

# The obligation to exercise “leniency” in penal and disciplinary measures against prisoners of war in light of the ICRC updated Commentary on the Third Geneva Convention

**Katayoun Hosseinnejad and Pouria Askary**

Katayoun Hosseinnejad is a Doctoral Fellow at the Geneva Centre for Security Policy.

Email: [katayoun.hosseine@graduateinstitute.ch](mailto:katayoun.hosseine@graduateinstitute.ch).

Pouria Askary is an Associate Professor of International Law at Allameh Tabataba'i University. Email: [p.askari@atu.ac.ir](mailto:p.askari@atu.ac.ir).

## Abstract

*This paper explores how the general obligation of the Detaining Power to exercise the greatest leniency towards prisoners of war may be used in interpreting the provisions of the Third Geneva Convention of 1949 (GC III) related to the sanction regime to fulfil the obligation of humane treatment and to preserve the persons and honour of prisoners of war. The International Committee of the Red Cross updated Commentary on GC III is placed at the core of the arguments of this research.*

**Keywords:** detaining power, disciplinary sanctions, humanity, leniency, penal punishments, prisoners of war.

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## Introduction

Leniency derives from the Latin verb *lenire*, denoting to softening the pain and stress.<sup>1</sup> Historically, this word was often connected with the term clemency as, for example, Lucius Annaeus Seneca the Younger, the Roman philosopher, defined *clementia* as “the leniency of the more powerful party toward the weaker in the matter of setting penalties”.<sup>2</sup> The concept of clemency, associated with the attitudes of mercy and gentleness, “functioned primarily in military contexts, displayed on the battlefield by a Roman general toward a defected foreign enemy, or as a political tool used by royalty in the discretionary administration of justice”.<sup>3</sup>

In the sphere of modern-day criminal law, the concept of leniency is still alive and the subject of debate. In using this term, criminal lawyers aim to distinguish between

crime treatment which, on the one hand, is based upon sentiment, emotion, and perhaps personal relationships existing between the offender and the person who deals with him, and on the other hand, treatment which is based upon considerations of the protection of society, the rehabilitation of the offender, his preparation for release and eventual reintegration into the social group as a self-supporting, self-respecting individual.<sup>4</sup>

In the context of international humanitarian law (IHL), the term leniency first appeared in Article 52 of the 1929 Convention Relative to the Treatment of Prisoners of War (1929 Convention),<sup>5</sup> in particular in connection with facts related to “escape or attempted escape”. With the adoption of Article 83 of the Third Geneva Convention of 1949 (GC III),<sup>6</sup> the obligation to exercise the

- 1 Merriam-Webster, “Lenient”, in *Merriam-Webster.com Dictionary*, available at: <https://www.merriam-webster.com/dictionary/lenient> (all internet references were accessed in March 2022).
- 2 Lucius Annaeus Seneca, *Of Clemency (De Clementia)*, at 2.3.1., cited in Susanna Morton Braund, “The Anger of Tyrants and the Forgiveness of Kings”, in Charles L. Griswold and David Konstan (eds), *Ancient Forgiveness: Classical, Judaic, and Christian*, Cambridge University Press, Cambridge, 2012, p. 89.
- 3 Jennifer M. Sandoval, *A Psychological Inquiry into the Meaning and Concept of Forgiveness*, Routledge, Abingdon, 2017, p. 28.
- 4 Justin Miller, “Philosophy of Leniency in Crime Treatment”, *Journal of Criminal Law and Criminology*, Vol. 32, No. 4, 1942, p. 389. See, also, Göran Duus-Otterström, “Why Retributivists Should Endorse Leniency in Punishment”, *Law and Philosophy*, Vol. 32, No. 4, 2013.
- 5 Convention Relative to the Treatment of Prisoners of War, Geneva, 27 July 1929, 118 LNTS 343 (entered into force 19 June 1931) (1929 Convention).
- 6 Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III).

greatest leniency towards prisoners of war (PoWs) in regards to penal and disciplinary measures against them was reinforced.<sup>7</sup> Article 83, the second article of Chapter III on penal and disciplinary sanctions, provides that “[i]n deciding whether proceedings in respect of an offence alleged to have been committed by a prisoner of war shall be judicial or disciplinary, the Detaining Power shall ensure that the competent authorities exercise the greatest leniency and adopt, wherever possible, disciplinary rather than judicial measures”. Chapter III of the Convention, in addition to general rules that are applicable to any kind of proceedings, consists of specific rules regulating disciplinary procedures and sanctions, on the one hand, and those rules regulating penal proceedings and punishments, on the other hand.

As will be discussed in this paper, the drafters of GC III intentionally included the obligation to exercise leniency in a distinct article at the beginning of the Chapter on penal and disciplinary measures and emphasized that it “should apply to the whole Chapter”.<sup>8</sup> As the history of the negotiations demonstrates,<sup>9</sup> the drafters sought that the authorities or the courts of the Detaining Power apply the leniency considerations prior to the institution of any disciplinary or judicial proceedings against a PoW until its end which includes all the stages of pre-trial, trial and post-trial of PoWs, as reflected in Chapter III. This attitude, *per se*, reiterates that contrary to the mainstream approach among criminal lawyers,<sup>10</sup> the authors of GC III, as will be discussed in the “Historical background” part below, did not restrict the application of leniency merely to the consideration of the severity of punishments.

The obligation to exercise the greatest leniency towards PoWs brings into play considerations of humanity, morality and conscience in the treatment of PoWs. In this way, it may resemble, to some extent, the Martens clause which, by reference to laws of humanity and the requirements of the public conscience, bridges the gap between positive norms of international law relating to armed conflicts and natural law.<sup>11</sup> This resemblance, however, does not mean that the lack of leniency equals automatically inhumane treatment.

7 It is noteworthy that Article 121 of the Fourth Geneva Convention also provides that: “The Parties to the conflict shall ensure that the competent authorities exercise leniency in deciding whether punishment inflicted for an offence shall be of a disciplinary or judicial nature, especially in respect of acts committed in connection with an escape, whether successful or not.” Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

8 Final Record of the Diplomatic Conference of Geneva of 1949, Federal Political Department, Bern (1949 Diplomatic Conference), Vol. II-A, p. 304.

9 See the “Historical background” part below.

10 See, for example, Nigel Walker, *Aggravation, Mitigation and Mercy in English Criminal Justice*, Blackstone Press, London, 1999, in particular pp. 219–30 where the author makes the distinction between mercy and leniency.

11 Rupert Ticehurst, “The Martens Clause and the Laws of Armed Conflict”, *International Review of the Red Cross*, Vol. 37, No. 317, 1997, p. 133.

