Defection and Prisoner of War Status: Protection under International Humanitarian Law for Those Who Join the Enemy?

La défection et le statut de prisonnier de guerre: protection en vertu du droit international humanitaire pour ceux qui se joignent à l'ennemi?

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Abstract

This article explores the issue of whether individuals who join enemy forces during international armed conflicts are entitled to prisoner of war status upon capture. It presents the long-running debate on the topic through a study of divided scholarly opinions and judicial decisions. An original analysis of the competing theories is conducted on the basis of available state practice, treaty interpretation methodology, and novel critical arguments and proposals. The article seeks to challenge the value attributed to mainstream academic opinions and judicial precedents and open the debate in an area of international humanitarian law that is still under development.

Keywords: collaboration; defectors; international humanitarian law; prisoner of war status; protection; treason.

Résumé

Cet article explore la question de savoir si les individus qui se joignent aux forces ennemies pendant les conflits armés internationaux ont droit au statut de prisonnier de guerre lors de leur capture. Le débat de longue date à ce sujet est présenté en vertu d'une étude d'opinions savantes et de décisions judiciaires divisées en la matière. Une analyse originale des théories concurrentes est effectuée sur la base de la pratique des États, de la méthodologie d'interprétation des traités, et de nouvelles critiques et propositions. L'article cherche à remettre en question la valeur attribuée à la jurisprudence et aux opinions académiques dominantes, ainsi qu'à ouvrir le débat dans un domaine du droit international humanitaire toujours en développement.

Mots-clés: collaboration; droit international humanitaire; protection; statut de prisonnier de guerre; trahison; transfuges.

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Introduction

Below the lustful, the gluttonous, and the greedy; below the wrathful, the sullen, and the lazy; below the heretics, the blasphemers, and the usurers; below the tyrants, the thieves, and the false counsellors; below the falsifiers, the flatterers, and the hypocrites; and below the seducers, the corrupters, and the dividers, Dante Alighieri reserved the deepest pit of hell — a frozen lake called *Cocytus* — for the treacherous who betrayed the bonds of trust between men. Along with traitors to their kin, guests, and benefactors, Alighieri included those who betrayed socio-political groups such as their city and their country.[1]

Alighieri's piece perfectly exemplifies the innate level of social repulsion against traitors and the severity of the punishments reserved for them. However exaggerated it may seem to cast them to the lowest pits of hell, the pages of history have proven that, very often, reality is as severe as fiction. The Greeks physically branded traitors to warn others about their character;[2] the Normans castrated and blinded them;[3] artistic depictions portrayed them as repulsive monsters deprived of human character;[4] and common language immortalized names such as Judas, Brutus, and Quisling as linguistic synonyms of treason. But the viciousness of punishments reserved for traitors is not a trait of past times, and contemporary reports show examples of the unfortunate fate that traitors face upon capture. For instance, contemporary reports speak of the bodies of executed Palestinians who collaborated with Israeli authorities being tied to motorcycles and dragged through the streets of the Palestinian territories.[5] In fact, the stigma attached to treason has sometimes led us to expect and accept as plausible the worst allegations of brutality and cruelty against traitors without much hesitation as to their veracity. This happened in 2013 when news of internal purges

[1] Robert M Durling, ed, *The Divine Comedy of Dante Alighieri*, vol 1 (Oxford: Oxford University Press, 1996).

[2] Erving Goffman, *Stigma* (London: Penguin, 1963) at 10 (affirming that "the Greeks, who were apparently strong on visual aids, originated the term stigma to refer to bodily signs designed to expose something unusual and bad about the moral status of the signifier. The signs were cut or burnt into the body and advertised that the bearer was a slave, a criminal, or a traitor").

[3] Klaus Van Eickels, "Gender Violence: Castration and Blinding as Punishment for Treason in Normandy and Anglo-Norman England" (2004) 16 Gender and History 588.

[4] Julie Crawford, *Marvelous Protestantism: Monstrous Births in Post-Reformation England* (Baltimore: Johns Hopkins University Press, 2005) at 104 (affirming that "the gunpowder plot traitors themselves were often represented as monsters"). Phil Fitzsimmons, "A Rebirth of Myth and Monster: An Old Sign in a New Framework" (2007) 4 Myth and Symbol 49 (on the visual representation of the Greek traitor Ephialtes as a deformed monster in the movie *300*).

[5] Josh Saul, "Man Killed by Gaza Militants and Dragged behind Motorcycles Was Palestinian Loyalist, Not Traitor: Family," *New York Post* (26 November 2012).

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within North Korea affirmed that Kim Jong-Un had ordered the execution of his own uncle by feeding him to a pack of hungry dogs.[6] This widely reproduced report was later debunked as false,[7] but the presumption of its truth and the unquestioned acceptance by the general public somehow managed to overshadow the degree of brutality involved in the real execution of Jong-Un's uncle-in-law, Jang-Song-Thaek, and members of his close family, for his alleged betrayal.[8]

The social repulsion against traitors and their severe punishment is particularly evident in times of armed conflict when patriotic sentiments are at their peak. Recent history has shown how combatants perceived as having betrayed their state faced cruel consequences for their acts without regard for the personal circumstances that motivated their actions. During the First World War, over three hundred English soldiers that deserted their lines were shot by their own side,[9] and after the end of the Second World War, hundreds of returning Soviet prisoners of war (POWs) were considered traitors by their own state, as true Soviet soldiers were expected to fight until death rather than allow themselves to be captured.[10]

The previously highlighted social realities surrounding betrayal during armed conflict not only evidence the existence of disloyal elements within social groups but also show the proclivity of authorities to react to them in the harshest terms. From a legal standpoint, questions of betrayal are traditionally approached from the perspective of domestic criminal law.[11] However, the special context of armed conflict generates a particular situation in which not only domestic criminal law applies but so too do the rules of international humanitarian law (IHL), with their objective of protecting individuals affected by armed conflict.

This article focuses on one of the most important issues that arises from the potential overlapping of these two legal spheres: the legal status afforded

[6] Tania Braningan, "North Korea Executes Kim Jong-Un's Uncle as 'Traitor'," *The Guardian* (13 December 2013).

[7] Jonathan Kaiman, "Story about Kin Jong-Un's Uncle Being Fed to Dogs Originated with Satirist," *The Guardian* (6 January 2014).

[8] Lizzie Parry, "Now Kim Jong-Un Executed His Late Uncle's Entire Family to Prevent 'Mutiny': Including Women, Children and the Ambassadors to Cuba and Malaysia," *Daily Mail Online* (26 January 2014).

[9] Anthony Babington, *For The Sake of Example: Capital Courts-Martial 1914–1920* (London: Penguin, 2002) at xi.

[10] Pavel Polian, "The Internment of Returning Soviet Prisoners of War after 1945" in Bob Moore & Barbara Hately-Broad, eds, *Prisoners of War, Prisoners of Peace: Captivity, Homecoming, and Memory in WWII* (Oxford: Berg, 2005) 123.

[11] Mary Connery, "Hung, Drawn and Quartered? The Future of the Constitutional Reference to Treason" (2002) 5 Trinity College L Rev 56; Alan Orr, *Treason and the State: Law, Politics, and Ideology in the English Civil War* (Cambridge: Cambridge University Press, 2002); Tom W Bell, "Treason, Technology, and Freedom of Expression" (2005) 37 Ariz St LJ 999.

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to individuals who have joined the enemy in battle and are captured (hereinafter defectors) during international armed conflicts (IACs). The author is aware of the multiple terms employed in scholarly works to refer to such individuals (for example, traitors, deserters joining the enemy, *transfuges*, and so on) as well as the numerous courses of conduct associated with defection in domestic military legislation (for example, absence without leave (AWOL), abandonment of post, desertion, and so on). However, for the sake of simplicity and clarity, this article uses the term "defector" in its basic dictionary form to convey the act of abandoning one's side in order to adhere to the enemy, leaving aside any additional legal discussions that may arise from this conduct.

Although some authors have addressed some of the abovementioned issues from the perspective of domestic criminal law,[12] the international perspective is essential as it takes into account additional legal layers that challenge the traditionally vengeful domestic reaction to treason. It might be unquestionable for domestic authorities that an individual who joins enemy troops against his or her own state is a mere traitor that could face execution, but are these individuals not entitled to the same protections granted by IHL to captured soldiers of an enemy state? The aim of this article is to refresh the academic debate by addressing existing theories on this question and their foundations and by putting forward critical arguments that question their validity.

The first part of the article introduces the legal problem of defectors and the question of POW status by showing the rival theories that are found in the writings of scholars and in the practice of states. The second part analyzes whether the denial of POW status has its basis in customary law or treaty interpretation. The third part undertakes a critical assessment of the theories presented in the first part by introducing novel arguments regarding their strength. Finally, the fourth part introduces a controversial and usually overlooked alternative theory for future debate.

The Problem and the Existing Theories

Service in the armed forces of a state is not a matter exclusive to patriotic citizens. Inclusion of foreigners in different armed formations has been a well-known practice for centuries. Not in vain, Lassa Oppenheim affirmed

[12] Suzanne K Babb, "Fear and Loathing in America: Application of Treason Law in Times of National Crisis and the Case of John Walker Lindh" (2002) 54 Hastings LJ 1721; Carlton FW Larson, "The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem" (2005) 154 U Pa L Rev 863; Michael J Lebowitz, "A Question of Allegiance: Choosing between Dueling Versions of 'Aiding the Enemy' during War Crimes Prosecution" (2011) 67 AFL Rev 131.

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that hardly any war has occurred in which there has not been the recruitment of foreigners.[13] Even though the French revolutionary government's adoption of measures designed to restrict service in the army by non-citizens decreased their numbers, foreign participation in armed conflicts during the twentieth century was considerable.[14] Several states have had famous foreign units,[15] some of which continue to enjoy wide recognition such as the Légion étrangère, the Swiss Guard in the Vatican, and the Gurkha brigades of the British army, just as several states continue to allow the recruitment of foreigners to their forces.[16] Authors such as Charles Hyde have affirmed that "no requirement of international law forbids a belligerent to enrol aliens in its armed forces,"[17] and, thus, it seems valid to affirm that the acceptance of foreigners in the armed forces remains within the exclusive competence of each state. Generally speaking, nationality has not been regarded as an impediment to granting POW status. Some authors affirm this in their writings,[18] and there is an important precedent of the International Military Tribunal in Nuremberg confirming this.[19] The irrelevance of nationality for POW status

[13] Lassa Oppenheim, *International Law: A Treatise*, 7th ed (London: Longmans, Green and Company, 1952) at 261, para 82a.

[14] See generally volume 14 of the *Journal of Modern European History* (2016).

[15] Aram Karamanoukian, *Les étrangers et le service militaire* (Paris: Pedone, 1978) at 57–94 (mentioning the French Troupes Indigènes d'Algérie, the Royal Netherlands East Indies Army, the Pontifical Swiss Guard, and the Spanish Tercio de extranjeros).

[16] Saurabh Pandey, "18 Armed Forces around the World That Allow Foreigners to Join Them," *Storypick* (1 December 2016) (listing at least eighteen states: India, United States, United Kingdom, Australia, Canada, France, Israel, New Zealand, Spain, Belgium, Denmark, Bahrain, Ireland, Luxemburg, Monaco, Norway, Serbia, and the Vatican).

[17] Charles C Hyde, *International Law: Chiefly as Interpreted and Applied by the United States*, vol 2 (Boston: Little, Brown and Company, 1922) at 295, para 651.

[18] Oppenheim, *supra* note 13 at 261, para 82a (affirming that alien subjects in belligerent forces "are in no better and no worse position, as regards the enemy, than the subjects of the state whose forces they have joined"). Eric David, *Principes de droit des conflits armés* (Brussels: Bruylant, 2012) at 505, para 2334 (affirming that "le fait que le combattant capturé soit étranger aux forces avec lesquelles il combat n'implique pas qu'il soit privé du statut de prisonnier de guerre").

[19] *Re Weizsaecker and Others* (1949), 16 ILR 355 (United States Military Tribunal at Nuremberg). The case referred to the fact that during the Second World War Nazi forces in Norway encountered enemy troops composed of Norwegians, Finns, Danes, and Swedes, and, upon Hitler's orders, they were denied prisoner of war (POW) status and treated as guerrilla fighters subjected to execution in accordance with martial law. The military tribunal found that the denial of POW status and the murdering of soldiers of an enemy belligerent was a violation of the 1929 *Geneva Convention* even if they were "volunteers from another country." *Geneva Convention Relative to the Treatment of Prisoners of War*, 27 July 1929, 75 UNTS 135 (entered into force 19 June 1931) [1929 *Geneva Convention*].

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seems to be accepted in Article 4 of *Geneva Convention III Relative to the Treatment of Prisoners of War*.[20] Unlike Article 4 of *Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* — regulating protected person status for civilians — POW status is not determined or conditioned on the basis of nationality.[21] Instead, Article 4 of *Geneva Convention III* lists a set of categories of persons entitled to POW status and imposes certain requirements for their characterization as POWs, irrespective of nationality.

History shows that, among international volunteers, there have been numerous individuals who have decided to join enemy troops in the fight against their own state. During the First World War, thousands of Czechs and Slovaks in search of independence and nationhood joined Russian, French, and Italian forces against the Austro-Hungarian Empire.[22] The French received in their ranks individuals from Alsace-Lorraine who had been captured by the Russians while fighting in German uniforms.[23] A small number of Irish soldiers joined German forces under the so-called Irish Brigade.[24] Several hundred Muslims fighting for the British Imperial Forces were captured by German forces in northern Africa and sent to Constantinople to join the Ottoman army,[25] while British forces used captured Arab nationalists to fight against the Ottoman Empire.[26] Similarly, during the Second World War, thousands of Indians fought against the British Empire upon joining the Indian National Army (INA), organized with the help of the Japanese.[27] German forces had a considerable number of foreign volunteers from enemy countries,[28] including the

[20] *Geneva Convention III Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) [*Geneva Convention III*].

[21] *Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) [*Geneva Convention IV*].

[22] David Bullock, *The Czech Legion 1914–1920* (Oxford: Osprey, 2012).

[23] Heather Jones, "Prisoners of War" (8 October 2014), online: *1914–1918 Online: International Encyclopedia of the First World War* <https://encyclopedia.1914-1918-online.net/article/prisoners_of_war> (affirming that "France tried to recruit prisoners of war from Alsace-Lorraine or ethnic Poles fighting in the German army to join the allied cause"). Simone A Bellezza, *Tornare in Italia: Come I Prigionieri Trentini in Russia Divennero Italiani (1914–1920)* (Bologna: Mulino, 2016) at 63.

[24] Filip Nerad, *The Irish Brigade in Germany, 1914–1918*, Prague Papers on the History of International Relations (Prague: Institute of World History, 2006) at 189.

[25] Eugene Rogan, *The Fall of the Ottomans: The Great War in the Middle East, 1914–1920* (New York: Basic Books, 2015) at 74.

[26] *Ibid* at 302.

[27] Joyce Chapman Lebra, *The Indian National Army and Japan* (Singapore: Iseas, 2008).

[28] David Littlejohn, *Foreign Legions of the Third Reich*, vol 1 (San Jose, CA: R. James Bender, 1987).

