are aware of the detrimental nature of the information either through the indications provided by the protected person during questioning or through its own sources of information. Furthermore, by virtue of Art. 140 (2) of the Fourth Convention, the Central Information Agency likewise does not transmit information «in cases where such transmissions might be detrimental to the persons whom the said information concerns, or to their relatives». It may refrain from forwarding the information on the basis of indications as to the harmful nature of such information, given by the person concerned, the National Information Bureau or any other source (94).

5) Repatriation of deserters.

Prisoners of war must be repatriated at the end of hostilities. Deserters do not want to be repatriated, because they know the Power on which they depend will prosecute — if not persecute — them for desertion. But in the present-day «crusade wars», many prisoners of war who do not fall within our definition of deserters also refuse to be repatriated, either because of a change of regime in their country while they were in captivity, or because they severed their allegiance during captivity, or because they know that the Power on which they depend regards all prisoners of war as «deserters».

All those who refuse to be repatriated are usually called «deserters» by the Power on which they depend. Although it is necessary, under the terms of our definition, to make a clear-cut distinction between the repatriation of deserters

92) Cf. Commentary, Fourth Convention, p. 446.

93) Art. 137(2) in fine, Fourth Convention.

94) Commentary, Fourth Convention, p. 532/533.
and the overall issue of forcible repatriation of prisoners of war at the end of hostilities, we must first look into the latter more general issue, before dealing specifically with the repatriation of deserters. This is imperative, in particular because in the literature on the subject the two issues are mixed.

**A) The general issue: Repatriation of prisoners of war against their will.**

**a) During hostilities**

By virtue of Art. 109 (3) of the Third Convention, «no sick or injured prisoner of war (...) may be repatriated against his will during hostilities». Even though this prohibition was opposed by many delegations during the 1949 Diplomatic Conference (95), it should apply, by analogy, to all repatriations during hostilities (96).

**b) After the cessation of hostilities**

To answer the question whether prisoners of war must or may be repatriated against their will after the cessation of hostilities, our starting point must be the wording of Art. 118 of the Third Convention, which reads: «Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities». The wording is ambiguous, for one may contend that the terms «release» and «repatriation» imply two distinctive and separate operations and that it is therefore impossible to repatriate by force a person who has been «released» (97). But the wording may also imply that release and repatriation are two simultaneous and indissociable operations (98).

The «travaux préparatoires» of the 1949 Conference do not provide a clear-cut answer. Although the 1949 Diplomatic Conference almost unanimously rejected the Austrian proposals stating that prisoners of war shall be entitled to apply for their transfer to any other country which is ready to accept them (99) or that at least they must have the option of not returning to their country if they so desire (100), this rejection is not to be construed as laying down the principle of forcible repatriation (101); it was meant to prevent prisoners of war from having

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96) Commentary, Third Convention, p. 512/513.

97) Shapiro, p. 323; Flory, RGDIP, p. 72.


the right to be sent at great expense «to the other side of the world» \( ^{102} \) and to avoid introducing an escape clause which Detaining Powers might use as a pretext to refrain from repatriating all prisoners of war \( ^{103} \) (at the time, some two million World War II prisoners of war who had served in the forces of the Axis Powers were still detained in the Soviet Union) \( ^{104} \).

Even an interpretation of Art. 118 in the light of International Humanitarian Law as a whole and of the humanitarian interests it protects does not provide a clear-cut answer. By virtue of International Humanitarian Law, which is meant to protect victims, one cannot force such victims to be repatriated to a country where they might be persecuted \( ^{105} \); on the other hand, one cannot risk having an exception reduce the right of prisoners of war to be repatriated to nothing \( ^{106} \).