The obligation to exercise leniency toward PoWs does not necessarily result in predetermined answers; rather, it is an appeal to the Detaining Power as a sovereign State to treat PoWs less severely, by contemplating the fact that PoWs are in its hand because they honoured the same ethos as the Detaining Power's members of armed forces: upholding their duty of allegiance. It is for this reason that Article 87(2) states clearly that:

[w]hen fixing the penalty, the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will ...

Contrary to the principle of humanity and the Martens clause, the nature and scope of which are vastly discussed in the legal literature,<sup>12</sup> the obligation to exercise leniency did not generate any debate in the IHL domain. Even the 1960 International Committee of the Red Cross (ICRC) Commentary, which linked leniency to the “considerations of the ‘honourable motives’ which prompted the prisoner of war to act”<sup>13</sup> did not discuss the peculiarities of the implementation of leniency to the whole of Chapter III. Consequently, in interpreting Article 87(2) which provides the list of extenuating circumstances that should be considered in fixing the penalties against PoWs, the 1960 Commentary does not ascribe any independent place for “leniency”.<sup>14</sup> However, the ICRC updated Commentary on GC III (Commentary),<sup>15</sup> based on general practice,<sup>16</sup> and following the developments of international law, has brought the humanitarian considerations including the concepts of leniency and clemency, wherever possible, to the heart of its interpretations of the GC III provisions with respect to penal and disciplinary sanctions. On this basis, the Commentary on Article 87(2) emphasizes that considerations mentioned in this Article do not replace rather “complement the rule contained in Article 83 ...”.<sup>17</sup> The Commentary furthermore states that Article 87 encourages detaining authorities “to exhibit as

12 See, for example, Vladimir V. Pustogarov, “The Martens Clause in International Law”, *Journal of the History of International Law*, Vol. 1, No. 2, 1999; Theodor Meron, “The Martens Clause, Principles of Humanity, and Dictates of Public Conscience”, *American Journal of International Law*, Vol. 94, No. 1, 2000.

13 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 3: *Geneva Convention Relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960 (1960 Commentary), commentary on Art. 83, p. 410.

14 *Ibid.*, commentary on Art. 87, pp. 430–1. These elements under Article 87 are “the absence of any duty of allegiance, and the fact that the prisoner is in the hands of the Detaining Power as the result of circumstances independent of his own will”.

15 ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War (Commentaries on the 1949 Geneva Conventions)*. Cambridge University Press, Cambridge, 2021 (Commentary).

16 Jemma Arman, Jean-Marie Henckaerts, Heleen Hiemstra and Kvitoslava Krotiuk, “The Updated ICRC Commentary on the Third Geneva Convention: A New Tool to Protect Prisoners of War in the Twenty-First Century”, *International Review of the Red Cross*, Vol. 102, No. 913, 2020, p. 391.

17 Commentary, above note 15, on Art. 87, paras 3662 and 3682.

much leniency as possible in determining the penalty because of the special circumstances in which prisoners of war find themselves”.<sup>18</sup>

With reference to the application of the leniency considerations to the whole provisions of Chapter III of GC III, this paper indulges in the obligation of exercising leniency regarding the laws and procedures that are applicable to disciplinary and judicial processes as well as fixing and enforcing sanctions against PoWs. In doing this, it first examines the origin of this rule based on the preparatory works of GC III. Subsequently, the paper develops its arguments about the effects of leniency considerations in each and every disciplinary or penal measure taken against PoWs by the Detaining Power. Moreover, it will be shown that the leniency considerations, as an appeal to the Detaining Power to treat PoWs less severely, has the potential to influence the interpretation of some other obligations under GC III. The ICRC updated Commentary on GC III, which expressly discusses leniency considerations as an independent obligation of conduct,<sup>19</sup> is placed at the core of the arguments of this research.

## Historical background

The experience of the First World War revealed the deep inadequacy of the Hague Conventions<sup>20</sup> in protecting PoWs in respect of punishments they might face.<sup>21</sup> As discussed by Wylie and Cameron, “the scale, duration and intensity of wartime captivity after 1914 gave rise to a conceptual shift in the way PoWs were perceived, transforming their status ... to ‘humanitarian subjects’, whose treatment was based on an understanding of their humanitarian needs and rights”.<sup>22</sup> As a result, a great number of bilateral agreements on the subject were drafted by the opposing belligerents and entered into force in 1918 to compensate for these shortcomings.<sup>23</sup>

These agreements constituted the first international efforts to regulate the treatment of PoWs<sup>24</sup> by confirming the existing approach of dividing offences

18 *Ibid.*, para. 3662.

19 *Ibid.*, commentary on Art. 83, para. 3588.

20 Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 29 July 1899 (entered into force 4 September 1900); and Regulation of Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 (entered into force 26 January 1910), (Hague Conventions).

21 Howard S. Levie, “Penal Sanctions for Maltreatment of Prisoners of War”, *American Journal of International Law*, Vol. 56, No. 2, 1962, p. 437.

22 Neville Wylie and Lindsey Cameron, “The Impact of World War I on the Law Governing the Treatment of Prisoners of War and the Making of a Humanitarian Subject”, *European Journal of International Law*, Vol. 29, No. 4, 2018, p. 1327.

23 Howard S. Levie, “Enforcing the Third Geneva Convention on the Humanitarian Treatment of Prisoners of War”, *United States Air Force Academy Journal of Legal Studies*, Vol. 7, No. 37, 1997, p. 459. Available at: <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1475&context=ils>.

24 Le code du prisonnier de guerre. Rapport présenté par le Comité international à la X<sup>me</sup> Conférence, *Revue Internationale de la Croix-Rouge et Bulletin*, No. 26, 1921, p. 104.

that PoWs might commit<sup>25</sup> into two categories: disciplinary and criminal offences.<sup>26</sup> They also prohibited collective punishment,<sup>27</sup> and the use of cruel and unusual punishments against PoWs.<sup>28</sup> These agreements, while aiming to provide more protection for PoWs, were proved to be inadequate, first and foremost, because these agreements came into existence almost at the end of the war,<sup>29</sup> when atrocities had already been committed. Besides, they were based, using the words of the ICRC, on the principle of reciprocity than the principle of justice since the belligerents aimed to secure their own advantages rather than to serve the cause of humanity.<sup>30</sup>