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British Free Corps and the Legion of St George, which were composed of British nationals;[29] the Langemarck Division, composed of Belgian nationals;[30] and the Charlemagne Division and the Légion des volontaires français contre le bolchevisme, composed of French nationals.[31] At the same time, British forces allowed German Jews to join army units and fight against the Germans.[32]

A review of the abundant literature on the question of whether such individuals are entitled to POW status reveals a marked division of opinion according to two competing theories: those who would deny POW status (the denial theory) and those who would grant it (the conferral theory). The following subparts present both theories by focusing on scholarly opinions and the most significant and influential instances of judicial state practice that are usually cited when supporting each theory.

THE DENIAL THEORY

The idea that a capturing power may deny POW status to its own individuals when they have joined the enemy can be traced to medieval times,[33] and it is no surprise that such a position was supported by classic scholars of international law such as Baltazar Ayala,[34] Cornelius van Bynkershoek,[35]

[29] Robert Seth, *Jackals of the Reich: The Story of the British Free Corps* (London: New English Library, 1973).

[30] Richard Landwehr, *Lions of Flanders: Flemish Volunteers of the Waffen-SS – Eastern Front, 1941–1945* (Bradford, UK: Shelf Books, 1996); Jonathan Trigg, *Hitler's Flemish Lions: The History of the 27th SS-Freiwillinger Grenadier Division Langermarck (Flämische NR. 1)* (Stroud, UK: Spellmount, 2012); Flore Plisnier, *Ils ont pris les armes pour Hitler* (Brussels: Soma/Ceges, 2008).

[31] Philippe Carrard, *The French Who Fought for Hitler: Memoirs from the Outcasts* (Cambridge: Cambridge University Press, 2011).

[32] Helen Fry, *Churchill's German Army: The Germans Who Fought for Britain in World War Two* (London: Thistle, 2015).

[33] Maurice H Keen, *The Laws of War in the Late Middle Ages* (Toronto: University of Toronto Press, 1965) at 87 (arguing that "[a] man was not formally regarded as entitled to wage war if his liege lord was a principal on the other side, unless it was in his own cause and he had formally defied him").

[34] Baltazar Ayala, *De Jure et Officiis Belliicis et Disciplina Militari Libri III*, translated by J Pawley Bate (Washington: Carnegie, 1912) at 99 ("nor will citizens and subjects, who with wicked intent and traitorous design are among the enemy … receive any protection from the law of nations … for although they may be classed as enemies, yet the same law does not apply to them … for they are rebels and unjust (*injusti*) enemies and they cannot by any means whatever free themselves from the jurisdiction and power of their sovereign, which bind his subjects all the world over — any more than the slave Barbarius Philippus, who had been appointed praetor at Rome, succeeded in buying his freedom when he was claimed as slave by his master who had followed him up").

[35] Cornelius van Bynkershoek, *Questionum Juris Publici Libri Duo*, translated by T Frank (Oxford: Clarendon, 1930) at 125 (mentioning the Dutch decrees from the states-general

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Hugo Grotius,[36] and Emmerich de Vattel.[37] This theory remained very popular in the writings of scholars of the nineteenth and twentieth centuries, despite the adoption of international treaties regulating POW status. Among them one can list the opinions of Sherston Baker,[38] Hannis Taylor,[39] Paul Fauchille,[40] Herbert Fooks,[41] William Flory,[42] Antonio Guerrero Burgos,[43] Myres McDougal and Florentino Feliciano,[44] Howard

of June 1674 and April 1676, establishing that "if any of our subjects entered the naval service of the enemy, they should be drowned").

[36] Hugo Grotius, *The Illustrious Hugo Grotius of the Law of War and Peace* (New Jersey: Lawbook Exchange, 2013) at 166 (affirming that "against defectors of the war that run from their colours, all persons, for the common quiet, have a right indulged on them to execute public revenge").

[37] Emmerich de Vattel, *The Laws of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (London: GG and J Robinson, 1797), book iii, ch viii at 351, para 144 (considering defectors to be "perfidious citizens, traitors to their country; … their enlistment with the enemy cannot obliterate that character, or exempt them from the punishment they deserved").

[38] Sir Sherston Baker, *Halleck's International Law or Rules Regulating the Intercourse of States in Peace and War*, 3rd ed (London: Kegan Paul, Trench, Trübner & Company, 1893) at 33–34, para 23 (providing no state practice as source for his conclusion, yet affirming that defectors "are not properly considered as military enemies, nor can they claim to be treated as such … [t]hey are not military enemies in the general meaning of that term, nor are they entitled to the rights of ordinary prisoners of war").

[39] Hannis Taylor, *A Treatise on International Public Law* (Chicago: Callaghan and Company, 1901) at 494, para 493 (affirming that "[w]hen taken by their former sovereign they are not treated as prisoners of war, although regularly uniformed and enrolled as members of the opposing army").

[40] Paul Fauchille, *Traité de droit international public* (Paris: Rousseau, 1921) at 151 (affirming that "le national qui sert la cause de l'ennemi commet alors le crime de trahison, et ce sont les lois pénales militaires du belligérant qui sont seules applicables").

[41] Herbert C Fooks, *Prisoners of War* (Federalsburg, MD: JW Stowell Printing, 1924) at 40 (arguing that "[i]f citizens of a country are captured while serving the enemy's army, they may be executed … on account of the strict laws of a nation pertaining to citizenship" and providing as references the American manual [*US Law of War Manual*, *infra* note 131 at 40] and American instructions in the *Lieber Code* [*infra* note 120, art 52]).

[42] William ES Flory, *Prisoners of War: A Study in the Development of International Law* (Washington: American Council on Public Affairs, 1942) at 29–30 (affirming that "individuals who owe allegiance to the capturing state may be deprived of treatment as prisoners of war" and referencing as sources the writings of Brandt).

[43] Antonio Guerrero Burgos, *Nociones de derecho de guerra* (Madrid: Ediciones Jura, 1955) at 89–90 (affirming that defectors "deben considerarse como traidores, y les es de aplicación la ley marcial del país de origen caso de ser aprehendidos por éste").

[44] Myres S McDougal & Florentino P Feliciano, "International Coercion and World Public Order: The General Principles of the Law of War" (1958) 67 Yale LJ 838 (arguing that *Geneva Convention III* "leaves [a state] free to deny prisoner-of-war status to spies, saboteurs, deserters from its own forces, traitors and perhaps parole violators").

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Levie,[45] Rupa C. Hingorani,[46] and Yoram Dinstein.[47] Although the popularity of the theory seems to have decreased in the twenty-first century, authors defending it include Robert Kolb,[48] Leslie Green,[49] Dinstein (again),[50] and Ebrahim Afsah.[51] Having said that, the most influential scholar taking this position was Oppenheim, whose opinion dates back to the beginning of the twentieth century. As his opinion is constantly referenced by other authors,

[45] Howard S Levie, "Prisoners of War in International Armed Conflicts" (1977) 59 Intl L Stud 81 (affirming that a captured defector "is not entitled to prisoner-of war status" and referencing the writings of Flory, Oppenheim, and Draper, as well as the British manual, as sources).

[46] Rupa C Hingorani, "Who Are the Prisoners of War?" (1980) 9 Australian YB Intl L 276 at 279–80 (considering indisputable that traitors serving with the enemy are not treated as POWs).

[47] Yoram Dinstein, "Refugees and the Law of Armed Conflicts" (1982) 12 Israel YB Human Rights 94 at 98 (affirming that "when a person is not merely a foreigner … but also owes allegiance to the captor State … he is an unlawful combatant and cannot invoke the status of a prisoner of war").

[48] Robert Kolb, *Ius in bello: Le droit international des conflits armés* (Brussels: Bruylant, 2003) at 164 (arguing that according to practice and dominant doctrinal opinion, traitors are not considered POWs simply because "les garanties conventionnelles ne couvrent que les ressortissants de la partie adverse ou neutre, mais pas (en-dehors de dispositions ponctuelles et explicites) le traitement des propres ressortissants").

[49] Leslie C Green, *The Contemporary Law of Armed Conflict* (Manchester: Manchester University Press, 2008) at 145 (affirming that the national authority might decide to consider deserters caught fighting for the enemy not as combatants and POWs but as "members of its own forces liable to trial for treason" in accordance with national law, and mentioning the fact that "members of the Indian national army who were captured by or surrendered to the British were tried by Indian military courts for waging war against the crown contrary to the Indian penal code"). On this subject, see Phil Mason, *A Matter of Honour: An Account of the Indian Army, Its Officers and Men* (London: Jonathan Cape, 1974) at 522 (affirming that for political reasons only three individuals faced trial and their sentence was remitted).

[50] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd ed (Cambridge: Cambridge University Press, 2016) at 55–56 (affirming that, apart from the express conditions set out in the chapeau and text of Article 4 of *Geneva Convention III*, the lack of a duty of allegiance to the detaining power is an additional condition for granting POW status, and referencing as the source of this theory the *Koi* case, *infra* note 53).

[51] Ebrahim Afsah, "Deserters" in Rüdiger Wolfrum, ed, *Max Planck Encyclopedia of Public International Law*, vol 3 (Oxford: Oxford University Press, 2012) 50 at 52, para 14 (affirming that "[t]he traditional rule holds that lawful combatants cannot fight against the country to which they owe allegiance. Consequently … [they] do not enjoy the protections accorded by international law … [and instead] are liable to punishment under municipal law" and referring as a source to art 48 of the *Lieber Code*, *infra* note 120, which affirms that "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").

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and heavily relied upon in certain judicial decisions on the issue, it is important to reproduce it in full. According to him,

> [t]he 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 forces of the enemy. Even if they appear under the protection of a flag of truce, deserters and traitors may be seized and punished.[52]

As can be perceived from the referenced opinions, despite a lack of in-depth argumentation, several scholars mention the existence of a duty of allegiance to the detaining state as a basis for denying POW status. This idea is further restated in the judicial decision that has become the seminal case and authoritative reference for the denial theory: the 1967 Privy Council decision in *Public Prosecutor v Koi*. This case arose from the armed conflict between Indonesia and Malaysia in the 1960s and refers specifically to the capture of fourteen individuals of undetermined nationality (described by the court as Chinese Malays). They parachuted into Johore as part of a paratrooper force comprising thirty-four Indonesian soldiers. All of the individuals were acting under the command of Indonesian air force officers and wearing camouflage uniforms, and each was carrying "fire-arm, ammunition, two hand grenades, food rations and other military equipment."[53] During the trial phase, all of the fourteen individuals were found guilty of illegal possession of firearms and ammunition and were sentenced to death under Malaysian criminal law. The defence team for one of the accused, Teo Boon Chai, objected to the court's jurisdiction, arguing that the defendant was neither Malaysian nor Indonesian and should be treated as a POW, but the objection was rejected by the judge. On appeal, the Federal Court quashed the conviction of two of the accused, Oie Hee Koi and Ooi Wan Yui, considering that there had been a mistrial due to their potential POW status. The prosecution appealed to the Privy Council, arguing that "a national of a Detaining Power, being a person who owed a duty of allegiance but had gone over to the enemy, was not entitled to the privileges accorded by the Convention to protected prisoners of war; neither was a person who, though not such a national, owed a duty of allegiance to the Detaining Power."[54]

[52] Lassa Oppenheim, *International Law: A Treatise*, 3rd ed (London: Longmans, Green and Company, 1921) at 115, para 86.

[53] *Public Prosecutor (Malaysia) v Koi* (1967), [1968] AC 829, 42 ILR 441 (PC) [*Koi* cited to ILR].

[54] *Ibid* at 442.

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In its judgment, the Privy Council analyzed whether the accused were entitled to be treated as POWs under the act that incorporated the *Geneva Conventions*. The Privy Council noted that the instrument did not indicate directly whether individuals owing allegiance to the capturing state were entitled to POW status. However, the Privy Council decided that POW status does not cover the captor state's own nationals and individuals who owe it allegiance. The decision was founded upon a "strong inference" that *Geneva Convention III* is an instrument "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."[55] This reading was based in part on what was labelled the underlying assumption of the convention — that is, that POWs are individuals who are neither nationals of the detaining power nor bound to it by any duty of allegiance. The court inferred this assumption from the references to allegiance made in Articles 87 and 100 of *Geneva Convention III* and concluded that "a person who owes this duty to a Detaining Power is not entitled to prisoner of war treatment."[56] Curiously, the members of the Privy Council themselves conceded the weakness of their argument by affirming that "[i]f the matter rested on inference from these articles alone, the argument might not be conclusive."[57] In order to overcome this weakness, the court argued that such an inference "coincides … with commonly accepted international law,"[58] which was proven by relying almost exclusively on the previously quoted opinion of Oppenheim.[59]

THE CONFERRAL THEORY

A different set of scholars believes that defectors are entitled to POW status. This position emerged around the middle of the twentieth century and includes the opinions of scholars such as René-Jean Wilhelm,[60] Eric David,[61]

[55] *Ibid* at 449.

[56] *Ibid.*

[57] *Ibid.*

[58] *Ibid.*

[59] It should be noted that the only other reference to "commonly accepted international law" in the judgment relies, incidentally, on another reference to Oppenheim's opinion cited in one of the lower court judgments in respect of the accused Lee Hoo Boon: *ibid* at 448, citing *Lee Hoo Boon v Public Prosecutor*, [1966] 2 MLJ 167 (Fed Ct Malaysia).

[60] René-Jean Wilhelm, "Peut-on modifier le statut des prisonniers de guerre? (suite et fin)" (1953) 35:417 Intl Rev Red Cross 681 at 685 (affirming that denying POW status to individuals holding the detaining power's nationality was "criticable et hâtive" since the term enemy in art 4 of *Geneva Convention III* covers every combatant of the adversary irrespective of their nationality).

[61] David, *supra* note 18 at 502, para 2325 (affirming that denying POW status to a traitor is hardly compatible with art 4 of *Geneva Convention III* and arts 43 and 44 of *Additional Protocol*

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Gary Solis,[62] Els Debuf,[63] David Cumin,[64] Sten Verhoeven and Hilde Sagon,[65] Emily Crawford,[66] and Heike Niebergall-Lackner.[67] The arguments in favour are predominantly legal and include the fact that no express exception was introduced in Article 4 of *Geneva Convention III*, and, therefore, nationality has no role to play in determining POW status.

When it comes to state practice, several cases from the United States seem to reaffirm this position. The first case is *Ex Parte Quirin*, in which the Supreme Court of the United States dealt with the writs of *habeas corpus* of eight captured Nazi saboteurs who entered US territory in a German U-boat during

I, *which, according to him "ne réservent nullement le statut des combattants prisonniers tenus par un devoir d'allégeance envers la Puissance détentrice").* Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict*, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) [*Additional Protocol I*].*

[62] Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge: Cambridge University Press, 2010) at 189, 197–98 (affirming that the additional requirement of non-allegiance for POW status argued by some scholars is "not cited in texts as a precondition for POW status … [and it is] not state practice," and that "[c]itizenship is not the point of lawful combatancy; membership in an army of a party to the conflict is the issue").

[63] Els Debuf, *Captured in War: Lawful Internment in Armed Conflict* (Paris: Pedone and Hart, 2013) at 223 (concluding that "as long as no rule of treaty or customary international law establishes the contrary, the text of Article 4 … and the object and purpose of the Third Geneva Convention do not allow for any individual to be excluded from the personal scope of application of that Convention on the basis of his or her nationality alone").