A review of State practice does not provide a conclusive answer \( ^{107} \). Treaties relating to the repatriation of prisoners of war seldom provide for people refusing repatriation \( ^{108} \). But prisoners of war who were opposed to their repatriation, often regarded as deserters, were usually not repatriated unless an amnesty clause was included in the treaty \( ^{109} \). The Treaty of Versailles provided that prisoners of war «who do not desire to be repatriated may be excluded from repatriation» \( ^{110} \). Approximately 20 treaties entered into by the new Soviet Russia between 1918 and 1921 contained «provisions under which the individual prisoner of war had the privilege of deciding whether or not he would accept repatriation» \( ^{111} \). Examples of State practice after the Second World War are hardly apposite: the Allies \( ^{112} \) and even Switzerland \( ^{113} \) repatriated — regardless of their desire — all Soviet prisoners of war (i.e. military internees) who had

104) Shields Delessert, p. 171.
105) Flory, RGDIP, p. 74.
107) For a detailed historical review of State practice see: Schapiro, p. 312-322.
108) Schapiro, p. 312.
110) Art. 220.
111) Levi, LOW, p. 422; Schapiro, p. 320/321; Flory, RGDIP, p. 73.
113) Reichel, p. 82 - but Switzerland had reserved the right to grant asylum in accordance with its practice.
fallen into their power following Germany's defeat; in this instance, however, repatriation was not from one adverse Power to another, but from one ally to another or from a neutral State to a belligerent Power.

On the other hand, after the Korean War, the Parties agreed — after long and arduous negotiations — not to repatriate prisoners of war unwilling to go back and to set up a Neutral Nations Repatriation Commission (114).

However, this precedent should not be given decisive weight for the creation of a customary rule (115) since the Geneva Conventions were not formally binding upon the Parties, and their principles were only partially respected (116). It was merely an ad hoc regulation (117) since the socialist countries contended, throughout the negotiations, that prisoners of war were not entitled to a free choice (118). The Korean conflict presented strongly internal elements (119) and the prisoners who refused repatriation were already physically present in Korea, and not in the United States for instance, which meant that the usual problems relative to asylum did not arise (120).

To sum up State practice, one can say that there is no internationally recognized rule of customary law which prohibits the repatriation of prisoners of war who refuse to be repatriated for fear of persecution (121). At the same time, there is no rule either in treaty law or in customary law which compels States to repatriate by force prisoners of war who refuse to be repatriated for fear of persecution in their own country (122).

Although some States persistently opposed (in the way of «persistent objectors») the notion of considering the wishes of prisoners of war with respect to repatriation, they cannot establish a customary rule, since «persistent objectors» cannot give rise to a rule. They are merely not bound by a rule arising from the practice of other States (123).

A rule providing that Detaining Powers are under no obligation to repatriate

114) Flory, RGDIP, p. 75-93.
115) Commentary, Third Convention, p. 546; Doehring, Deserters, p. 155; Esgain/Solf, p. 593; Rosas, p. 483.
116) Commentary, Third Convention, p. 546.
117) Doehring, Deserters, p. 155.
118) Flory, RGDIP, P. 75-93.
120) Shields Delessert, p. 203; Esgain/Solf, p. 593.
121) Doehring, Deserters, p. 155; Greenspan, p. 613.
122) Commentary, Third Convention, p. 547/548; Rosas, p. 480; Baxter, p. 489; Schapiro, p. 324; Hingorani, Prisoners of War, p. 184/185.
prisoners of war refusing repatriation for fear of persecution in their own country is not at variance with the prohibition enounced in Art. 7 of the Third Convention which stipulates that prisoners of war cannot renounce their rights, since it would be impossible to interpret that provision as «prohibiting a prisoner of war from renouncing his «right» of being forcibly repatriated» (124).

If one takes into consideration the development of International Human Rights Law and of International Refugee Law which — even if they were not formally applicable to prisoners of war — must perforce influence the interpretation of International Humanitarian Law, one can even maintain that it is prohibited to repatriate a prisoner of war who personally refuses to be repatriated on the grounds that after repatriation, he will be subject to unjust measures affecting his life, his physical or moral integrity or his freedom on grounds of race, social class, religion or political views, or merely because he was captured and interned in the course of hostilities. Various instruments of International Human Rights Law stipulate that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment (125).