Considering these experiences, the 10th International Red Cross Conference of 1921 decided to address the insufficiency of the existing international conventions to afford the PoWs the necessary protection.<sup>31</sup> For this purpose, the Conference proposed sixteen main principles regarding the treatment of PoWs.<sup>32</sup> These principles were aimed to serve, among others, as the basis for an international code that would govern the judicial and disciplinary measures applicable to PoWs.<sup>33</sup> Among these principles, the Conference, emphasizing that the PoWs are entitled to all considerations that are due to every human being, stressed the general principle that any treatment of PoWs should be free of any hostility, and no restriction should be imposed on them unless it was absolutely necessary.<sup>34</sup>

The ICRC, based on Resolution XV of the Conference,<sup>35</sup> established the so-called “Diplomatic Commission”, composed of five members to draft a convention.<sup>36</sup> This commission based its work mainly on the principles approved

25 The first international announcement of such a distinction can be found in Article 28 of the Project of an International Declaration Concerning the Laws and Customs of War of 27 August 1874 expressing that “Prisoners of war are subject to the laws and regulations in force in the army in whose power they are. Arms may be used, after summoning, against a prisoner of war attempting to escape. If recaptured he is liable to disciplinary punishment or subject to a stricter surveillance.” “Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874”, in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts*, Martinus Nijhoff Publishers, Dordrecht, 1988, pp. 22–34.

26 William Evans Sherlock Flory, *Prisoners of War: A Study in the Development of International Law*, American Council on Public Affairs, Washington, DC, 1942, p. 91.

27 See, for example, Article XLIX of the Agreement between the British and German Governments Concerning Combatant Prisoners of War and Civilians (The Hague, 14 July 1918), and Article 84 of the Agreement between the United States of America and Germany Concerning Prisoners of War, Sanitary Personnel, and Civilians (Berne, 11 November 1918), in Howard S. Levie, “Documents on Prisoners of War”, *International Law Studies*, Vol. 60, pp. 110 and 131, respectively.

28 Agreement between the United States of America and Germany, *Ibid.*, Arts 74–5, pp. 128–9.

29 Le code du prisonnier de guerre, above note 24, p. 104.

30 *Ibid.*, p. 105.

31 Compte Rendu, Dixième Conférence Internationale de la Croix Rouge, Geneva, 30 March to 7 April 1921, p. 12.

32 These principles were enumerated in Resolution XV, No. 1 adopted by the 10th Conference. *Ibid.*, pp. 218–20.

33 The relevant part of Resolution XV, No. 1 reads as follows: “Un code international de mesures disciplinaires et pénales à appliquer aux prisonniers de guerre fera partie intégrante de cette Convention.” *Ibid.*, p. 218.

34 Resolution XV, No. 1, para. 3. *Ibid.*

35 Resolution XV, No. 2, *ibid.*, pp. 220–1.

36 The names of the members are M. le Dr Ferrière, président, MM. P. Des Gouttes, Edmond Boissier, P. Logoz and G. Werner. Rapport sur la réalisation de la résolution XV de la Xème Conférence

at the 10th Conference, Hague Convention IV, and the agreements that were signed between belligerent powers during the First World War.<sup>37</sup> The draft convention, consisting of 103 articles, was submitted for review to the 11th International Red Cross Conference.<sup>38</sup> In this draft, one chapter was devoted to the code of penal and disciplinary measures as requested by the 10th Conference, consisting of twenty-five articles. According to the ICRC, these provisions reflected the general principle that PoWs are subject to the laws, regulations and orders of the Detaining Power, and set limits on judicial and disciplinary measures by, for example, limiting the duration of disciplinary confinement,<sup>39</sup> prescribing PoWs’ defence rights, and providing for a special procedure in the issuance of the death sentence.<sup>40</sup> At the same time, two other works to develop international rules on treating PoWs were underway: one by the International Law Association<sup>41</sup> and the other by the Russian Red Cross.<sup>42</sup> These three works, which were developed independently, provided similar solutions for almost all the questions.<sup>43</sup> Yet, reference to the notion of exercising the greatest leniency was only mentioned in the draft articles prepared by the ICRC. The ICRC draft Article 49, which was later adopted as Article 52 of the 1929 Convention, had two paragraphs: the first requiring belligerents to consider the greatest leniency in determining whether an offence committed by a PoW should be punished disciplinarily or judicially, and the second, listing a few offences that should be faced only with disciplinary measures, such as minor disobedience, refusing to work without a legitimate reason, violating camp discipline and minor property offences.<sup>44</sup>

The Proceedings of the 1929 Conference reveal that the delegates had no reservation or comment in regard to the inclusion of leniency in treating PoWs. The discussion, rather, was about the second paragraph, listing offences entailing

internationale de la Croix-Rouge, suivi d’un Avant-projet de Convention relative au traitement des prisonniers de guerre (ICRC Report to 11th Red Cross Conference), p. 2.

37 These agreements include agreement between Turkey, Britain and France of 28 December 1917 and 23 March 1918; France and Germany of 26 April 1918; Austria and Serbia of 1 June 1918; Germany and Great Britain of 14 July 1918; Austria–Hungry and Italy of 21 September 1918, and Germany and the United States of 11 November 1918. *Ibid.*, p. 3.

38 *Ibid.*, p. 2.

39 *Ibid.*, p. 11.

40 *Ibid.*, p. 12.

41 The International Law Association in its 30th Conference, held in the Hague in 1921, adopted twenty-three articles as its proposal for international regulations on treatment of PoWs. See *Reglements internationaux proposes par l’International Law Association pour le traitement des prisonniers de guerre*, in Théodore Aubert, “La XXX<sup>me</sup> Conférence de l’International Law Association”, *Revue Internationale de la Croix-Rouge*, Vol. 3, No. 35, 1921, pp. 1087–93.

42 This code was presented to the 11th International Conference. The code provided eight principles including the obligation to treat PoWs with human dignity; see Société Russe de la Croix-Rouge, “Rapport sur l’activité de la Société Russe de la Croix-Rouge du 1<sup>er</sup> août 1922 au 1<sup>er</sup> août 1923”, pp. 10–11, available at: [https://library.icrc.org/library/docs/CI/CI\\_1923\\_043\\_FRE\\_050\\_RU\\_Ra.pdf](https://library.icrc.org/library/docs/CI/CI_1923_043_FRE_050_RU_Ra.pdf).