[64] David Cumin, *Le droit de la guerre: Traité sur l'emploi de la force armée en droit international*, vol 2 (Paris: L'Harmattan, 2015) at 621 (affirming that "[l]e *jus in bello*, lui, ne connaît pas de 'Traîtres'; il récuse toute discrimination à raison de la nationalité" and that POW status covers all individuals belonging to the categories included in *Geneva Convention III* since "l'uniforme couvre la nationalité").

[65] Sten Verhoeven & Hilde Sagon, "Protected Persons in International Humanitarian Law" in Jan Wouters & Philip de Man, eds, *Armed Conflicts and the Law* (Antwerp: Intersentia, 2016) 367 at 382, n 110 (referring to the denial theory as an unjust exception to POW status, since "there is no reason under IHL to deny prisoner of war status to such a combatant since due to his incorporation into the armed forces he is a lawful combatant").

[66] Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (Oxford: Oxford University Press, 2010) at 60 (noting the impossibility of intermediate statuses under the *Geneva Convention* regime and affirming that "[t]he adoption of the Geneva Conventions must be seen as superseding any interpretation of the law of armed conflict, which sanctions stripping any person detained in relation to an armed conflict of any sort of legal protection or status").

[67] Heike Niebergall-Lackner *Status and Treatment of Deserters in International Armed Conflicts* (Leiden: Brill-Nijhoff, 2016) at 146 (arguing that "if states have the right to recruit enemy deserters to the benefit of their own war efforts … they should, in turn, be obliged to respect the adverse party's right to do the same, and recognize a defector's combatant and eventual prisoner of war status").

the Second World War, discarded their uniforms, and conspired to attack war industries and facilities. Upon capture, they were treated as unlawful combatants not entitled to POW status and were subjected to trial and punishment by a military tribunal. The US Supreme Court rejected their petition, reaffirming the denial of POW status to unlawful combatants and the legality of their trial before a military commission. Nonetheless, as two of the captured individuals were American citizens, the court clarified that "[c]itizens 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."[68] A way to understand this position is that nationality and allegiance do not affect belligerent status and that, had these individuals not discarded their uniforms to commit acts of sabotage behind enemy lines, they would have been granted POW status upon capture irrespective of their American nationality. In fact, this conclusion was clearly reached by the US Ninth Circuit Court of Appeals in another Second World War case: *In re Territo*. In that case, an American citizen, who was captured by Allied forces while serving in the enemy Italian army, raised a writ of *habeas corpus* against his detention as a POW based on his American nationality. The court of first instance found that US citizenship was immaterial to the legality of detention as a POW, and, on appeal, the court 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."[69]

These cases from the United States have been recognized as settled practice by the US executive. For instance, both cases are quoted in a memorandum of the Department of Justice when affirming that all individuals (regardless of citizenship) who associate with the enemy are enemy belligerents and that "[n]othing further need be demonstrated to justify their detention as enemy combatants."[70] In 2004, an American national, Yaser Esam Hamdi, brought a writ of *certiorari* against his detention after being caught fighting with the Taliban in Afghanistan.[71] The US Supreme Court reaffirmed the rule that nationality does not alter the status of enemy combatants and that their detention becomes a simple war measure to prevent these individuals from rejoining the enemy and continuing to participate in hostilities. In this case, the court expressly stated that

[68] *Ex Parte Quirin*, 317 US 1 at 37–38 (1942).

[69] *In re Territo*, 156 F2d 142 at 145 (9th Cir 1946).

[70] US Department of Justice, Office of the Deputy Assistant Attorney General, *Memorandum for Daniel J Bryant, Assistant Attorney General, Office of Legislative Affairs Re: Applicability of 18 USC § 4001(a) to Military Detention of United States Citizens* (Washington, DC: US Department of Justice, 2002).

[71] Matthew Dollan, "American-Born Taliban Fighter Jailed in Norfolk," *Virginian Pilot* (6 April 2002).

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> [t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant. … A citizen, no less than an alien, can be "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States," … [S]uch a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict.[72]

The most important aspect to highlight is that among academics supporting this theory there are two currents that relate to the effects of POW status. Authors such as Levie,[73] Wilhelm,[74] Yutaka Arai-Takahashi,[75] David,[76] Tse Ka Ho,[77] Debuf,[78] and Niebergall-Lackner[79] have adopted a reconciliatory position in which the defector gets POW status but can be tried for treason by the capturing state in any case. For them, POW status functions as a set of

[72] *Hamdi v Rumsfeld*, 542 US 507 (2004).

[73] Levie, *supra* note 45 at 75–76 (affirming the detaining state does not lose its capacity and right to charge an individual for treason, nor does the individual lose his or her entitlement to protection as a POW "at least up to and during the trial … in accordance with the guarantees contained in the relevant provisions of the Convention").

[74] Wilhelm, *supra* note 60 at 686 (affirming that the application of Article 85 of *Geneva Convention III* "n'empêche nullement d'ailleurs l'État détenteur de punir son national; elle a simplement pour résultat de conférer à celui-ci les garanties d'ordre judiciaires et pénitentiaires prévues par la Convention comme un minimum admis par les nations civilisées").

[75] Yutaka Arai-Takahashi, "Legal Questions Concerning Afghanistan" (2002) 5 Yb Intl Human L 88 (concluding that even one's own nationals should not be denied POW status, but adding "while awaiting possible trials for treason;" and suggesting the application of the same reasoning followed by the ICTY in the allegiance test to interpret the meaning of the requirement of falling into the power of the enemy under Article 4 of *Geneva Convention III*. In that sense allegiance would determine who is the "real" enemy "so that even nationals of a detaining power should not be excluded from POW status under the third Geneva convention").

[76] David, *supra* note 18 at 505, para 2334, 502, paras 2326–27 (affirming that art 4 of *Geneva Convention IV*, *supra* note 21, and arts 43 and 44 of *Additional Protocol I*, *supra* note 61, "ne font aucune discrimination entre les personnes capturées sur la base de la nationalité," but accepting that, in principle, *Geneva Convention III* does not prevent the detaining power from prosecuting a traitor, depending on the reasons the individual might have to engage with enemy forces — that is, "si le combat de celles-ci est conforme au *jus contra bellum*, le traitre ne devrait pas être puni pour s'être engagé du 'bon côté'; dans le cas inverse la punition serait justifiée").

[77] Tse Ka Ho, "The Relevancy of Nationality to the Right to Prisoner of War Status" (2009) 8 Chinese J Intl L 395 at 399, para 12 (arguing the error of the Privy Council in *Koi* was to consider POW status and liability for treason as mutually exclusive concepts since the act of treason is independent of the combatant's duties in the battlefield, which only cover lawful acts of warfare with immunity (e.g. murder, assault, and so on).

[78] Debuf, *supra* note 63 at 223 (affirming that "[p]risoners of war who have committed the crime of treason against the power in whose hands they have fallen may be tried and punished for that crime and may be detained during trial or imprisoned upon conviction").

[79] Niebergall-Lackner, *supra* note 67 (clarifying that upon the end of the armed conflict and the release of prisoners "the home country can prosecute defectors in ordinary criminal trials for … offences applicable under the national military laws of the country").

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judicial guarantees that must be respected during trial, but the charges and punishment raised against a defector remain at the discretion of the capturing state. This current will be referred to as the soft-conferral theory in this article. The opposite current (the full-conferral theory) will be the object of analysis in the next part.

The Denial Theory *vis-à-vis* Customary International Law and Treaty Interpretation

The debate regarding the denial of POW status to defectors is strongly linked to customary international law and interpretation of the *Geneva Conventions*. Undoubtedly, POW status is a matter that was regulated by states in practice even before its codification in treaty law,[80] and the fact that the most important treaty provision does not expressly address the issue cannot lead to an automatic exclusion of potential unwritten requirements deriving from customary rules or the existence of underlying rationales within the *Geneva Conventions*.[81] However, the analysis cannot be based solely on academic opinions or a single judicial decision of one state. State practice is paramount for the determination of other possible factors supporting the denial theory. This part focuses on the denial theory, as it is the theory most debated in academic studies, and explores three areas that constantly arise from the debates. The first subpart addresses whether the denial theory has its basis in customary international law. The second subpart explores whether unwritten requirements and underlying assumptions supporting the denial theory can derive from interpretation of *Geneva Convention III*. Finally, the third subpart analyzes whether the subsequent practice of states allows an interpretation of *Geneva Convention III* that favours the denial theory.

customary international law

The idea that the denial theory derives from customary international law was argued by the Privy Council in the *Koi* decision when affirming that the theory is consistent with generally accepted international law.[82] Some

[80] Sean Watts, "Who Is a Prisoner of War?" in Andrew Clapham, Paola Gaeta & Marco Sassòli, eds, *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015) 889 at 890 (affirming that "[s]tates typically reserved POW status as a matter of custom, and later treaty law, for members of the opposing state's regular armed forces").

[81] Jean S Pictet, ed, *Commentaries to the 1949 Geneva Conventions* (Geneva: International Committee of the Red Cross [ICRC], 1958) at 11 (arguing that during the drafting process of *Geneva Convention III*, "the Convention was neither a codification of measures which already existed in various instruments, nor a complete collection of all the regulations applicable to prisoners of war").

[82] *Koi*, *supra* note 53 at 449.

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authors such as Hingorani[83] and Marco Sassòli[84] have made similar affirmations. In order to argue the existence of a customary rule, it is necessary to discover instances of practice relevant to the topic[85] that are sufficiently widespread[86] and consistent[87] to dissolve any doubts regarding the existence of an *opinio juris*.[88] Such exacting requirements make the identification of relevant practice very difficult and that is probably why — for the most part — authors who support the denial theory rarely point to any state practice other than the *Koi* case.

Admittedly, most of the historical precedents that could be uncovered show a tendency of states to deny POW status to defectors. For instance, during the First World War, Austria-Hungary denied POW status to its own subjects, such as the Italian irredentists Cesare Battisti[89] and Nazario Sauro, who were captured serving in Italian formations, judged for treason, and executed shortly thereafter.[90] Historians have also reported some examples

[83] Hingorani, *supra* note 46 at 27 (referencing as evidence the writings of Oppenheim and Hyde and affirming that the exception to POW status based on allegiance to the captor is "considered to be the customary rule of international law based on national prescriptions").

[84] Marco Sassòli, Antoine Bouvier & Anne Quintin, *How Does Law Protect in War*, 3rd ed, vol 1 (Geneva: ICRC, 2011) ch 6 at 1 (affirming that "[i]t is often considered that customary law allows a detaining power to deny its own nationals prisoner-of-war status, even if they fall into its hands as members of enemy armed forces").

[85] It is necessary that captors and captives fight in rival formations to each other and share the same nationality/allegiance; that captives fall into the power of enemy troops while an international armed conflict (IAC) still exists (in order to distinguish it from the post-war trials against collaborators); and that denial of POW status be based on the fact of shared nationality/allegiance and not on other bases (such as espionage, the failure to comply with POW requirements, and so on).

[86] Michael Wood, International Law Commission, *Second Report on Identification of Customary International Law*, UN Doc A/CN.4/672 (22 May 2014) at para 52 (arguing that "the practice need not be unanimous (universal); but, it must be 'extensive' or, in other words, sufficiently widespread").

[87] *Ibid* at para 55 (arguing that "while the specific circumstances surrounding each act may naturally vary, 'a core of meaning that does not change' common to them is required: it is then that a regularity of conduct may be observed").

[88] *North Sea Continental Shelf (Germany v Denmark; Germany v Netherlands)*, [1969] ICJ Rep 3 at para 76.

[89] Spencer C Tucker, "Battisti Cesare" in Spencer C Tucker, ed, *World War I: The Definitive Encyclopedia and Document Collection*, vol 1 (Santa Barbara: ABC-CLIO, 2014) 215 at 215–16 (affirming that upon capture by Austro-Hungarian forces, Battisti was charged with treason and "[h]is defence that he should be considered a prisoner of war was rejected out of hand").

[90] Pamela Ballinger, *History in Exile: Memory and Identity at the Borders of the Balkans* (Princeton, NJ: Princeton University Press, 2003) at 63 (affirming that Sauro in Istria was executed by the Austro-Hungarians "in order to demonstrate to the Italian populations of its imperial lands that treason in wartime would not be tolerated").

from the Second World War. Although Germany treated Free French Forces captured in 1942 in Bir-Hakeim as POWs (for fear of retaliation by the Allies), captured Germans serving in the French Foreign Legion "were subjected to immediate execution as traitors."[91] Similarly, thirteen French volunteers fighting within Nazi formations (known as the Thirty-Third Waffen-SS Charlemagne Division), who were captured by American forces, were summarily executed when handed over to the Free French Forces of the Second Armoured Division under the command of General Leclerc, in Bad Reichenhall, on the last day of the war.[92] Perhaps due to such expected treatment, British and French forces provided their German members with fake non-German sounding names and documents in case of capture by German forces.[93]

One of the most interesting examples is the case of the nearly twenty-eight thousand Soviet nationals serving in German uniforms that were captured by the Allies. According to Nigel Cawthorne, these individuals were initially captured by the Germans, who reported them as POWs to Soviet authorities via the Swiss government but, due to the fact that the Soviets had not signed the 1929 *Geneva Convention for the Protection of Prisoners of War* (1929 *Geneva Convention*) and denied the existence of virtually any POWs, they were abandoned to their luck in German captivity.[94] The Germans felt freed from their obligations under the 1929 *Geneva Convention*, and no food parcels were sent to the Soviet prisoners by their motherland, resulting in the very real risk of starvation, which forced them to volunteer for German work groups in order to receive better food rations. As Cawthorne points out, "[l]ater these groups were armed and given German uniforms. Anyone who objected to this forcible induction into the German army was shot."[95] When the Allied forces captured these individuals, American authorities asked the Soviets what to do with them, but Soviet authorities maintained their denial of the existence of Russians serving in German ranks.[96] Later on,

[91] Simon P Mackenzie, "Treatment of Prisoners of War in World War II" (1994) 66 J Modern History 487 at 496.

[92] Jonathan Trigg, *Hitler's Gauls: The History of the 33rd Waffen Division Charlemagne* (Stroud, UK: History Publishing Group, 2009) at 161.

[93] Fry, *supra* note 32; Edward L Bimberg, "A Tale of the French Foreign Legion," *World War II Magazine*, vol 12 (September 1997) at 32.

[94] Nigel Cawthorne, *The Iron Cage* (Lanham, MD: Garrett County Press, 2013) at 30 (affirming that "the Soviets were not concerned about the conditions of imprisonment of their own men either. Stalin considered any of its people who had been taken prisoner by the Germans as traitors. In fact, they did not exist. All true Soviet citizens would gladly fight to their last drop of blood for socialism"). 1929 *Geneva Convention*, *supra* note 19.

[95] Cawthorne, *supra* note 94 at 30.

[96] Mark Elliot, "The United States and Forced Repatriation of Soviet Citizens, 1944–47" (1973) 88 Political Science Q 253 at 258.