They further prohibit any discrimination before the law and in the law on any ground such as race, colour, sex, language, religion or political opinion (126).

Persecution for the mere fact of having been captured and interned as a prisoner of war would render the whole Third Convention meaningless and is therefore implicitly prohibited by the Convention itself: it is hardly conceivable that 161 States could be party to a Convention — the very purpose of which is to protect prisoners of war in the power of the enemy — if they considered that the mere fact of having been made a prisoner by the enemy could entail persecution after repatriation.

It follows from the prohibition of such persecution that no one may be handed over to a State where he would be liable to such persecution (127). This general principle of international law, referred to in International Refugee Law as the principle of «non-refoulement», has been recognized as a peremptory rule (128) and as such, it would override Art. 118 of the Third Convention should the

124) Schapiro, p. 323; Flory, RGDIP, p. 72; Hingorani, Prisoners of War, p. 183/184.


127) This general principle is explicitly mentioned in: Art. 33 of the Convention relating to the Status of Refugees; Art. 22 of the American Convention on Human Rights; Art. II of the OAU Convention of 10 September 1969 governing the specific aspects of refugee problems in Africa.

128) See, for instance, the following decisions of the Swiss Federal Tribunal: Arrêts du Tribunal Fédéral Suisse, Recueil Officiel, 108 Ib 411 and 109 Ib 72/73.
latter be interpreted in such a way that it is in conflict with that principle.

As regards civilians, the principle of «non-refoulement» is even anchored in International Humanitarian Law\(^\text{(129)}\) and was furthermore affirmed in Resolution 610 (VII) adopted by the United Nations General Assembly at the time of the Korean war \(^\text{(130)}\).

However, an exception to the general rule that all prisoners of war must be repatriated at the end of active hostilities may prejudice their fundamental right to be repatriated \(^\text{(131)}\). It is therefore necessary to «provide for a mechanism which will establish, on the one hand, a tight screening process and on the other, ensure the integrity of the screening authorities» to make certain that the prisoners of war are under no undue pressure in taking their decision \(^\text{(132)}\). That is the reason why some authors are extremely reticent about \(^\text{(133)}\), or even opposed to an exception to the general rule of repatriation of all prisoners before such a mechanism is provided \(^\text{(134)}\).

However, all of them agree that the principle as such is in keeping with the spirit and the purpose of International Humanitarian Law.

**B) Repatriation of deserters**

Since the Detaining Power is not obliged to repatriate prisoners of war against their will, all the more reason for it not to be obliged to repatriate deserters. In the literature, this is a well-established principle \(^\text{(135)}\), even for authors who have reservations about a general exception — for prisoners of war who refuse repatriation — to the rule enunciated in Art. 118 \(^\text{(136)}\). One could even contend that the repatriation of defectors who have enlisted in the enemy armed

\(^{129}\) Art. 45(4) of the Fourth Convention.

\(^{130}\) *Commentary, Third Convention*, p. 544.


\(^{133}\) Pictet, loc. cit; Rosas, p. 483/484.

\(^{134}\) Esgain/Solf, p. 593/594; Shields Delessert, p. 174/175, 191-194.


\(^{136}\) *Commentary, Third Convention*, p. 549.
forces is prohibited, for it would violate the principle of estoppel. Any forcible repatriation of deserters in general would anyway be contrary to the principles of International Human Rights Law or even of International Refugee Law (in respect of deserters entitled to refugee status).

The provisions of International Humanitarian Law achieve the same objective. Since deserters are civilians, they are covered by Art. 45 (4) and 132-134 of the Fourth Convention. Articles 132-134 set forth no obligation, for the Detaining Power, to repatriate civilians. In the Stockholm Draft, Art. 132 of the Fourth Convention even contained a third paragraph setting forth the principle of voluntary repatriation, but the Diplomatic Conference deleted the paragraph because it considered that the question had already been settled under the terms of Art. 45 (4) which provides that a protected person may not be transferred to a country where he or she may be persecuted.

137) On this principle, cf. supra, notes 65 and 66.