43 ICRC Report to 11th Red Cross Conference, above note 36, p. 4.

44 Art. 49. “Les belligérants veilleront à ce que les Autorités compétentes usent de la plus grande indulgence dans l’appréciation de la question de savoir si une infraction commise par un prisonnier de guerre doit être punie disciplinairement ou judiciairement. Ne seront, en particulier, passibles que de peines disciplinaires les prisonniers coupables d’insubordination légère, de refus de travailler sans motif légitime, de contraventions à la discipline du camp et de délits de peu de gravité contre la propriété.” *Ibid.*, p. 27.

only disciplinary measures.<sup>45</sup> In this regard, the delegation of Germany proposed to replace the second part of the draft provision with the following “[t]his will in particular be the case in the assessment of the facts which accompanied an escape”, while the delegation of Belgium proposed a third new paragraph that for the same act, no cumulative of penal and disciplinary measure can be applied.<sup>46</sup> This third paragraph was replaced later with the principle of *non bis in idem*,<sup>47</sup> which in the view of the delegates constituted a guarantee in the favour of PoWs.<sup>48</sup> With these changes, Article 52 was adopted by the Conference as follows:

Belligerents shall ensure that the competent authorities exercise the greatest leniency in considering the question whether an offence committed by a prisoner of war should be punished by disciplinary or by judicial measure.

This provision shall be observed in particular in appraising facts in connexion with escape or attempted escape.

A prisoner shall not be punished more than once for the same act or on the same charge.

During the Second World War, the 1929 Convention, “in spite of its imperfections, ... acted as a deterrent on abuses and laid down an average treatment for prisoners of war which seems better, than that meted out to them during the War of 1914–1918”.<sup>49</sup> However, from thirty-five million military personnel in enemy hands between 1939 and 1945, approximately five million lost their lives by atrocities committed,<sup>50</sup> which demonstrated the need to strengthen the protection afforded to PoWs. In light of this, efforts were made to supplement the principles and rules laid down in the 1929 Convention.<sup>51</sup>

For the revision of provisions on penal and disciplinary measures of the 1929 Convention, a special commission was formed under the 1949 Diplomatic Conference composed of delegates from the United States of America, France, the

45 Actes de la Conférence diplomatique convoquée par le Conseil fédéral suisse pour la révision de la Convention du 6 juillet 1906 pour l’amélioration du sort des blessés et malades dans les armées en campagne et pour l’élaboration d’une convention relative au traitement des prisonniers de guerre et réunie à Genève du 1<sup>er</sup> au 27 juillet 1929, C. Deuxième commission (Code des prisonniers de guerre): séances 6, p. 491.

46 Premier sous-commission (juridique et pénale) de la Deuxième commission (Code des prisonniers de guerre), séance du lundi 8 juillet à 16h.30, *ibid.*, pp. 24 and 27.

47 *Ibid.*, p. 491.

48 *Ibid.*

49 Conférence préliminaire des Sociétés nationales de la Croix-Rouge pour l’étude des Conventions et de divers problèmes ayant trait à la Croix-Rouge, Genève, 26 juillet au 3 août 1946 : documentation fournie par le Comité international de la Croix-Rouge, Vol. II. Convention Relative to Prisoners of War, ICRC, 1946, p. 2.

50 S. P. MacKenzie, “The Treatment of Prisoners of War in World War II”, *Journal of Modern History*, Vol. 66, No. 3, 1994, p. 487. MacKenzie explains that during the war the treatment of the PoWs, depending on the nationality of both captive and captor and the period of the war, could range from strict adherence to the terms of the 1929 Convention to severe brutality such as subjecting the Black colonial troops from Senegal captured in 1940 to spurious medical research into racial differences. *Ibid.*, p. 504.

51 Conférence préliminaire des Sociétés nationales de la Croix-Rouge, above note 49, p. 2.



United Kingdom, the Union of Soviet Socialist Republics and the ICRC, to review draft provisions submitted by the 17th Red Cross Conference.<sup>52</sup> Contrary to the 1929 Convention which had one separate provision on attempted escape (Article 51), and one provision (Article 52) on the exercise of leniency, in general, and in appraising facts in connection with escape, in particular, the ICRC “thought it advisable to merge into one single Article the stipulations of the former Art. 51 and 52, with the exception of Section 3 of Art. 52 [*non bis in idem*]”.<sup>53</sup> As this formulation could give the impression that the exercise of leniency would be mainly applicable in regard to offences connected with escape,<sup>54</sup> the special commission recommended that leniency “should apply to the whole Chapter, and therefore reflected it in a new separate article”.<sup>55</sup> The importance of the general application of leniency was so obvious that during the discussion on the applicable law, the delegate of the United Kingdom requested its inclusion in the provision of applicable law by stating that:

Article 52 of the Convention of 1929 ... was precisely an Article included in the “General Provisions” of Chapter III ... it [is] logical to maintain this rule and to write in the same Article [on applicable law] the principles of the limitation of legislation and the leniency in appreciating the question whether a breach committed by a prisoner of war should involve a disciplinary or a judicial penalty.<sup>56</sup>

In response, the ICRC delegates recommended not including the reference to leniency in that article because it should “be limited to ‘*droit applicable*’”.<sup>57</sup> Finally, Article 83 as a new article, titled “Choice of Disciplinary or Judicial Proceedings”, was adopted unanimously.<sup>58</sup> In this way, the exercise of the greatest leniency as a separate independent obligation of conduct<sup>59</sup> entered into GC III, and its placement at the beginning of Chapter III as well as its

52 1949 Diplomatic Conference, above note 8, Vol. II, p. 303.

53 The records do not contain the reasons why the ICRC found such a formulation advisable. See ICRC, Draft Revised or New Conventions for the Protection of War Victims Established by the International Committee of the Red Cross with the Assistance of Government Experts, National Red Cross Societies and Other Humanitarian Associations, ICRC, May 1948 (ICRC Draft to the 17th International Red Cross), pp. 110–11.

54 Article 83 of the draft convention, adopted by the 17th International Red Cross Conference in Stockholm of August 1948 to be submitted to 1949 Diplomatic Conference, read as follows: “Escape, or attempt to escape, even if it is a repeated offence, shall not be deemed an aggravating circumstance... *Belligerents shall see that the responsible authorities exercise the greatest leniency in deciding whether an infraction committed by a prisoner of war shall be punished by disciplinary or judicial measures, particularly in respect of acts committed in connexion with the escape, whether successful or not ...*” In Revised and new Draft Conventions for the protection of war victims: texts approved and amended by the XVIIth international Red Cross Conference, Revision of the Convention Concluded at Geneva on July 27, 1929, Relative to the Treatment of Prisoners of War, ICRC, 1948, p. 85 (emphasis added).

55 1949 Diplomatic Conference, above note 8, Vol. II, p. 304.

56 *Ibid.*, p. 484.

57 *Ibid.*

58 *Ibid.*, p. 500.

59 Commentary, above note 15, on Art. 83, para. 3588.

formulation in a distinct article reinforces its application to the whole Chapter on penal and disciplinary sanctions.