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while engaging in negotiations for the repatriation of POWs, the Soviets informed their American counterparts that they expected "that all liberated Soviet nationals be treated as free citizens, not as prisoners of war."[97] British and American authorities accepted these conditions and forcefully repatriated them despite their evident wish to the contrary and some suicide attempts triggered by their fear of Soviet retaliation.[98] As Pavel Polian has noted, from the beginning of the war until October 1941, Soviet authorities had executed 10,221 repatriated soldiers who were considered traitors.[99] By 1946, around 339,618 individuals, including the Vlasovtsy,[100] were sent to the gulags and labour camps in an act of "great leniency" by the Soviet Union.[101]

Despite those examples (of which there might be more), it is important to question whether state practice on this issue can constitute a customary rule of international law. The International Court of Justice has repeatedly stated that varied, inconsistent, divided, and sporadic practice represents a lack of uniformity and consistency, which impedes the formation of a customary rule.[102] In addition, the court has highlighted that discrepancies in practice due to political considerations evidence a lack of uniformity and consistency of state practice. This was clearly set out in the *Asylum* case,[103] where the

[97] *Ibid* at 260.

[98] *Ibid* at 253 (referring to an incident on 29 June 1945, concerning 154 Russian prisoners at Fort Dix, New Jersey, who attempted mass suicide on the day of their deportation. The situation was brought under control by the police through the use of tear gas only after three prisoners had succeeded in their attempts).

[99] Polian, *supra* note 10 at 126 (explaining how the Soviet position regarding POWs was so extreme that even captured or surrendered POWs were suspected, investigated, and many times unjustly convicted for betrayals).

[100] This was the name usually given to those fighting for the Russian Liberation Army and later on for the armed forces of the Committee for the Liberation of the Peoples of Russia. In general terms, these groups were military formations composed mainly of Russians, fighting under German command, and led by Andrey Vlasov, a former general of the Red Army who defected and tried to unite Russian opponents of communism. See Catherine Andreyev, *Vlasov and the Russian Liberation Movement: Soviet Reality and Emigré Theories* (Cambridge: Cambridge University Press, 1990).

[101] Polian, *supra* note 10 at 131.

[102] *Fisheries Case (United Kingdom v Norway)*, [1951] ICJ Rep 116 at 131; *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v Albania)*, [1949] ICJ Rep 4 at 74; *ibid* (Dissenting Opinion of Judge Krylov at 128); *ibid* (Dissenting Opinion of Dr Ečer); *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)*, [1974] ICJ Rep 175 at 212 (Declaration of Judge Nagendra Singh); *Arrest Warrant Case (Democratic Republic of the Congo v Belgium)*, [2002] ICJ Rep 3 at 117 (Separate Opinion of Judge Bula-Bula).

[103] *Asylum Case (Colombia v Peru)*, [1950] ICJ Rep 266 at 277 (finding that although a large number of cases had been presented to the court, it had not been shown whether they evidenced invocation of the alleged customary rule as a right "and not merely for reasons of political expediency").

court rejected the existence of a customary rule on the basis that state practice displayed "so much uncertainty and contradiction, so much fluctuation and discrepancy … so much inconsistency"[104] and particularly that "the practice has been so influenced by considerations of political expediency in the various cases that it is not possible to discern in all this any constant and uniform usage, accepted as law."[105]

Caution must also be exercised when addressing such state practice since, upon closer examination, there is ample evidence that political reasons have determined the treatment of captured defectors. For instance, from the few examples previously mentioned, one should note that the execution of the French volunteers of the Waffen SS referenced above has been linked to an incident of personal sensitivity rather than a legal position regarding POW status. According to Jonathan Trigg, "General [Leclerc] asked the volunteers why they were wearing a German uniform. One of the volunteers shot back a reply asking the General why he was wearing an American one. It sealed the men's fate. A firing squad was hastily convened and the prisoners were taken to local farmland and shot on the spot."[106] Additionally, the Allied treatment of Soviets fighting in German uniform seems to have been motivated by the fact that American authorities were more concerned with recovering their own servicemen, who had been liberated by the Soviets, than with the status or fate of the captured Soviets upon their return to the Soviet Union.[107]

More importantly, attention should be given to the fact that there is abundant evidence of inconsistency in the practice of several states. A global comparative study exceeds the scope of this article; nonetheless, a few examples regarding the practice of key states show the zigzagging of domestic policies in this field. Just as the United Kingdom has deviated from longstanding precedents regarding the denial of POW treatment to internal traitors[108] — for instance, during the American revolution[109] — so has it

[104] *Ibid.*

[105] *Ibid.*

[106] Trigg, *supra* note 92 at 161.

[107] Elliot, *supra* note 96 at 253.

[108] Allan Rosas, *The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable in Armed Conflicts* (Helsinki: Suomalainen Tiedeakatemia, 1976) at 383 (referring to *The Case of Æneas Macdonald* of 1747, in which a British court established that "subjects taken in arms against their lawful prince, are not considered as prisoners of war, but as rebels; and are liable to the punishments ordinarily inflicted on rebels"). *The Case of Æneas Macdonald*, reprinted in Michael Foster, ed, *A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry*, 3rd ed (London: E & R Brooke, 1792) 59.

[109] William R. Lindsey, "Treatment of American Prisoners of War during the Revolution" (1973) 22:1 Emporia State Research Studies 5 at 6 (affirming captured American rebels

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deviated from its denial of POW status to defectors. For instance, during the War of 1812, several British-born seamen on board US ships were captured by the British, denied POW status, and sent to England to be tried for treason. Nonetheless, since the United States had captured a similar number of British individuals, British detainees were not treated as traitors and were eventually exchanged for British POWs, a decision that Sir Alexander Cockburn attributes to fear of "the horrors of reciprocal and indefinite retaliation."[110] In fairness, the British Crown did proclaim through the prince regent shortly afterward that allegiance was perpetual and, thus, that any person who voluntarily served on a ship of war of the United States was guilty of treason.[111]

However, during the Boer War, Irishmen fighting for the South African Republic were treated as POWs, with the British secretary for war and the financial secretary to the War Office reportedly affirming that the Irish "cannot be treated differently from other prisoners of war … [and should be] treated in the same way as their Boer comrades — as ordinary prisoners of war."[112] Finally, during the Second World War, a considerable number of Indians belonging to the Imperial British Army deserted upon instigation by the Japanese and joined the ranks of a nationalist force (the INA) fighting British colonial domination and seeking the independence of India. The INA's military campaign was not successful, and many members of the INA were captured by the British; their captivity was kept secret from public opinion, and they were temporarily treated as POWs.[113] After conducting investigations, the British classified Indian members of the INA in three groups, freeing and dismissing from prosecution the members of the first two groups.[114] Due to the political circumstances of the time, members of the last group, who would have been considered perfect traitors and executed after trial under other circumstances — were only put on trial if they had been responsible for the brutal treatment or the death of a British or

were granted POW status from 1782, one year before Britain recognized US independence in the *Treaty of Paris* of 1783).

[110] Sir Alexander Cockburn, *Nationality: On the Law Relating to Subjects and Aliens* (London: Wm Ridgway, 1869) at 76.

[111] *Ibid* at 78.

[112] Flory, *supra* note 42 at 30.

[113] Mason, *supra* note 49 at 520 (explaining that the white group was composed of POWs who saw the Indian National Army (INA) as an opportunity to escape captivity and return to British lines as soon as possible; the grey group included the credulous and opportunistic Indians who believed Japanese propaganda and joined the INA, but eventually deserted the Japanese; while the black group included those who "clearly knew what they were doing and did their utmost to bring about a Japanese victory, either on a simple calculation of self-interest or because they were captivated by Bose's eloquence").

[114] *Ibid*.

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Allied subject.[115] This was due to the political environment of the time as "[p]ublic opinion had already judged the men [potentially facing trial as] heroes and patriots"[116] and because India's imminent independence prevented the United Kingdom from punishing them as it would "leave a legacy of hatred and was likely to produce an immediate outbreak of violence."[117] For these reasons, the British only opened three court martial cases, all of which were permeated with political arguments by the defendants claiming that the crimes of which they were charged were inapplicable since the defendants were "waging war for the liberation of India according to the rules of warfare which applied to the status of belligerents."[118] The defendants were found guilty of waging war against the king, but the army chief, Claude Auchinleck, upon confirming the findings and sentences in the first cases, decided to "show clemency in respect to the sentence of transportation for life, which he remitted."[119]

Inconsistency is also present in the practice of the United States. Perhaps the clearest codification of the denial of POW status is found in the *Lieber Code*, which, in Article 48, established that "[d]eserters from the American Army, having entered the service of the enemy, suffer death if they fall again into the hands of the United States."[120] In fact, the same article considered that the same treatment by the enemy against their own defectors serving in the American army "is not a breach against the law and usages of war, requiring redress or retaliation."[121] Subsequent military documents from the United States reaffirm this position. For instance, the 1914 US manual entitled *Rules of Land Warfare* affirmed that certain individuals forming part of a *levée en masse* cannot claim belligerent status, including "deserters, [and] subjects of the invading belligerent."[122] The same rule was replicated in the basic field manual of the Judge Advocate General in 1934[123] and in the 1940

[115] Lebra, *supra* note 27 at 201.

[116] *Ibid* at 202.

[117] Mason, *supra* note 49 at 522.

[118] David, *supra* note 18 at 203.

[119] Mason, *supra* note 49 at 522.

[120] US General Orders no 100 (1863), art 48 [*Lieber Code*].

[121] *Ibid.*

[122] War Department: Office of the Chief of Staff, *Rules of Land Warfare* (Washington, DC: Government Printing Office, 1914) at 23, para 38.

[123] Judge Advocate General, *Basic Field Manual, Vol VII: Military Law, Part Two: Rules of Land Warfare* (Washington, DC: Government Printing Office, 1934) at 4, para 11 (affirming that "[d]eserters from, or subjects of, the invading belligerent" do not enjoy immunity given to members of a *levée en masse*).

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version of the *Rules of Land Warfare*.[124] However, following the Second World War, US practice turned 180 degrees with the already mentioned cases of *Ex Parte Quirin*[125] and *In re Territo*,[126] in which nationality was not considered an impediment to treating an individual as an enemy belligerent for the purposes of detention. The 1956 version of the *Rules of Land Warfare* opened the door to denial when it listed those entitled to POW status on the basis of the 1949 *Geneva Convention III* but excluded from POW treatment those who "without regard to citizenship or military or civil status … give aid to an enemy government or persons adhering to it."[127] However, in the 2004 *Hamdi* case, the US Supreme Court reaffirmed the position that even US nationals can be detained as enemy combatants.[128] Yet another shift occurred in cases such as that of John Walker Lindh, an American citizen and member of Taliban forces captured in 2001 in Afghanistan,[129] who was put on trial in the US federal court and "was convicted of providing services to the Taliban government and carrying explosives on their behalf."[130]

More recently, the 2015 US *Law of War Manual* ratifies this change and takes a clear position when including, in the list of persons who are not entitled to POW status, "persons who are nationals of the Detaining Power or its co-belligerents, such as a defector who subsequently is captured by the force from which he or she defected."[131] The manual affirms that "[t]he special privileges that international law affords combatants generally do not apply between a national and his or her State of nationality,"[132] and it explains this on the basis of the same sources listed above, including the

[124] *The Law of Land Warfare*, Field Manual 27-10 (1 October 1940) at 4 (affirming that "deserters from, or subjects of, the invading belligerent" do not enjoy immunity given to members of a *levée en masse*) [*Law of Land Warfare*].

[125] *Ex Parte Quirin*, *supra* note 68 at 37–38.

[126] *In re Territo*, *supra* note 69 at 145.

[127] *Law of Land Warfare*, *supra* note 124 at 33, s 79.

[128] *Hamdi v Rumsfeld*, *supra* note 72.

[129] This is a relevant example for defection in IACs since John Walker Lindh was captured during an IAC between US-led forces and the Taliban government of Afghanistan, before it mutated into a non-international armed conflict where the Afghan government invited international forces to aid in the fight against non-state armed groups. Lindh was captured on 25 November 2001 by troops of the Afghan Northern Alliance, interrogated by Central Intelligence Agency agents, and eventually transferred to the US base "Camp Rhino" on 7 December 2001. This was prior to the creation of the International Security Assistance Force (20 December 2001) and the Afghan Interim Administration (22 December 2001).

[130] Arnold Krammer, *Prisoner of War: A Reference Handbook* (Westport: Praeger Security International, 2008) at 66.

[131] US Department of Defence, *Law of War Manual* (June 2015) at 519, s 9.3.2.1 [*US Law of War Manual*].

[132] *Ibid* at 110, s 4.4.4.2.

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other rules of *Geneva Convention III*, the *Koi* case, and Oppenheim's opinion. The manual thus concludes that "the privileges of combatant status are generally understood not to apply, as a matter of international law, between nationals and their State of nationality"[133] and that "international law does not prevent a State from punishing its nationals whom it may capture among the ranks of enemy forces."[134] Part of the rationale adopted to justify this position is the fact that defectors are not regarded by the US manual to have fallen into the power of the enemy "since they have voluntarily chosen to switch sides."[135] Justifying this position, the US manual quotes a report of the UN Secretary-General[136] and a provision of an older version of the UK military manual that does not exist in its most recent version.[137] In this author's view, this reading of the *Geneva Conventions* is clearly contrary to authoritative interpretations that hold that the voluntary nature of the decision to surrender or defect is irrelevant to the denial of POW status.[138]

Similar inconsistent practice arose in Germany during the Second World War. According to Alexander Gillespie, Germany obliged Vichy France in Article 9 of the Franco-German armistice of June 1940 to forbid its nationals from fighting against the Reich in foreign armies and threatened to treat captured French nationals as *franc-tireurs*. A similar position was taken by Germany towards the Czechs and German Jews incorporated into enemy formations. However, Gillespie notes that "the Germans did not enforce this following De Gaulle's promise that the Free French forces would abide by the *Geneva Conventions*."[139] Additionally, the same author affirms that German practice showed that "if they were captured wearing a uniform they

[133] *Ibid* at 116, s 4.5.2.6.

[134] *Ibid* at 111, s 4.4.4.2, n 86.

[135] *Ibid* at 520, s 9.3.4.2.

[136] United Nations, *Report of the Secretary-General: Respect For Human Rights in Armed Conflicts*, UN Doc A/7720 (20 November 1969) at 33, para 88 (establishing that "the view has been expressed that persons who defect from their own forces and give themselves up to the enemy … do not have prisoner of war status").

[137] Mentioning the 1958 UK manual at para 126, n 1 ("[d]efectors are not considered to have 'fallen' into the power of the enemy within the meaning of art 4a. … [T]he term 'fallen' clearly shows that it concerns combatants who pass into enemy hands, not of their own free will but by a force beyond their control because they are under its restraint"). It must be highlighted that a corresponding provision does not exist in the current UK *Joint Service Manual of the Law of Armed Conflict*, Joint Service Publication 383 (2004) [*UK Joint Service Manual*].

[138] Pictet, *supra* note 81 at 50 (affirming that the expression "fallen into the power" replaced the term "captured" in an attempt to cover other situations, apart from capture, in which combatants find themselves in the power of enemy forces. In that sense the term "fallen" has "a wider significance … covering the case of soldiers who became prisoners without fighting, for example following a surrender").