## **The implications of the obligation to exercise the greatest leniency**

The provisions of Chapter III of GC III prescribe the obligations of the Detaining Power with respect to disciplinary and criminal procedures as well as sanction measures taken against PoWs. These obligations are formulated to safeguard the life and wellbeing of accused and convicted PoWs. These provisions encompass general and specific protections applicable during pre-trial, trial and post-trial stages of judicial/disciplinary proceedings. In this regard, Article 83 has a special function since it also addresses an obligation of the detaining authorities before instituting any procedure. Having this in mind, in the first section, we briefly discuss the differences between judicial and disciplinary processes as well as the reasons why the latter should in general be preferred. In the next sections, the paper analyses the safeguards provided for PoWs during proceedings or under punishment and discusses how the obligation to exercise the greatest leniency will influence their interpretation and application. It will be argued that while most of the safeguards in Chapter III, as well as general obligations, like humane treatment, reflect the minimum standards, the leniency consideration in essence is an appeal to go further than this threshold.

### **General preference for disciplinary proceedings**

GC III does not predetermine the choice of proceedings in all cases, yet for certain offences<sup>60</sup> it provides that only disciplinary sanctions can be applied. For other offences, leniency considerations, as reflected in Article 83, call the Detaining Power to adopt disciplinary measures wherever possible. This formulation may suggest that the drafters of the Convention gave a general preference to disciplinary procedures.

Generally, it is accepted that it is the nature of the alleged offence that determines the choice of proceedings and, thus, as mentioned in the ICRC Commentary on Article 82, “disciplinary measures cover minor offences that can be imposed by a camp commander without a trial, whereas judicial measures are taken in response to more serious, criminal offences after trial proceedings”.<sup>61</sup> In

60 For example, Article 82(2) instructs the Detaining Power to assure that sanctioning the violations of the rules which are enacted to ensure the order in the camp are only through disciplinary measures. Also, Articles 92 and 93 on unsuccessful escape and connected offences. Examples of other offences that are not listed explicitly in the Convention, especially under Article 93(2), but that may equally give rise to disciplinary sanctions only, are the use of forgeries (e.g. counterfeit money), violations of traffic regulations, the abandonment of military equipment, or bribery, as long as they are committed with the sole intent of facilitating the escape. Commentary, above note 15, on Art. 93, para. 3862.

61 *Ibid.*, commentary on Art. 82, para. 3573. According to Article 96(2), disciplinary punishments may be imposed by superior military authorities, the camp commander, a responsible officer according to the

this regard, it is important to note that the part of Article 83 addressing the choice of proceedings based on leniency considerations has a limited scope compared with Article 52 of the 1929 Convention,<sup>62</sup> because the former subjects the choice of disciplinary measures to “wherever possible”. However, this discretion granted to the Detaining Authority should be always be applied in a lenient way.<sup>63</sup> In other words, the adoption of disciplinary measures, in principle, seems to be possible except where the applicable law, in a specific manner, restricts the authorities from choosing measures other than judicial proceedings and sanctions.<sup>64</sup>

Having said that, as will be discussed in the following sections, the rights and guarantees available for PoWs in disciplinary procedures compared with those provided for judicial proceedings are minimal.<sup>65</sup> This is why the Commentary argues that certain aspects of judicial proceedings could make them more lenient to an accused prisoner.<sup>66</sup> On this basis, the ICRC provides that in the implementation of the rule contained in Article 83 and to ensure the exercise of the greatest leniency, in each case the competent authorities of the Detaining Power will need to determine “whether judicial or disciplinary proceedings are more lenient”.<sup>67</sup> In other words, when the Convention does not specifically call for disciplinary punishments,<sup>68</sup> and it is obvious that judicial proceedings result in more respect for fair trial standards, the obligation to ensure the exercise of the greatest leniency may result in choosing the judicial proceedings. Of course, such a decision is only warranted when the impossible penal punishments foreseen under the domestic law are not more severe than the disciplinary measures prescribed under Article 89(1).

established rules, an officer to whom the camp commander has delegated such a power, or in some occasions, by courts.

62 Article 52 did not refer to “proceedings”; rather it used the phrase “punished by disciplinary or by judicial measure”. In this regard it is important to note that the French version of Article 52 used the phrase “être punis disciplinairement ou judiciairement” which is exactly the same as the French version of the first part of Article 83 addressing the exercise of leniency in deciding the kind of “proceedings”. The two ICRC commentaries emphasize that both English and French versions must be interpreted as requiring leniency in the case of both proceedings and punishments. Commentary, above note 15, on Art. 83, para. 3593; 1960 Commentary, above note 13, on Art. 83, p. 410. Thus, it can be argued that Article 52 of the 1929 Convention by using the term “measure” addressed both proceedings and sentences. See, also, military manuals of different countries, for example, Rule 9.26.2, Leniency in Favor of Disciplinary Rather Than Judicial Proceedings, *U.S. Department of Defense Law of War Manual*, 2015, p. 617; Rule 8.116, *UK Manual of the Law of Armed Conflict (JSP 383)*, 2013, p. 187.

63 It is noteworthy that the principle of *in dubio pro reo*, known in the common law doctrine as the “rule of lenity”, also directs courts to construe ambiguities in favour of criminal defendants. See, for example, Zachary Price, “The Rule of Lenity as a Rule of Structure”, *Fordham Law Review*, Vol. 72, No. 4, 2004, p. 885.

64 An example can be the case of mandatory sentencing provided by law for a specific crime limiting the discretion of competent authorities. For further details, see Anthony Gray, “Mandatory Sentencing Around the World and the Need for Reform”, *New Criminal Law Review: An International and Interdisciplinary Journal*, Vol. 20, No. 3, 2017.

65 In the same vein, while Article 15 of the U.S. Uniform Code of Military Justice authorizes the commander to opt for non-judicial punishment, a soldier can refuse it and instead demand trial by court-martial. U.S. Congress, 1958, United States Code: Uniform Code of Military Justice, 10 U.S.C. §§ 801–940.

66 Commentary, above note 15, on Art. 83, para. 3594.

67 *Ibid.*, para. 3595.