[139] Alexander Gillespie, *A History of the Laws of War*, vol I (Oxford: Hart, 2011) at 60, n 262.

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were entitled to become a prisoner of war of the country they were fighting for."[140]

An important detail to highlight is that most authors adopting the denial theory do not reference state practice beyond the seminal *Koi* case mentioned above and, therefore, doubts arise regarding its customary nature. Allan Rosas might be one of the few authors who references some provisions of military manuals as evidence of the existence of such an exception to the entitlement to POW status. In his 1976 text, Rosas affirms that the mentioned exception "is expressly stated in the British military manual and seems to be implicitly present in other similar manuals."[141] However, a review of the most recent version of the UK manual shows the absence of such a provision; instead, it expressly accepts that "[i]t is not clear whether captives of the nationality of the Detaining Power are entitled to P[O]W status."[142] A review of other current military manuals shows that the majority of them simply replicate the language of *Geneva Convention III* when determining who is entitled to POW status, including the same categories and the same known exclusions to POW status (spies and mercenaries), and therefore providing almost no guidance on the issue at hand.[143] Some military manuals include further categories of individuals included or excluded

[140] *Ibid* at 61.

[141] Rosas, *supra* note 108 at 384, n 744.

[142] *UK Joint Service Manual*, *supra* note 137, ch 8, s K, para 8.116.1, n 340.

[143] República Argentina, *Manual de Derecho International de Los Conflictos Armados* (2010) (approved by Ministerial Resolution no 435/2010), ch 3, s 3, paras 3.08 (replicating the categories of *Geneva Convention III*), 3.25 (listing spies and mercenaries as the only exceptions); Brazil, Ministério Da Defesa, *Manual de Emprego do Direito Internacional dos Conflitos Armados* (2011), ch III, arts 3.1 (replicating the categories of *Geneva Convention III*), 3.3 (listing spies and mercenaries as the only exceptions); France, *Manuel de droit des conflits armés* (2012) at 76 (establishing that combatants are POWs), 32 (defining combatants by replicating the definition of *Geneva Convention III*); Federal Republic of Germany, *Law of Armed Conflict Manual*, Joint Service Regulation (zdv) 15/2 (May 2013), para 809 (replicating the categories of *Geneva Convention III*) [*German Manual*]; Italia, Stato Maggiore Della Difesa, *Manuale Di Diritto Umanitario*, Doc SMD-G-014 (1991) at 3, vol ii, para 1; Mexico, Secretaria de la Defensa Nacional, *Manual de Derecho Internacional Humanitario Para El Ejercito y FAM* (June 2009), ch III, s IV, arts 138–48 (replicating the categories of *Geneva Convention III*); Peru, Ministerio de Defensa, *Direccion General de Educacion Y Doctrina, Manual Para las Fuerzas Armadas – Derechos Humanos Y Derecho Internacional Humanitario* (21 May 2010), part ii, ch 3, s iv, art 35 (replicating the categories of *Geneva Convention III*); Sierra Leone, Lt M Koroma, *The Law of Armed Conflict: Instructor Manual for the Republic of Sierra Leone Armed Forces* (September 2007) at 40; Spain, *El Derecho de Los Conflictos Armados*, vol 1, *Mando de Adiestramiento Y Doctrina*, Doc 0r7-004, para 8.2.b (1) (defining POW based on *Geneva Convention III* and *Additional Protocol I*) [*Spain Manual*]; Ukraine, Ministry of Defence of Ukraine, Order no 400 (11 September 2004), art 1.2.31 (on the adoption of the manual on the application of the rules of international humanitarian law in the armed forces of Ukraine); Soviet Union, *Order of the Defence Minister of the USSR*, Doc 75 (16 February 1990), part vi, art 13.

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from POW status, but none of them make reference to the nationals of, or the individuals owing allegiance to, the capturing power,[144] except for the already mentioned US military manual of 2015.

With all of these elements in mind, it seems to this author that there is a lack of sufficient uniformity and consistency of state practice to ground a customary rule in line with the denial theory. Additionally, political and military reasons have forced states to adapt their practices and modify their positions to accomplish the most advantageous results in particular circumstances. It is evident that the denial theory coincides with more common incidents of war reported by historians. But supporters of the denial theory have been generally unable to point to a consistent and unified practice of states beyond the *Koi* case and the *Lieber Code*; instead, scholarly writings seem to constitute the bulk of the references used to justify this theory. This author accepts that many of the examples given here are historically removed, but more recent examples were unavailable despite best efforts to discover them. Perhaps others may contribute to the present discussion by adducing further instances of contemporary and global practice, but, for the time being, it is the opinion of this author that the available practice raises doubts as to the existence of a crystalized customary rule of IHL reflecting the denial theory.

UNDERLYING ASSUMPTIONS AND UNWRITTEN REQUIREMENTS THROUGH TREATY INTERPRETATION

A literal reading of Article 4 of *Geneva Convention III* would indicate that POW status is dependent on the individual belonging to any of the categories established therein, irrespective of nationality or allegiance. As will be shown, some state authorities argue for the existence of an underlying assumption and unwritten requirements of allegiance. Following the rules

[144] Canada, *Law of Armed Conflict at the Operational and Tactical Levels*, Doc b-gj-005-104.fp-021 (2001), ch 10, s 2, paras 1006 (replicating the categories of *Geneva Convention III*), 1007 (listing as exceptions: civilians who take part in hostilities other than a *levée en masse*, mercenaries, and spies) [*Canada Manual*]; Chile, Ejército de Chile – Comando de Institutos y Doctrina, *Manual Derecho Operacional* (2009), paras 2.8.2.1 (replicating the categories of *Geneva Convention III*), 2.8.2.2 (listing as exceptions: civilians who take part in hostilities and do not belong to a *levée en masse*, mercenaries, spies, and sanitary and religious personnel); Commonwealth of Australia, *Law of Armed Conflict*, Doc addp 06.4 (2006), ch 10, paras 10.06 (replicating the definition of *Geneva Convention III*), 10.08–10.14 (listing as exceptions: medical and religious personnel, the wounded and sick, mercenaries, civilians, diplomatic staff, journalists); *UK Joint Service Manual*, *supra* note 137, ch 8, s B, paras 8.3–8.4 (replicating the categories of *Geneva Convention III*), 8.6–8.18 (listing other categories: the wounded and sick, medical and religious personnel, auxiliary medical personnel, combatants qualified as medical personnel or chaplains, members of civil defence organizations, mercenaries, civilians, diplomatic staff and agents, and journalists).

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on the interpretation of treaties of the *Vienna Convention on the Law of Treaties* (*VCLT*),[145] an interpreter is bound to analyze whether the terms of Article 4 of *Geneva Convention III* — interpreted in good faith and in accordance with their context, object, and purpose — are ambiguous, obscure, manifestly absurd, or lead to an unreasonable conclusion and thus require the use of the preparatory works of the convention as a supplementary means of interpretation.

Although the text of the treaty is clear, supporters of the denial theory sometimes make use of contextual interpretation by pointing to Article 87, which affirms that "the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance,"[146] and Article 100, which has a similar assumption when it states that "since the accused is not a national of the Detaining Power, he is not bound to it by any duty of allegiance."[147] In *Koi*, the Privy Council affirmed that the articles' "reference to the duty of allegiance might fairly suggest the further inference that a person who owes this duty to a Detaining Power is not entitled to prisoner of war treatment."[148] Similarly, the US military manual affirms that other provisions of *Geneva Convention III* "assume that POWs are not nationals of the Detaining Power."[149]

Although the assumption is evident in both articles, not all authors agree that such language proves the existence of an additional requirement of non-allegiance for POW status. Ka Ho has argued that the language in Articles 87 and 100 of *Geneva Convention III* is "descriptive, rather than normative"[150] and that all references to non-allegiance in these articles were inserted to "redress the potential problems caused by article 87(1)."[151] This particular paragraph of Article 87 establishes that a POW cannot be sentenced by military courts of the detaining power to a penalty "except those provided for in respect of members of the armed forces of the said Power who have committed the same acts,"[152] and, thus, the two elements of the provision (not being a national and not owing allegiance to the detaining power) were inserted with the aim of avoiding a full assimilation of POWs with the detaining power's own soldiers under military law and avoiding

[145] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, art 31 (entered into force 27 January 1980) [*VCLT*].

[146] *Geneva Convention III, supra* note 20, art 87.

[147] *Ibid*, art 100.

[148] *Koi, supra* note 53 at 449.

[149] *US Law of War Manual, supra* note 131 at 110, s 4.4.4.2, n 85 (mentioning art 87 of *Geneva Convention III*).

[150] Ka Ho, *supra* note 77 at 400, para 17.

[151] *Ibid* at 401, para 18.

[152] *Geneva Convention III, supra* note 20, art 87(1).

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their consequent treatment as traitors if they tried to escape. If one follows this interpretation, the references to allegiance in Articles 87 and 100 of *Geneva Convention III* are not indications of an additional requirement for POW status but, simply, the rejection of a full assimilation between POWs and soldiers of the capturing power for judicial matters and a reminder or authorization to the judge "to reduce the penalty even below the minimum prescribed by law."[153]

The language of both articles is clear and gives some strength to the denial theory. However, some strength does not mean an unequivocal answer to the question under analysis. Just as the Privy Council itself noted, it would be feeble to argue that the language of Articles 87 and 100 of *Geneva Convention III* is the sole justification for the theory of the denial of POW status on the basis of allegiance. The Privy Council was forced to pair such a contextual interpretation with "commonly accepted international law."[154] But, as has been shown before, state practice does not reveal a clear position due to its serious inconsistencies, and, thus, other elements must be looked at by anyone trying to confirm or disprove such a theory.

Oppenheim tried to point to another contextual element when affirming that the denial theory refers to apparent customary rules concerning the inviolability of the bearer of the white flag. According to him, the mission assigned to *parlementaires* "protects everyone who is charged with it, whatever his rank … but it does not protect a deserter. A deserter may be detained, court-martialled, and punished."[155] Although the rule does not mention allegiance and POW status, it can be inferred that the refusal to treat a defector as a *parlementaire* derives from the fact that nationality or allegiance owed to the detaining or receiving side nullifies any type of status under IHL. However, the exception for *parlementaires* seems to be recognized only by a very small number of contemporary sources, including only one military manual[156] and one scholar who mentions it in his writings.[157] On the contrary, most other manuals that include provisions on *parlementaires* do not mention exceptions regarding defectors, deserters, one's own nationals, or individuals owing allegiance.[158] In

[153] Pictet, *supra* note 81 at 430.

[154] *Koi*, *supra* note 53 at 449.

[155] Oppenheim, *supra* note 52 at 311, para 222.

[156] *German Manual*, *supra* note 143, para 497 (affirming that "defectors or prisoners of war have no *parlementaire* status and thus no right of inviolability").

[157] Christopher Greenwood, "Scope of Application of Humanitarian Law" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nd ed (Oxford: Oxford University Press, 2008) 45 at 64, para 226.

[158] *Canada Manual*, *supra* note 144, ch 14, para 1402; *UK Joint Service Manual*, *supra* note 137, ch 10, s B, para 10.4; *Spain Manual*, *supra* note 143, para 2.6.c.(1); *US Law of War Manual*, *supra* note 131 at 829, s 12.5. Additionally, this exception does not appear in any of the military manuals defining *parlementaires* that are included on the ICRC's customary IHL

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addition, Leslie Green has reported some contrary practice by the United Kingdom during the Falklands War. According to him, British forces sent an Argentinian POW as a *parlementaire* to call on the Argentinean side to surrender by a given time.[159] Green does not explain how the POW was received by the Argentinians, but he does mention that acceptance of the proposal was to be signalled by "returning the P[O]W under the White Flag. Rejection of the summons to surrender would be indicated "by returning the P[O]W without his White Flag, although his neutrality [would] be respected."[160] This example shows that, in recent practice, UK forces expected the POW to receive full treatment as a *parlementaire* and to be returned to his captors despite his nationality, membership on the Argentinian side, and the duty of allegiance that derived from both of these facts. In this sense, it is uncertain whether the rule referenced by Oppenheim really exists or supports his position. In sum, contextual elements do not seem to provide particularly conclusive arguments in support of the existence of the requirement.

Unfortunately, the object and purpose of the convention also provides little guidance on this issue given that *Geneva Convention III* has no preamble that could clarify its object and purpose, due to the inability to reach an agreement on its text. The preamble of the 1929 *Geneva Convention* stated that its objectives included giving effect to "the duty of every Power to mitigate, as far as possible, the hardships of war and to alleviate the fate of prisoners of war"[161] as well as developing "the principles which have inspired the international conventions of The Hague, in particular the Convention concerning the Laws and Customs of War and the Regulations annexed to it."[162] It is difficult to see how this protective spirit could be construed to allow for the denial of POW status on the basis of a requirement not included in the text of the convention itself.

Opinions on teleological elements also seem divided. Authors such as Susan Elman have argued for a teleological interpretation of *Geneva Convention III* that extends POW status to defectors because the "emphasis throughout the Convention is on the importance of the rights and privileges which prisoners of war ought to enjoy"[163] and "[A]rticle 4 is a clear improvement and extension of earlier definitions of prisoners of war, surely done in

webpage relating to rule 66 (non-hostile contacts between the parties to the conflict), s C (on the definition of *parlementaires*) (online: *ICRC* <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter19_rule66_sectionc>).

[159] Green, *supra* note 49 at 114.

[160] *Ibid.*

[161] Pictet, *supra* note 81 at 12–13.

[162] *Ibid* at 13.

[163] Susan Elman, "Prisoners of War under the Geneva Convention" (1969) 18 Intl & Comp LQ 178 at 183.

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the attempt to include as many persons as possible within the scope of the convention."[164] At the same time, scholars such as Yutaka Arai-Takahashi suggest following the reasoning of the International Criminal Tribunal for the former Yugoslavia (ICTY) in applying an allegiance test to interpret the meaning of the requirement of falling into the power of the enemy under Article 4 of *Geneva Convention III*. In this sense, allegiance would determine who is the real enemy "so that even nationals of a Detaining Power should not be excluded from POW status under the Third Geneva Convention."[165] The current author expected judicial interpreters in The Hague to make use of extensive teleological interpretation techniques and perhaps confirm Arai-Takahashi's view, but, in a curious turn of events, the Trial Chamber of the ICTY in *Prosecutor v Prilić et al.* rejected such an extensive reading. The case concerned crimes committed by a non-state armed group — the Croatian Defence Council (HVO), an armed group of ethnic Croats in Bosnia — against its own members, who were not Bosnian Croats but, rather, Bosnian Muslims. The Trial Chamber decided that Muslim members of the HVO detained by their own forces could not be considered POWs because the requirements of the conventional definition of a POW under Article 4 of *Geneva Convention III* were not met. In this case, the court clarified that a "teleological interpretation seeking to establish 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."[166] The Trial Chamber did not rely on allegiance to determine POW status and, instead, focused on auxiliary sources to confirm the meaning of the text of *Geneva Convention III*. Basing itself on Pictet's commentary to Article 4 of *Geneva Convention III*, the Trial Chamber deduced that "a member of the armed forces may not be considered a prisoner of war unless he is captured by that party to the conflict against which the armed forces to which he belongs are fighting."[167] This interpretation was not challenged on appeal, but, nonetheless, the Appeals Chamber confirmed the findings of the Trial Chamber categorizing the individuals as civilians.[168] Although the case does not refer to captured defectors, it shows a strict adherence to the requirements of Article 4 of *Geneva Convention III* and a refusal to expand the protections of POW status over situations not foreseen in the text of the convention through teleological interpretation.