68 For example, GC III, Arts 82(2) and 93(2).

## Applicable legal regime

GC III provides that PoWs shall be subject to the laws, regulations and orders *in force in the armed forces of the Detaining Power*<sup>69</sup> until the captivity ends.<sup>70</sup> This provision, the so-called “principle of assimilation”, first appeared in the Hague Regulations of 1899 and 1907<sup>71</sup> and the 1929 Convention reconfirmed it.<sup>72</sup> This principle, as described in the Commentary, “seeks to avoid prisoners of war being placed in a less favourable position than members of the armed forces of the Detaining Power”.<sup>73</sup> Here, it is worth mentioning that the application of GC III is not limited only to nationals of the parties to the conflict; rather, it will be applied to all those who are members of one party’s armed forces. The Commentary on Article 87 confirms this by interpreting the lack of duty of allegiance of PoWs as owing “fidelity and obedience not to the Detaining Power, but to their country of origin”.<sup>74</sup> In the ICRC view, the “country of origin” means the Power on which the prisoner “depends”, and not the Power of nationality.<sup>75</sup> This interpretation, despite the clear reference to nationality in Articles 87(2) and 100(3) of GC III, does not enumerate nationality as a factor for granting PoW status under Article 4 of GC III. The Commentary on Article 4, by using the term “clemency”, seems to apply the leniency considerations to expand the protective power of the Convention to PoWs with dual nationality<sup>76</sup> or those who are nationals of the Detaining State.<sup>77</sup> The Commentary emphasizes that Articles 87 and 100 “encourage *clemency* in these circumstances, given that each Party to a conflict requires the allegiance of its armed forces and, therefore, prisoners of war should not be punished for their allegiance to the State on which they depend”.<sup>78</sup>

The application of the principle of assimilation, as explained by the Commentary, “constitutes one, but not necessarily the governing, benchmark for determining the judicial and disciplinary treatment owed to prisoners of war”.<sup>79</sup> Hence, while any offence committed by a PoW shall be sanctioned by measures in accordance with the domestic laws, regulations and orders of the Detaining

69 GC III, Art. 82(1) (emphasis added).

70 Sandra Krähenmann, “Protection of Prisoners in Armed Conflict”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 4th ed., Oxford University Press, Oxford, 2021, p. 439.

71 Hague Conventions, Art. 8.

72 1929 Convention, Art. 45(1).

73 Commentary, above note 15, on Art. 82, para. 3565.

74 *Ibid.*, commentary on Art. 87, para. 3679.

75 *Ibid.*, commentary on Art. 4, para. 971.

76 *Ibid.*, para. 973.

77 For a detailed historical analysis of this phenomenon, see Arnold Krammer, *Prisoners of War: A Reference Handbook* (Contemporary Military, Strategic, and Security Issues), Greenwood Publishing Group, Westport, CT, 2008, pp. 9–11.

78 Commentary, above note 15, on Art. 4, para. 971 (emphasis added). The Commentary elaborates further that “granting prisoner of war status to a State’s own nationals does not exclude the possibility of prosecuting such individuals for treason, meaning that there is no need to deny such status in order to punish this or similar acts”. *Ibid.*, para. 972. See, also, Howard S. Levie, Preliminary Problems, in “Prisoners of War in International Armed Conflict”, *International Law Studies*, Vol. 59, 1978, p. 76.

79 Commentary, above note 15, on Art. 82, para. 3577.

Power in force at the time of the offence was committed,<sup>80</sup> such application is not unconditional. As the second part of Article 82(1) stipulates, only proceedings or punishments that are compatible with the provisions of Chapter III of the Convention shall be allowed.<sup>81</sup> In other words, irrespective of whether the legal system of the Detaining Power can be categorized as monist or dualist,<sup>82</sup> in cases where domestic laws are not compatible with the requirements of this Chapter, the Detaining Power is requested to directly apply the provisions of the Convention.<sup>83</sup> This, however, does not mean that if domestic laws provide for more protection than what is accorded to PoWs under international law, the application of domestic law will be suspended. The provisions of GC III are aimed to ensure the international minimum standards of treatment of PoWs, acknowledging the fact that national laws may vary widely.<sup>84</sup> Thus, as explained by the ICRC, the last sentence of Article 82(1) “indicates an upward exemption to the principle of assimilation” so as to bar the application of domestic laws that fall below the minimum standards set by these provisions, “not if they go beyond them and provide for greater protection”.<sup>85</sup> Moreover, although the text of this Article only refers to the provisions of one Chapter, it cannot be read as releasing the Detaining Power of its general obligations under the other provisions of the Convention, and, first and foremost, the general obligation to treat PoWs humanly *at all times* under Article 13(1). In other words, the obligation to provide humane treatment at all times will prevail over the principle of assimilation if national legislation does not guarantee humane treatment of the Detaining Power’s own forces. The Commentary emphasizes that the term “at all times” has to be read in an inclusive way in order to exclude any argument against this provision including any justification of acts or omissions inconsistent with the requirements of humane treatment.<sup>86</sup>

80 GC III, Art. 82(1).

81 For example, in the defence doctrine of Australia, it is provided that “The types of disciplinary punishments available are set out in G.[C] III. The duration of any punishment cannot exceed 30 days.” Australian Defence Force, Australian Defence Doctrine Publication 06.4 (ADDP 06.4): Law of Armed Conflict, para. 10.52, 10–12.

82 For further discussion, see Philip Allott, “The Emerging Universal Legal System”, in Janne E. Nijman and André Nollkaemper (eds), *New Perspectives on the Divide between National and International Law*, Oxford University Press, Oxford, 2007.

83 Whenever the laws and regulations of the Detaining Power do not provide disciplinary sanctions compatible with Article 89, the detaining authority is required to directly apply this Article and choose disciplinary sanctions from its list. Commentary, above note 15, on Art. 89, para. 3743.

84 For further discussion, see *ibid.*, on Art. 82, para. 3575.

85 *Ibid.*, para. 3577.

86 *Ibid.*, commentary on Art. 13, para. 1580. In the same vein, the Human Rights Committee confirmed that the principle of humane treatment applies to all times and situations and is a non-derogable obligation. General Comment No. 29: States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001 (General Comment 29), para. 13(a). Other international obligations of the Detaining State, including those under applicable human rights treaties, have to be also taken into account. See Daragh Murray, “Prisoners of War and Internment”, in Daragh Murray (author), Elizabeth Wilmshurstin, Françoise Hampson, Charles Garraway, Noam Lubell and Dapo Akande (eds), *Practitioners’ Guide to Human Rights Law in Armed Conflict*, Oxford University Press, Oxford, 2016. For a detailed analysis of the influence of human rights obligations on military disciplinary process, see

Another point regarding the application of domestic laws is about laws enacted specifically for PoWs. Article 82 in its second paragraph contains an important limitation in enforcing the laws of the Detaining Power that are specifically enacted for PoWs. No similar provision existed in the 1929 Convention. The experience of the Second World War, when certain Detaining Powers enacted special legislation for PoWs and imposed heavy penalties for their violations, led the drafters to include this provision as a necessary safeguard.<sup>87</sup> Article 82(2) instructs the Detaining Power not to sanction the violation of these specifically designated regulations by penal punishments. In this way, Article 82(2), which is also derived from leniency considerations, in the words of the Commentary “goes further than the general leniency clause set out in Article 83, as it excludes the option of imposing penal sanctions for offences that can only be committed by prisoners of war”.<sup>88</sup>

PoWs can also be prosecuted under the laws of the Detaining Power for the acts committed before their capture, but according to Article 85 they retain, even if convicted, the benefits of the Convention. Retaining the benefits of the Convention would mean that prior acts which were compatible with IHL,<sup>89</sup> such as targeting military objectives, cannot be prosecuted by the Detaining Power even if they are considered as a breach of its laws.<sup>90</sup> Moreover, apart from the rules of the national law, the benefits that are prescribed by GC III, such as the general rule of exercising leniency under Article 83 and the provision of Article 102, requiring the PoWs to be tried by the same courts and according to the same procedures of the armed forces of the Detaining Power, must also be applied when the Detaining Power is prosecuting PoWs for offences committed before their capture.<sup>91</sup>

Article 85 should be read in conjunction with the principle of legality. This principle, first, prohibits the imposition of a penalty that was not foreseen at the time the crime was committed, as enshrined in Article 87(1), and second, it establishes that no one may be held responsible for a crime on account of an act or omission that did not constitute a criminal offence under domestic or international law, as

Peter Rowe, “Human Rights and the Disciplinary Process”, in P. Rowe, *The Impact of Human Rights Law on Armed Forces*, Cambridge University Press, Cambridge, 2005.

87 Commentary, above note 15, on Art. 82, para. 3579.

88 *Ibid.*, para. 3581.

89 Commentary refers to this category as “combatant immunity” or “combatant privilege”. *Ibid.*, commentary on Art. 85, para. 3634.

90 See, also, Peter Rowe, “The Trial of Prisoners of War by Military Courts in Modern Armed Conflicts”, in C. Harvey, J. Summers and N. White (eds), *Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe*, Cambridge University Press, Cambridge, 2014, p. 326.

91 This emphasis is important since at the time of the adoption of GC III, practice existed to deprive PoWs from the benefits of the Convention for offences committed “before” becoming a PoW. See 1960 Commentary, above note 13, on Art. 85, p. 423. See also the *Yamashita* case in which the US Supreme Court held that the corresponding provision to Article 102 in the 1929 Convention about “same court”, “same procedure” was not applicable to those accused of war crimes because the Article was directed “for an offense committed while a prisoner of war, and not for a violation of the law of war committed while a combatant”. *Yamashita* case, 317 U.S. 1; 66 S. 340, Judgment, 4 February 1946, para. 4(b), p. 20. Levie argues that in adopting Article 85, the drafters aimed to depart from the finding in the *Yamashita* case. H. S. Levie, above note 23, pp. 463–4. The implications of GC III, Art. 102 are discussed in the “Exercising leniency during the proceedings” section.

expressed in Article 99(1). The reference to international law in Article 99(1) demonstrates that PoWs may be prosecuted for a crime even if the conduct in question was not prohibited under the domestic law of the Detaining Power at the time of the act.<sup>92</sup> However, the benefits of GC III, including the application of leniency considerations, in cases where PoWs are prosecuted or sentenced under international law for pre-capture offences will be retained.<sup>93</sup>

The Convention does not address the case of disparities between domestic law and international law beyond the minimum provisions mentioned thereto. This may arise specially for the prosecution of international crimes. For example, if the domestic law of the Detaining Power criminalizes the recruitment of children under 18 years old, while the age limit under customary international law is 15 years old,<sup>94</sup> it will not be clear whether the rules of international law should prevail or the domestic law. The answer to this question is not straightforward but may be inferred from the application of the principle of legality. This principle requires that the laws in force be reasonably foreseeable to the accused at the time the act or omission took place.<sup>95</sup> Foreseeability of a crime for an accused would mean that the person must be able “to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”.<sup>96</sup> For these reasons, the Commentary, while emphasizing that Article 99(1) “does not provide an accused prisoner of war with a defence to plead ignorance of the law”,<sup>97</sup> considers it to be implicit in the principle of legality that

92 Commentary, above note 15, on Art. 99, para. 3959.

93 See H. S. Levie, above note 23, pp. 464–5; Commentary, above note 15, on Art. 85, para. 3629. The review of the historical context of Article 85 shows that one of the underlying reasons for its adoption was to ensure the continued application of the Convention for those prosecuted and convicted for international law crimes. During the Second World War, and in the absence of any explicit reference on the subject in the 1929 Convention, many national courts prosecuting PoWs for alleged war crimes on the basis of international law had announced “[i]t is a recognised rule that a person accused of having committed war crimes is not entitled to the rights in connection with his trial laid down for the benefit of prisoners of war by ... Convention of 1929.” United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, 1947–1949, London, 1948, Vol. III, p. 50. The French Court of Appeal in 1946, as a corollary to this rule, held that Robert Wagner, the German head of government of Alsace, was not entitled to the rights provided for a PoW under French Law. See *Trial of Robert Wagner*, in *ibid.* The same considerations led the following States to formulate reservations to exclude PoWs convicted for war crimes and crimes against humanity from the scope of Article 85: Angola, China, the Democratic People’s Republic of Korea, the Russian Federation and Vietnam. See Commentary, above note 15, paras 3642–6.

94 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rul\\_rule136](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule136) Rule 136, Recruitment of Child Soldiers.

95 International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Milan Milutinović, Nikola Šainović & Dragoljub Ojdanić*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise* (Appeals Chamber), 21 May 2003, para. 37.

96 European Court of Human Rights, *Cantoni v. France*, Application No. 17862/91, Judgment (Grand Chamber), 15 November 1996, para. 35. See also International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Enver Hadžihasanović, Mehmed Alagic and Amir Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (Appeals Chamber), 16 July 2003, para. 35. For further discussion, see Alexandre Skander Galand, “Article 13 (b) vs Principle of Legality”, in A. S. Galand, *UN Security Council Referrals to the International Criminal Court*, Brill, Leiden, The Netherlands, 2019, p. 144.

97 Commentary, above note 15, on Art. 99, para. 3963.

such laws should be reasonably foreseeable to the accused PoW.<sup>98</sup> The Commentary does not elaborate what “reasonably foreseeable” means; however, it can be argued that if customary international law does not prohibit an act, it is difficult to say that the law of the Detaining Power providing for a different threshold than what is foreseen under international law is reasonably foreseeable to a PoW.