[164] *Ibid.*

[165] Arai-Takahashi, *supra* note 75 at 88.

[166] *Prosecutor v Prilić et al*, IT-04-74-T, Trial Judgment (vol III) (29 May 2013) at para 603 [*Prilić* Trial]; *Prosecutor v Prilić et al*, IT-04-74-A, Appeals Judgement (vol I) (29 November 2017) at para 359 [*Prilić* Appeal].

[167] *Prilić* Trial, *supra* note 166 at para 604.

[168] *Prilić* Appeal, *supra* note 166 at paras 348–60.

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Given the inconclusiveness of these means of interpretation, recourse to auxiliary methods of interpretation could be sought. There is at least one aspect of the preparatory works that is interesting for the topic of allegiance and POWs: the report from the conference of government experts in 1947.[169] The 1947 conference was convened to discuss the revisions made by the 1937 meeting of international experts to the 1929 *Geneva Convention* in light of the experiences gained from the Second World War in order to draft a new humanitarian agreement for POWs. The experts at this conference, who were listed as "delegates," seemed to have acted on behalf of their states[170] and effectively undertook part of the preliminary work to develop the *Geneva Convention III* of 1949. A section of the report from the conference of government experts discussing a provision concerning penal sanctions for POWs clearly affirms that

> [t]wo essential principles should govern all clauses relating to proceedings and sentences concerning P[O]W[s], and should be specifically stated in Article 45, namely:
>
> (a) as a rule, P[O]W[s] are not nationals of the [Detaining Power], to which they owe no allegiance;
> (b) as members of forces they owe a duty of obedience to their home country.[171]

This understanding was reaffirmed by the majority's rejection of the term "insubordination" that is contained in the second part of the article, on the basis that "it may give rise to the impression that the P[O]W owes allegiance to the [detaining power], which is not the case."[172] The solution adopted to determine which penal legislation binds POWs was to assimilate POWs to soldiers of the detaining power. However, the assimilation was not absolute, and the fact that POWs "remain enemies whose patriotism must be respected" was taken into account in order to avoid punishment for certain acts that, when committed by a regular soldier of the detaining power, would constitute serious crimes but, when committed by a POW, would lack enough links to the detaining power to consider them criminal.[173] In this

[169] ICRC, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* (Geneva: ICRC, 1947).

[170] Namely, Australia, Belgium, Brazil, Canada, China, Czechoslovakia, France, Great Britain, India, The Netherlands, New Zealand, Norway, Poland, Union of South Africa, and the United States.

[171] ICRC, *supra* note 169 at 202 (establishing in art 45 that "prisoners of war shall be subject to the laws, regulations, and orders in force in the armed forces of the detaining power. Any act of insubordination shall render them liable to the measures prescribed by such laws, regulations, and orders, except as otherwise provided in this chapter" (at 204).

[172] *Ibid* at 203.

[173] Pictet, *supra* note 81 at 407.

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sense, allegiance as an underlying concept helps prevent undue assimilation for the purpose of determining sanctions, and, thus, as Jean Pictet's commentary mentions, "an attempt to escape, for instance, cannot be considered in the same light as desertion, nor can unrest in a prisoner-of-war camp be assimilated to mutiny in the armed forces."[174] During the conference of government experts, the International Committee of the Red Cross (ICRC) had inquired whether offences that implied allegiance to the detaining power should be included as exceptions in special rules of the convention, as was the case for escape attempts. The idea was considered to be extreme, and, instead, the commission decided to include a stipulation "to remind the court that enemy P[O]W[s] brought before it for judgment are not nationals of the country, but that they owe obedience to the home country,"[175] which can now be found in the relevant articles of *Geneva Convention III*.[176]

This fact draws one's attention back to the discussion on contextual interpretation and the criticism of Ka Ho that was previously mentioned. There is no question that the discussions mentioned in the previous paragraph assumed that POWs are not nationals of the detaining power and, thus, owe it no allegiance. The question that arises is whether that assumption is generally applicable to all aspects of POW law or if it is an assumption solely included for the purposes of rules concerning procedures and penalties applicable to POWs. Note should be taken of the fact that the chapeau of the quoted extract clearly locates this assumption as a principle that governs the clauses on proceedings and sentences. The fact that the chapeau limits the application of this rule to proceedings and sentences begs the question of why the principle is not mentioned in the discussions of other areas, especially the provisions on POW status during the preparatory works of the convention. This could be argued to be an indicator of its restrictive application to proceedings and sentences exclusively and not of a more general underlying assumption.

After considering the interpretative process under the *VCLT*, it seems that there are no conclusive elements that would convincingly justify departing from a literal interpretation of Article 4 of *Geneva Convention III*. The formulation of Articles 87 and 100, providing that a POW does not owe allegiance to the detaining power, is unquestionably applicable to procedures and penalties; however, its existence as a general principle of POW status is not clear and, thus, cannot be argued unequivocally as a decisive contextual element. For its part, a teleological approach to interpretation and the practice related to it seem to favour the literal interpretation. Finally, there are important

[174] *Ibid.*

[175] ICRC, *supra* note 169 at 204–05.

[176] *Geneva Convention III*, *supra* note 20, arts 87, 100.

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elements in the drafting history of *Geneva Convention III*, but, since they refer to Articles 87 and 100, it is not clear whether these elements can be extended to general rules regarding POW status and, more importantly, to an exception to POW status. It is true that a majority of scholarly opinions support the denial theory, but the previous section has shown that secondary sources are divided and do not reflect widespread practice.

SUBSEQUENT STATE PRACTICE

Some authors have argued that the denial theory originates from state practice subsequent to the 1949 *Geneva Conventions*. This was the case for Yoram Dinstein, who once affirmed that non-allegiance to the detaining power is a condition for POW status that "is not specifically mentioned in the *Geneva Conventions*, and is derived from the case law."[177] The derivation of a requirement not included in the text of a convention refers either to the creation of a rule of customary international law, which has been shown earlier in this article to be highly questionable, or to subsequent practice as "objective evidence of the understanding of the Parties"[178] in accordance with Article 31(3)(b) of the *VCLT*.[179]

Dinstein's slight change of language in the most recent edition of his book comes as no surprise considering that the case law he once referred to was, in reality, only a single domestic judicial decision (the *Koi* case). Nonetheless, his point is interesting as it is reminiscent of the work of Georg Nolte as special rapporteur of the International Law Commission (ILC) on the topic of subsequent practice in relation to the interpretation of treaties. Although finding that the qualities of concordance, commonality, and consistency are not a minimum threshold for the applicability of Article 31(3)(b), Nolte affirms that these qualities are "an indication as to the circumstances under which subsequent practice under Article 31(3)(b) would have more or less value as a means of interpretation in a process of interpretation,"[180] particularly when they allow one to identify a pattern of conduct that implies an

[177] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd ed (Cambridge: Cambridge University Press, 2010) at 40. Note that this formulation was later rephrased by Dinstein in his third edition in 2016 (Dinstein, *supra* note 50 at 55), which reads "…is not spelt out as such in the *Geneva Conventions*, and was inferentially deduced from the *Conventions* in the case law."

[178] United Nations, *Yearbook of the International Law Commission*, vol 2 (New York: United Nations, 1966) at 221, para 15.

[179] *VCLT*, *supra* note 145, art 31(3)(b) (establishing that "there shall be taken into account, together with the context: … (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation").

[180] International Law Commission, *Second Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation*, UN Doc A/CN.4/671 (26 March 2014) at 23 (Georg Nolte, special rapporteur).

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agreement of the parties that must be included, through interpretation, as part of the treaty.[181] Evidently, the inclusion of the denial theory in the 2015 US military manual may be relevant in this sense, but it has insufficient weight or value on its own to determine the existence of an agreement to interpret *Geneva Convention III* as requiring non-allegiance or non-nationality for POW status. Further state practice clearly adopting this theory would be necessary, and, until that is evident, the Privy Council's decision as well as the US military manual are only steps in the direction of the denial theory; they would have to be confirmed and reaffirmed by additional state practice through time.

Having said this, the most important question that arises here is whether including such a requirement (non-allegiance) would go beyond interpretation of *Geneva Convention III* and actually modify it. One of the conclusions reached by Nolte is that "[i]t is presumed that the parties to a treaty, by a subsequent agreement or subsequent practice, intend to interpret the treaty, not to modify it. The possibility of modifying a treaty by subsequent practice of the parties has not been generally recognized."[182] It is evident that the incorporation of non-allegiance as a requirement of POW status, based on subsequent practice, would more than interpret the convention but would effectively modify Article 4 of *Geneva Convention III* by creating a further exception to the entitlement to POW status. The creation of such an exception via practice would amount to new customary law, and, therefore, the requirements of state practice and *opinio juris* would have to be met, including widespread, uniform, and consistent state practice. In the opinion of this author, Dinstein's argument is far too generous since a single domestic case (the *Koi* case) cannot create a non-allegiance requirement by itself, nor can the Privy Council's deductions be said to have led to a full reinterpretation of *Geneva Convention III* by states in this sense.

A Critical Reading of the Theories

In addition to the analysis provided in the previous part, there are fundamental problems with both theories (denial and conferral) that deserve further attention. A critical approach can question the value assigned to both theories and the judicial precedents on which they are built. The first subpart criticizes the denial theory for originating from, and relying heavily on, questionable domestic case law. The second subsection criticizes what was labelled earlier as the soft conferral theory — that is, the view that POW status can be conferred upon a defector for purposes of covering him or her with the full set of judicial guarantees given to POWs. This position is

[181] *Ibid.*

[182] *Ibid* at 69.

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criticized on the basis that it deprives the concept of POW of the benefit of combatant immunity in order to accommodate the interests of states.

CRITICISM OF THE DENIAL THEORY

Before jumping to criticisms, it must be recognized that the denial theory is built upon two absolutely valid legal ideas. The first is the underlying idea that POW status is not automatically granted to all participants in an IAC that covers them with full, blanket immunity. It is clear from the provisions of IHL regarding POWs that certain requirements have to be met[183] and that not everyone fulfilling them is entitled to POW status.[184] The second idea is that being a member of an enemy army does not shield the individual from all punishment by his captors, and, thus, even fully covered POWs may be tried by the detaining state for domestic crimes.[185] Despite this observation, it is impossible to ignore the fact that the denial theory poses a clash between domestic law and international law and, more importantly, that the denial theory refers to a very particular topic: the determination of POW status. Therefore, it is necessary to distinguish between arguments of domestic law and the whole body of international law concerning POWs. One of the most important criticisms that can be formulated against the denial theory is that it uses domestic law to alter the application of international law. This goes against the rule of international law that forbids states from relying on domestic law to breach their international obligations. The Permanent Court of International Justice (PCIJ) in its advisory opinion on the *Treatment of Polish Nationals* clearly affirmed that "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."[186] The rule has been characterized by the PCIJ as a generally accepted principle of international law,[187] and it was incorporated in Article 27 of the *VCLT*.[188] From that perspective, the denial theory would be in violation of a general principle of

[183] *Geneva Convention III*, *supra* note 20, art 4 (requiring membership of certain armed groups, including particular requirements of distinction and organization for some of them: art 4 (a)(2)); ICRC, *Customary International Humanitarian Law*, vol 1, *Rules* (Geneva: ICRC, 2005), Rule 106: conditions for prisoner of war status; *Additional Protocol I*, *supra* note 61, art 43.

[184] *Additional Protocol I*, *supra* note 61, arts 75(1), 46 (spies), 47 (mercenaries); ICRC, *supra* note 183, Rules 107 (spies), 108 (mercenaries); Knut Dörmann, "The Legal Situation of 'Unlawful/Unprivileged Combatants'" (2003) 85:849 Intl Rev Red Cross 45.

[185] *Geneva Convention III*, *supra* note 20, arts 82–88.

[186] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory* (1932), Advisory Opinion, PCIJ (Ser A/B) No 44 at 24.

[187] *Greco-Bulgarian Communities* (1930), Advisory Opinion, PCIJ (Ser B) No 17 at 32.

[188] *VCLT*, *supra* note 145, art 27 (establishing that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty").

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international law since it uses allegiance, which is nothing but a concept of domestic law, to avoid the application of Article 4 of *Geneva Convention III*, which grants POW status irrespective of nationality.

Beyond this remark regarding the dynamics of domestic and international law, a more specific criticism can be raised with reference to the sources usually quoted to justify the denial theory. As shown above, authors supporting the denial theory often use the writing of scholars — particularly Oppenheim — and, more recently, the *Koi* case as evidence of state practice. Unquestionably, the *Koi* decision represents a very interesting precedent since the *Koi* judgment is more recent and perhaps more specific to the issue under analysis than other cases such as those from the Second World War. However, scholarly references to the *Koi* case tend to present it superficially by focusing attention on the final decision adopting the denial theory. Such a treatment of the case disregards elements of the decision that cast strong doubts on its reliability. Upon a deeper reading of the case, two problems become evident: first, its reliance on Oppenheim's opinion and, second, the factual findings of the case.

The *Koi* decision refers to Oppenheim's opinion as evidence of "commonly accepted international law" and affirms that the edition quoted was published after the adoption of the *Geneva Conventions* and "in their Lordships' opinion correctly states the relevant law."[189] In reality, Oppenheim's opinion does not provide express evidence of state practice on this particular issue and, instead, only seems to reference his own work on how the flag of truce does not cover deserters as well as the writings of William Hall on the same issue.[190] As argued above, the rule on *parlamentaires* that Oppenheim references is rather obscure and is not reflected in recent, known state practice and scholarly writings.

An additional criticism that can be raised against Oppenheim's conclusion is that the denial theory derives from the no longer sustainable assumption that states reject the conferral of immunities on their own nationals or allegiants. The contrary is actually recognized in at least one area of contemporary public international law. As Ian Brownlie has pointed out, "[t]he *Vienna Convention on Diplomatic Relations* restricts the conferral of privileges and immunities in the case of members of the mission if they are nationals of the receiving State or 'permanently resident' therein."[191] The extension to

[189] *Koi*, *supra* note 53 at 449.

[190] Oppenheim, *supra* note 13 at paras 86, 268 (referring to para 222 of the same book); James E Edmons & Lassa Oppenheim, *Land Warfare: An Exposition of the Laws and Usages of War on Land for the Guidance of Officers of His Majesty's Army* (London: His Majesty's Stationery Office, 1910) at para 36; William E Hall, *A Treatise on International Law* (Oxford: Clarendon Press, 1917) at 583, para 190 (referencing the work of other authors on the general topic of the "flag of truce").

[191] Ian Brownlie, "The Relations of Nationality in Public International Law" (1963) 39 Brit YB Intl L 284 at 348.

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permanent residents shows that nationality alone is not the only concept that supports such a position. However, the commentaries of the ILC to the draft predecessor to Article 38 of the *Vienna Convention on Diplomatic Relations* noted that "practice is not uniform, and the opinion of writers is also divided."[192] The division seems to have been between those who believed that even nationals of the receiving state should enjoy full privileges and immunities and those who believed that these individuals should only enjoy those expressly granted by the receiving state. The commentaries clarify that the majority of ILC members favoured an intermediate position granting the individual "a minimum of immunity to enable him to perform his duties satisfactorily. That minimum, it was felt, was inviolability, and also immunity from jurisdiction in respect of official acts performed in the exercise of his functions."[193] As Eileen Denza affirms, during the Vienna Conference, the ILC presented a compromise that was accepted by the delegations, including those initially opposed to granting nationals of the receiving state immunity as diplomatic agents because "a minimum of inviolability and immunity for official acts of such persons must follow as [a] logical consequence."[194] This precedent is of the utmost importance because it shows a functional approach that privileges the official operation of international relations over the domestic relations between states and individuals.

Following that, it could be argued that diplomatic and consular immunities may serve as a guide on how to solve the conflict between domestic entitlements of states and international rules conferring privileges on individuals who act in official capacities. Consequently, a parallel could be drawn between both areas of law (diplomatic and military). Nothing in international law impedes states from engaging, within their diplomatic or military ranks, nationals or permanent residents of another state. Both capacities (diplomatic and military) are covered by a special regime of international law that grants privileges and immunities. Such privileges imply that violations of domestic laws of the receiving state are covered. It follows that the international order takes priority for the purposes of ensuring the smooth operation of international norms and relations and, therefore, that those individuals enjoy a minimum degree of immunity when performing their official functions. This would seem to cover soldiers with POW status for all acts considered lawful under international law regarding the conduct of hostilities, even if such participation constitutes a criminal offence at the

[192] International Law Commission, *Draft Articles on Diplomatic Intercourse and Immunities with Commentaries*, in *Yearbook of the International Law Commission*, vol 2 (1958) at 102. *Vienna Convention on Diplomatic Relations*, 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964) [*VCDR*].

[193] International Law Commission, *supra* note 192.

[194] Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (Oxford: Oxford University Press, 2016) at 338.

domestic level. One could argue the existence of a functional approach in international law by which state agents enjoy a minimum of immunity that allows them to exercise their official functions, even if they are nationals of the receiving state (or, for IHL purposes, the capturing state).[195]

But returning to the heavy reliance on Oppenheim's opinion, there is yet another feature worth criticizing. During the *Koi* proceedings, some defendants raised the existence of contrary US jurisprudence (that is, the *In Re Territo* case) in order to show equal treatment of captured combatants despite nationality. However, the Privy Council dismissed the entirety of the US case on the basis that such a decision was based on "various authorities which do not support the contention that the particular protection relied on by the majority of the appellants extends to nationals of the Detaining Power who fall into that Power's hands."[196] After an examination of the sources in question, it becomes evident that the erroneously referenced authority is the work of Oppenheim, who, as seen above, had a very clear position denying POW status to individuals owing allegiance to captor states. The mistake of the *In re Territo* court in referencing Oppenheim is undeniable. However, it is questionable to what extent the misquotation enables a court to dismiss the entirety of the *In re Territo* reasoning as flawed, particularly when — unlike the Privy Council in *Koi* — the US court actually did reference state practice conferring POW status irrespective of nationality. In particular, the US court noted that "Irishmen, though then subjects of Great Britain, who had taken the oath of allegiance to the South African Republic during the Boer war, were treated as prisoners of war."[197] In sum, it seems that heavy reliance on Oppenheim was used by the Privy Council not only to avoid supporting its decision with references to state practice but also to summarily dismiss contrary state practice (both the practice quoted in the US decision and the decision itself, which also counts as state practice) as being erroneously based on authorities that do not support the position. All of these elements make the dependence on Oppenheim's opinion problematic and raise doubts regarding the validity of the foundations of the *Koi* judgment itself.

Having said that, the most controversial aspect of the *Koi* case is the fact that the strong theoretical doctrine set up by the Privy Council was not supported by the factual findings made by the various judicial instances

[195] *VCDR*, *supra* note 192, arts 33, 37–38; *Vienna Convention on Consular Relations*, 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967), arts 33, 37–38, 71. Notice should be given to the fact that all exceptions regarding one's own nationals and permanent residents are expressed in the text of the conventions and never implied.

[196] *Koi*, *supra* note 53 at 450.

[197] *In re Territo*, *supra* note 69 at 145. A careful inspection of the source mentioned by the author (that is, Flory, *supra* note 42 at 30) shows that the referenced author rejects POW status for individuals owing allegiance to the capturing state.

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considering the case. In other words, the decision relied on a doctrine that deprives individuals of POW status on the basis of allegiance without having been able to determine the allegiance of the defendants. The Privy Council and all of the previous Malay judicial instances in the case failed to determine the nationality of the accused. The decision referred to the accused as "Chinese Malays either born or settled in Malaysia," but it accepted that "in no case was it shown whether or not they were of Malaysian nationality."[198] Probably aware of this major weakness, the Privy Council extended its denial of POW status not only to nationals but also to individuals owing allegiance by affirming that "allegiance is the governing principle whether based on citizenship or not."[199] For this purpose, the Privy Council found English jurisprudence convenient and referenced *Joyce v Director of Public Prosecutions*[200] and *Rex v Neumann*[201] as cases showing that allegiance is independent of nationality but derives from protection and, consequently, that nationality was irrelevant to the case. On the allegiance of the accused, the decision affirmed that "[w]hether the duty of allegiance exists or not is a question of fact in which a number of elements may be involved."[202] However, the Privy Council did not make any effort to determine the existence of any allegiance to Malaysia and, in a shocking paragraph, simply accepted that "[i]t was not proved that the accused were citizens of Malaysia nor that they owed allegiance to Malaysia, though in many cases there was evidence which, if the issue had directly arisen, might have suggested that they did; but further findings of fact would have been required to decide either question."[203]

The Privy Council did not clarify to which evidence it was referring, and, from the whole of the decision, the only apparent element seems to be the fact that the majority of the captured individuals "carried blue identity cards issued pursuant to the National Registration Regulations which, by regulation 5(2)(a), provide for the issue of 'blue bordered cards with blue printing to citizens of the Federation of Malaya.' One carried a red card appropriate to a non-citizen."[204] Many questions arise as to why, if the legal authorities

[198] *Koi*, *supra* note 53 at 442–43.

[199] *Ibid* at 450.

[200] *R v Joyce*, [1945] WN 220, 173 LT 377 (Eng CA) [*Joyce* Appeal]; *Joyce v Director of Public Prosecutions*, [1946] AC 347, [1946] 1 All ER 186 (UKHL) [*Joyce* HL]. William Joyce (a.k.a. Lord Haw Haw) was an American citizen who resided in the United Kingdom and joined the Nazis as an infamous propagandist. He was captured, tried in the United Kingdom for treason for violating the theory of local allegiance, found guilty, and executed.

[201] *R v Neumann*, (1949) 3 SALR 1238 (TPD).

[202] *Koi*, *supra* note 53 at 450.

[203] *Ibid* at 449.

[204] *Ibid* at 442.

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had knowledge of the existence of such cards, none of them used them as evidence of the nationality of most of the individuals or the residency status of the remaining one, which would have proved a duty of allegiance. Proper legal procedure would have determined whether the cards were indeed issued by Malaysian authorities or, for example, counterfeit documents provided by Indonesian forces to their soldiers as a ruse to evade capture in case of document control on the ground during escape behind enemy lines. Furthermore, the Privy Council affirmed that allegiance was the governing principle but, at the same time, unapologetically brushed off strong circumstantial evidence suggesting that the individuals in question could have actually belonged to Indonesian forces and thus owed allegiance to Indonesia through their service in the armed forces.[205] The court dismissed this evidence by affirming that "[t]here was nothing to show that the accused were protected prisoners of war or to raise a doubt whether they were or were not. The mere fact that they landed as part of the Indonesian armed forces did not raise a doubt."[206]

With these observations in mind, it is only logical to re-evaluate the weight given in academic circles to the *Koi* decision as it seems to be a judgment in which the court arbitrarily presumed the nationality and allegiance of the accused and discarded strong evidence suggesting that the individuals actually belonged to the Indonesian armed forces. The outcome of this highly irregular procedure was a failure to effectively determine the status of the individuals under IHL, a fact that Richard Baxter pointed out back in 1969 when affirming that "[t]he better view … is that a person who outwardly seems to meet the requirements of Article 4, but whose nationality or allegiance is in question, should be put before a competent tribunal under Article 5 and must until that time be treated as a prisoner of war."[207] Despite its gravity, it is doubtful that this criticism alone will be considered sufficient to invalidate the doctrinal position and the set of legal principles set out in *Koi* regarding allegiance and POW status. After all, it would not be the first time that an arbitrary wartime decision lacking factual foundation was used

[205] Not only is this type of allegiance recognized at common law; traditionally, soldiers in armies undertake oaths of allegiance as part of their acceptance into military forces. See art 57 of the *Lieber Code*, *supra* note 120, stating "so soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses. No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organized as soldiers, will not be treated by him as public enemies."

[206] *Koi*, *supra* note 53 at 449.

[207] Richard Baxter, "The Privy Council on the Qualifications of Belligerents" (1969) 63 Am J Intl L 290 at 293.

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to create a theory in international law.[208] Very often, states and scholars turn a blind eye to the technical injustice committed against an individual in favour of a decision that brings redress for a particular offence and that sets a precedent to cite when defending preferred doctrinal views. Unfortunately, this seems to be the case with the *Koi* decision, as many cite it blindly.

Finally, it is important to understand that at the heart of the denial theory lies the concept of allegiance. But if protection is granted irrespective of race, ethnicity, religion, or nationality, why should we accept the introduction of allegiance as a new factor of discrimination in IHL? Allegiance is a very particular concept of the common law that has no legal counterpart in other legal systems. Although most states would share the idea that the individual should not betray the state, the bottom line is that, in many states, it is not an independent legal concept but is instead dealt with in criminal law as an alternative to adopting a customary duty deriving from nationality, residency, naturalization or service. Allowing this concept to define the scope of IHL protections would enable one legal system to impose, via international law, its doctrines on other legal systems that have developed differently. Another cause for concern is the fact that the common law theory of allegiance is vague and has permitted the adoption of highly controversial decisions that may produce very problematic results.

For instance, some cases have used allegiance to condemn foreign residents for treason when joining or collaborating with invading or enemy forces, regardless of the fact that such forces were their own national forces.[209] Despite the existence of a nationality link to the enemy, such precedents have discarded those links, holding individuals accountable on the basis of a type of allegiance derived from residency. In another case, a foreigner was sentenced for the sole possession abroad of a British passport, as British authorities argued that holding a passport conferred a duty of allegiance to the issuing state that derived from the protection it grants.[210] This presumption was adopted in disregard of other important elements of the case, such as the fact that the person in question was not a British subject; had obtained the passport under false pretences; and had only used it to move to Germany with his family and belongings. The decision disregarded

[208] Suffice it to recall the trial of generals Homma and Yamashita for the establishment of the doctrine of command responsibility, now a fundamental doctrine of international criminal law. See David L Herman, "A Dish Best Not Served at All: How Foreign Military War Crimes Suspects Lack Protection under United States and International Law" (2002) 172 Mil L Rev 40.

[209] *The King v Lodewyk Johannes de Jager (Natal)*, [1907] UKPC 24 at 2; *United States v Shinohara*, Military Commission Cases no 134819 (28 July 1945) (as quoted in Robert D Powers Jr, "Note: Treason by Domiciled Aliens" (1962) 17 Mil L Rev 123 at 127, n 17).

[210] *R v Joyce*, [1945] 2 All ER 673 (Eng Crim Ct); *Joyce* Appeal, *supra* note 200; *Joyce* HL, *supra* note 200; see also John W Hall, ed, *The Trial of William Joyce* (London: William Hodge and Company, 1946).

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other facts that could have indicated his true allegiance in favour of a formalistic approach in which he could only be free from UK allegiance had he formally surrendered his passport. These cases, which have become seminal precedents in the common law, could be considered red flags outside of that legal tradition and should be reason for concern by other states since similar problems could arise if allegiance is allowed to become the driving force behind entitlement to POW status.

CRITICISM OF THE CONFERRAL THEORY AS A MERE JUDICIAL GUARANTEE (SOFT CONFERRAL THEORY)

In general terms, the soft conferral theory is in line with the content of Article 85 of *Geneva Convention III*, which enables the capturing power to prosecute POWs: "Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."[211] This provision implies that the state may prosecute crimes committed prior to capture, but it is necessary to question whether the provision applies to all crimes or not. Pictet tried to resolve this question in his commentaries by affirming that the provision covers crimes under international law (genocide, war crimes, crimes against humanity)—as well as acts not connected to the state of war — that is, violations of domestic criminal law including offences against the interests of the detaining power. However, when it comes to domestic crimes, the issue becomes complex as a state could misuse the provision to charge a domestic offence in order to punish the individual's participation in the armed conflict. Pictet clarified that the article does not cover "trying a prisoner of war for an act or an attitude which is punishable under the laws of the Detaining Power but would not have been a matter for prosecution in his country of origin."[212] Based on this, his commentary adopts a dual criminality test and suggests looking at crimes included in extradition treaties since "[a]n act in respect of which there could be no extradition should not be punished by the Detaining Power."[213] But this is not useful for several reasons. First, there is no certainty on which crimes will be charged against these individuals. Common sense would suggest political crimes, particularly treason. However, practice has shown that, due to the high evidentiary threshold of some of these crimes, domestic authorities may prefer to charge individuals with other types of crimes that may or may not

[211] *Geneva Convention III*, *supra* note 20, art 85.

[212] Pictet, *supra* note 81 at 419 (using as an example the crime of membership of the communist party, when this membership is not a criminal offence in the country of origin of the POW).

[213] *Ibid.*

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exist in the state for which the POW fights.[214] Second, crimes such as treason are universally recognized but traditionally excluded from extradition treaties,[215] covering not only purely political crimes against the existence and security of the state but also relative political crimes that include actions such as illegal possession of firearms or providing support to certain organizations.[216] In this sense, Pictet's commentaries lack depth and do not solve the root of the issue.

A better approach to the problem might be to address the question of prosecutable actions from the point of view of IHL. In other words, the key issue is to determine whether special status under international law (such as POW status) shields anyone from prosecution for certain offences. The answer to this question could be found in the concept of so-called combatant immunity. The general understanding behind combatant immunity is that soldiers engage in hostilities under sovereign authority "and are therefore exempt from the normal bonds of law as privileged combatants."[217] The idea of possessing an authorization to partake in armed conflict is acknowledged within the rules of IHL under the notion of combatant status, in opposition to other categories of individuals who engage without authorization.[218] Attached to combatant status comes the privilege of immunity as suggested by numerous authors[219] and recognized in the *Lieber Code*[220] and the *Trial of Wilhelm List and Others* before the International Military Tribunal in Nuremberg.[221] In the

[214] For instance, Koi was charged with the illegal possession of firearms; while John Walker Lindh was charged with the crimes of conspiracy to murder US nationals, providing material support and resources to foreign terrorist organizations, contributing services to Al Qaeda, supplying services to the Taliban, and using and carrying firearms and destructive devices during crimes of violence.

[215] Mahmoud Cherif Bassiouni, "The Political Offence Exception in Extradition Law and Practice" in Mahmoud Cherif Bassiouni, ed, *International Terrorism and Political Crimes* (Springfield: Charles C Thomas, 1975) 383 at 399.

[216] *Ibid* at 405. For a detailed discussion on the topic, see Mahmoud Cherif Bassiouni, *International Extradition: United States Law and Practice* (New York: Oceana, 2002) at 611–54.

[217] Christopher Burris, "Re-Examining the Prisoner of War Status of PLO *Fedayeen*" (1997) 22 NCJ Intl L & Com Reg 943 at 965.

[218] Nils Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008) at 307 (according to Melzer, the underlying assumption of IACs is that "all organized armed actors conducting hostilities under the command of a party to an international armed conflict do so as organs of a subject of international law, and that their conduct must therefore be accredited to that party").

[219] Lorenzo Redalié, *La conduite des hostilités dans les conflits armés asymétriques: un défi au droit humanitaire* (Geneva: Université de Genève, 2013) at 88; Crawford, *supra* note 66 at 52; Françoise Bouchet-Saulnier, *The Practical Guide to Humanitarian Law* (Lanham, MD: Rowman & Littlefield, 2002) at 50.

[220] *Lieber Code*, *supra* note 120, art 57.

[221] United States Military Tribunal, Judgment, *Trial of Wilhelm List and Others*, reprinted in United Nations War Crimes Commission, Law Reports of Trials of War Criminals, vol 8 (London: United Nations War Crimes Commission, 1947) at 50 (qualifying as

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context of IHL, logic dictates that such authorization is provided by the state under whose flag the forces fight. Therefore, a defector may not have the authorization of his home state under domestic law to fight but, under international law, is authorized by a belligerent power to do so and thus is authorized and covered by combatant immunity.

Having said that, the fact that combatant immunity is not included as a concept in the text of the *Geneva Conventions* forces one to refer to case law and the writings of academics in an attempt to clarify the extent and scope of the concept. When reviewing the literature on the subject, it is fairly common to find very general terminology describing the acts covered by the immunity. Some authors describe the privilege as "a blanket immunity for … pre-capture warlike acts."[222] Others affirm that the privilege shields those entitled to POW status "from criminal prosecution for those warlike acts which do not violate the laws and customs of war but which might otherwise be common crimes under municipal law."[223] In the *Noriega* case, a US District Court determined that the essential purpose of *Geneva Convention III* is to protect POWs from prosecution for acts customary in armed conflict but not "to provide immunity against prosecution for common crimes committed against the Detaining Power before the outbreak of military hostilities."[224] In this particular case, it was found that drug trafficking and other drug-related offences were "activities which have no bearing on the conduct of battle or the defence of country," and, therefore, they were excluded from the privilege.[225] Other authors define the privilege in more specific terms. Some include acts such as homicide, wounding, destroying property, and detaining individuals,[226] while others refer clearly to acts of participation in hostilities.[227] In sum, it seems that combatant immunity

unquestionable the fact that "acts done in time of war under the military authority of an enemy, cannot involve any criminal liability on the part of officers or soldiers if the acts are not prohibited by the conventional or customary rules of war").

[222] Geoffrey S Corn & Michael L Smidt, "'To Be or Not to Be, That Is the Question': Contemporary Military Operations and the Status of Captured Personel" (1999) 14 Army Law 1 at 14, n 124.

[223] Waldemar A Solf & Edward R Cummings, "A Survey of Penal Sanctions under Protocol I to the Geneva Conventions of August 12, 1949" (1977) 9 Case W Res J Intl L 205 at 212; see also McDougal & Feliciano, *supra* note 44 at 712 (arguing that acts committed during war may be punishable as crimes under domestic law "only to the extent that such acts are violative of the international law on the conduct of hostilities").

[224] *United States v Noriega*, 746 F Supp 1506 (SD Fla 1990).

[225] *Ibid.*

[226] Michael Bothe, K Josef Partsch & Waldemar A Solf, *New Rules for Victims of Armed Conflicts: Commentary on the 1977 Protocols Additional to the Geneva Conventions of 1949* (The Hague: Martinus Nijhoff, 2013) at 277.

[227] Sassòli, Bouvier & Quintin, *supra* note 84, ch 6 at 1; Derek Jinks, "The Declining Significance of POW Status" (2004) 45 Harv Intl LJ 367 at 376, n 38.

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covers all warlike acts that are not contrary to the laws of armed conflict and that form part of the conduct of hostilities themselves.

The matter should not be viewed from the viewpoint of domestic criminal law alone, and the domestic criminal character of the action has to be set aside in favour of the international legal character of the armed conduct. This is due to the fact that IHL is the prevailing legal framework regulating the prosecution of POWs, and even though it recognizes the right for a state to try a POW, this cannot enable a state to bypass the most fundamental rules of IHL. Under normal circumstances, states recognize that combatant privilege covers actions as serious as homicide, grave injury, and deprivation of liberty because they are committed in the context of war. It would be absurd not to cover with the same privilege all acts that are materially required for a person's participation in the conflict such as his physical presence behind enemy lines, his enlistment with enemy forces, his use of uniforms, and the possession of weapons during military activities — that is, his defection.

The problem arises when the said actions go beyond normal acts of participation that may be prosecuted and not covered by combatant immunity. It is possible that an individual switching sides might commit a set of serious crimes beyond mere treason or the carrying of weapons. For instance, a defector may have killed a fellow soldier to be able to cross enemy lines and join the enemy. This problem has not been addressed yet in international law, and one risks speculation when trying to address it. An objective and independent determination on a case-by-case basis would be desirable not only to prevent normal acts of participation from being categorized as prosecutable domestic crimes but also to avoid transforming combatant immunity into a blanket immunity and giving *carte blanche* to individuals to purge all crimes by simply switching sides. Evidently, this is an area that requires further development in both practice and scholarly writings, but enough has been shown here to make the argument that the rationale behind the rule permitting states to prosecute POWs is not to allow them to criminalize their participation in the conflict. The soft conferral theory commits a grave error by not drawing a line when it comes to criminalized offences and when it overlooks the concept of combatant immunity. Such a position actually weakens POW status under IHL and potentially enables states to criminalize lawful conduct under IHL as long as judicial guarantees are provided. For this reason, this author rejects the soft conferral approach.

The Overlooked Alternative

Having seen the debate from a critical and contemporary perspective, this author perceives that many voices in the discussion seem antiquated in light of the evolution of rules of IHL in the field of POW status. In a way, IHL has

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managed to avoid being based on stereotypical or idealized depictions of who is entitled to protection. For instance, POW status is no longer exclusively reserved for regular soldiers forming part of national armies. Protection has been extended to other groups such as partisan groups, resistance groups, and divergent factions of the regular forces following an unrecognized government that can now access that status. Similarly, the idea that only patriotic nationals belong to the army has been abandoned to recognize that foreign volunteers can also be part of armed groups entitled to POW protection. The International Military Tribunal in the *Re Weizsaecker and Others* case correctly pointed out that allowing a capturing party to grant or refuse POW status on its own assessment of the legality of the incorporation of foreigners into enemy forces would mean that "the very purpose of the provisions of the Hague Convention would be defeated."[228] The next step in this evolution could be the issue under analysis in this article, and, therefore, some alternative arguments are presented here to fuel future debate.

Taking a position on this issue can be a moral conundrum for scholars. Many would agree with the idea that "it is no 'crime' to be a soldier,"[229] but the reality is that betrayal carries such a heavy social stigma that even those who support the idea of conferring POW status sometimes do so in a compromised way (that is, the soft conferral theory). Voicing arguments in favour of traitors is not the most popular approach. However, emotional and political elements are inevitably present even in the mainstream legal theories. The denial theory is not just motivated by a legitimate need of the state to uphold the law and guard against dangerous acts; behind it lies vengeance and punishment against those who question the righteousness of the state and betray their own group. For its part, the soft conferral theory is not solely motivated by a sense of humanitarianism, and one can perceive an attempt by scholars to reassure themselves in believing that a right makes up for a wrong when arguing that judicial guarantees expunge potential execution. Having said that, as this area of IHL is under development and fully open to debate, this is a good opportunity to ask whether the full conferral theory is not desirable. Most voices in favour of this theory are quite formalistic and defend its adoption on the basis of the absence of clear exceptions to the rule and a literal application of Article 4 of *Geneva Convention III*. However, very little is said about the desirability and feasibility of this position. Far from wanting to formulate an allegory of treason and betrayal, this article will put forward

[228] *Re Weizsaecker*, *supra* note 19 at 356 (basing its decision on art 17 of *Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, 18 October 1907, USTS 540 (entered into force 26 January 1910), which expressly states that a neutral individual (such as the Swedish nationals in that case) that abandons his neutrality, for instance by enlisting in the army of one of the belligerents, shall not be treated more severely than a national of a belligerent state for the same conduct.

[229] *Johnson v Eisentrager*, 339 US 763 at 793 (1950).

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some novel observations in favour of the full conferral theory as an alternative solution to the stale debate reviewed above.

The first argument is purely humanitarian. Adopting the full conferral theory could represent an opportunity to move beyond the expected scenario of expeditious military trials followed by equally rushed executions. Such a theory can foster an understanding that a state has many other tools to deal with a violation of allegiance. Many oppose the full conferral theory on the basis that it impedes the right of states to prosecute criminals and consequently rewards defectors with impunity, but alternative punishments can fully satisfy this state entitlement without altering the POW regime and without reaching the severity of a potential death penalty. For instance, the state could choose to cut all ties with the defector and exclude him or her from all practical benefits derived from their relationship. Alternative punishments could include the removal of citizenship,[230] denying entry to its territory under threat of prosecution and subsequent deportation, using administrative forfeiture to freeze and seize assets, blacklisting the defector from its financial system, prohibiting national companies and individuals from trading with that person, and so on.[231] Such measures are probably still proportional punishment, yet they constitute severe penalties for anyone to face, with the benefit that the state would respect the existing system of POW status under *Geneva Convention III* without opening the door to loose exceptions.

The second argument refers to a more practical (even tactical) aspect of the full conferral theory. Potential exile and statelessness is a heavy consequence that could deter participation in acts of betrayal. In practical terms, the state benefits from this approach more than executing the defector as it would prevent the individual from becoming a martyr figure exploitable by the enemy's propaganda machine. Additionally, simple offers of money in exchange for betrayal would fall short of matching the potential outcomes faced by the individual. Military and intelligence authorities inciting defection would need to promise effective remedies such as naturalization and relocation to defectors of the enemy in case of discovery. Achieving those benefits would be difficult in practice as they often involve civilian authorities who would face public scrutiny and would have to justify the introduction of persons of questionable character into the community. If recent practice regarding Afghani and Iraqi translators collaborating with US forces is any indication of the practical problems involved in fulfilling this

[230] *Convention on the Reduction of Statelessness*, 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975), art 8(3)(a) and (b) (affirming that the state has the right to de-nationalize an individual who violates his duty of loyalty); Sandra Mantu, "'Terrorist' Citizens and the Human Right to Nationality" (2018) 26 J Contemporary European Studies 28 at 30.

[231] These measures are domestic decisions that states take for national security reasons and often include the blacklisting of individuals associated with terrorism or organized crime.

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type of promise, it is possible that defectors would think twice before aiding the enemy since insufficient promises could represent grave practical problems for the individual.[232]

Finally, the full conferral theory could be useful if one considers that defection is a very complex situation that not only covers the most despicable individuals who sell out their country for money but also the individuals who dare to fight back against persecution by their own discriminating governments by joining the forces that challenge such regimes. As objectivity in the determination of the particular circumstances of each defector is impossible given the vested interest of the detaining/betrayed state, providing them with POW protection for mere acts of participation could help minimize the mortal consequences of internal purges and persecution campaigns against brave individuals fighting for righteous causes.

Conclusions

The issue of individuals changing sides and fighting for the enemy is as old as war itself. Debates and practice have extended for centuries, and divided opinions can be found over time. With no end in sight to the debate on whether such individuals are protected by POW status or not, the traditional legal conclusion is that the issue remains an area of IHL under debate and formation.[233] Therefore, the decision to grant or deny POW status is a matter of discretion for the capturing state.[234] A crude reading of international law would indicate that there is a trend towards the denial theory, marked by the reversal of the US position in its 2015 military manual. However, it remains to be seen whether that theory is applied in practice, not only by US military authorities but also primarily by their own judicial authorities, who would need to reverse the existing judicial precedents and set up a new doctrine. At the same time, it remains to be seen whether other states in the world would protest, acquiesce, or adopt a particular theory in practice, before suggesting whether the mentioned trend might one day lead to the formation of a customary rule of IHL. If that eventually happens, the issue under study might resolve itself in a scenario similar to that of espionage: lawful under IHL, used by every state in practice, but constituting an exception to POW status.

[232] Eline Gordts, "America's Afghan and Iraqi Interpreters Risk Lives but Wait Years in Danger for Visas," *Huffington Post* (23 June 2013); Shashank Bengali, "Afghans Who Helped the U.S. Military Worry They, Too, Will Suffer under Trump's Refugee Ban," *LA Times* (30 January 2017); Quil Lawrence, "Why the Number of U.S. Visas Being Granted to Afghan and Iraqi Allies Are Down," *National Public Radio* (24 August 2018).

[233] Marie-Louise Tougas, "Determination of Prisoner of War Status" in Clapham, Gaeta & Sassòli, *supra* note 80, 939 at 947; see also *UK Joint Service Manual*, *supra* note 137, ch 8, s K, para 8.116.1, n 340.

[234] Debuf, *supra* note 63 at 205.

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Having said this, we are far from that scenario. Defection will continue to be a reality of every armed conflict of the future and thus challenge the available theories and expose their flaws. In this context, proposing alternative solutions is a necessary and healthy academic exercise that might open the debate to new ideas. The denial theory does not lack a logical basis. In fact, this article has shown several circumstantial elements supporting it in legal terms under IHL. However, none of them seem sufficiently strong to affirm the validity of such a theory as an unwritten exception to entitlement to POW status. It seems to this author that an exception to a crucial rule should be express, or at least clearly identifiable beyond doubt, instead of being left to the perils of speculation, interpretation, and personal opinion. Furthermore, when looking deeply into the sources that are the foundations of such theory, one discovers that legal rigour is absent in many cases, and, instead, rules have been interpreted to justify political positions. Similarly, despite the conciliatory nature of the soft conferral theory, a deeper analysis forces one to reject it as it is an almost cosmetic remedy to a very complex problem: that mere participation in an international armed conflict is not a criminal offence.

In this context, it is necessary to explore the full conferral theory as a potentially viable alternative for resolving the debate. Some arguments in favour of this approach have been outlined in order to begin dissolving fears that usually surround the full conferral approach and that tend to affect academic judgment. Protection does not always equate to impunity, and punishment does not always equate to justice. Perhaps this article will open the debate even further to fresh opinions regarding the mainstream theories and pave the way for new solutions to an ancient problem. Until states decide what to do with defectors, it could be useful to keep in mind that social evolution has forced changes in how we perceive authority and what we perceive as just. In this sense, the greatness of nations is not only revealed by how they treat their most vulnerable or even their enemies; it could be argued that it is also measured by how they treat those who dissent, those who denounce, those who challenge authority, and maybe even those who betray them.