In practice, the prosecution of PoWs for prior offences may raise several legal and political challenges. For example, the trials of 195 Pakistani PoWs handed over by India to Bangladesh for acts of genocide and crimes against humanity were never held, as an agreement was reached between India, Pakistan and Bangladesh (through the Indian negotiator) for the release of accused PoWs for the future recognition of Bangladesh.<sup>99</sup> The other case concerns the captivity of Captain Alfredo Astiz during the Falkland Islands/Islands Malvinas conflict. While in the hands of the UK as a PoW, Astiz was charged by France and Sweden for the kidnapping and torture of hundreds of civilians, not at the time of the conflict but before the outbreak of hostilities.<sup>100</sup> The UK did not initiate any proceedings against him not only because the alleged conduct occurred outside the context of the battlefield, but also because “[t]he fact that Astiz was under British control solely because of his capture during armed conflict might lend support to the view that he should be dealt with more leniently”.<sup>101</sup> Thus, despite the request for his extradition, the UK repatriated him to Argentina.<sup>102</sup>

Another well-known example is the case of Manuel Noriega who was detained as a PoW in 1990. He was charged with drug trafficking offences before the outbreak of armed conflict between the United States and Panama. The US court’s explanation for the non-relevance of leniency considerations in the evaluation of his offences is revealing:

The humanitarian character of the Geneva Convention cannot be overemphasized, and weighs heavily against Defendants’ applications to the Court. GC III was enacted for the express purpose of protecting PoWs from abuse after capture by a detaining power. The essential principle of *tendance liberale*, pervasive throughout the Convention, promotes lenient treatment of PoWs on the basis that, not being a national of the detaining power, they are not bound to it by any duty of allegiance. Hence, the “honorable motives” which may have prompted his offending act must be recognized ... That such motives are consistent with the conduct and laws of war is implicit in the principle. Here, the Government seeks to prosecute Defendants for alleged narcotics trafficking and other drug-related offences, activities which

98 *Ibid.*, para. 3962.

99 Pakistan even filed a dispute at the International Court of Justice which was later discontinued. See International Court of Justice, *Trial of Pakistani Prisoners of War*, Order of 15 December 1973, *ICJ Reports* 1973, p. 347. For further discussion, see Donald N. Zillman, “Prisoners in the Bangladesh War: Humanitarian Concerns and Political Demands”, *The International Lawyer*, Vol. 8, No. 1, 1974.

100 Michael A. Meyer, “Liability of Prisoners of War for Offences Committed Prior to Capture: The Astiz Affair”, *International and Comparative Law Quarterly*, Vol. 32, No. 4, 1983, pp. 952–3.

101 *Ibid.*, p. 963.

102 *Ibid.*, p. 954.



have no bearing on the conduct of battle or the defense of country. The fact that such alleged conduct is by nature wholly devoid of “honorable motives” renders *tendance liberale* inapposite to the case at bar.<sup>103</sup>

## Exercising leniency during the proceedings

GC III, as discussed above, regulates the proceedings against PoWs in two cumulative ways: the principle of assimilation, together with prescribing the minimum standards that should be applied independently of the laws and regulations of the Detaining Power. The principle of assimilation was integrated, *inter alia*, to overcome the need of establishing a detailed code of punitive procedures for PoWs.<sup>104</sup> Through this principle, developments in international law, including in human rights law, since the adoption of the Geneva Conventions will be applicable to the proceedings against PoWs.<sup>105</sup> With this in mind, this section reviews the rules in the Convention applicable to disciplinary and penal proceedings and the possible instances of the application of the obligation to exercise leniency.

The first provision regarding procedural issues can be found in Article 84, placed in the general provisions of the Chapter on judicial and disciplinary measures that establishes the competence of military courts for the trial of PoWs. This Article also permits PoWs trial in civilian courts only in accordance with the principle of assimilation, meaning only when such jurisdiction has been expressly granted to civilian courts to try the members of the armed forces of the Detaining Power for the same offence.<sup>106</sup> The presumption in favour of the competence of military courts for PoWs *with combatant status* can be explained by the fact that “the military courts of that State ... possess the necessary expertise to deal with any alleged offence the prisoners might commit against ... [military] laws”.<sup>107</sup> It can also be added that the military experience of the judges and their familiarity with military honours and loyalty may make the exercise of leniency even more possible. This is because a PoW is “subject more than anyone else to the

103 *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990), Opinion: Omnibus Order, William M. Hoeveler, United States District Judge, No. 88-79-CR, 8 June 1990, at 1529.

104 Commentary, above note 15, on Art. 103, para. 4022.

105 See, for example, General Comment 29 stating that “fundamental principles of fair trial” may never be derogated from (above note 86, paras 11 and 16); also, General Comment no. 35 of the Human Rights Committee stating that the “procedural guarantees protecting liberty of person may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights”. Human Rights Committee, General Comment No. 35. Article 9 (Liberty and Security of Person), UN Doc. CCPR/C/GC/35, 16 December 2014, para. 67.

106 Commentary, above note 15, on Art. 84, para. 3596. For example, in 1996, amendments were made to the Guatemalan Military Code limiting the jurisdiction of military tribunals to strictly military offences, and granting the ordinary courts jurisdiction over ordinary offences committed by military personnel. Military Code (Decree No. 214 - 1878/09/15. Last amendment: Decree No. 41-96 - 1996/07/10), Art. 1. See also principle 4 of the draft principles governing the administration of justice through military tribunals in the Report submitted by the Special Rapporteur, Emmanuel Decaux, Administration of Justice, Rule of Law and Democracy, Issue of the Administration of Justice Through Military Tribunals, UN Doc. E/CN.4/Sub.2/2005/9, 16 June 2005.

107 Commentary, above note 15, on Art. 84, para. 3600.

influences which are generally recognized as extenuating circumstances: extreme distress, great temptation, anger or severe pain”,<sup>108</sup> and a judge with a military background may better understand the special situation of PoWs as prescribed by Article 87(2).

The provision of Article 84 has to be read together with Article 102, which expressly mentions that the courts and the procedures for PoWs should be the “same” as in the case of members of the armed forces of the Detaining Power.<sup>109</sup> The principle of assimilation in regard to the courts and procedures, like other provisions of the Convention, is subject to observing the minimum requirements set by GC III. In this regard, Article 84(2) prohibits, in absolute terms, the trial of PoWs in any court that does not comply with the requirements of independence and impartiality or proceeds under procedures that fail to afford the accused the rights and means of defence provided in Article 105. These requirements are aimed to ensure fair trial of PoWs. The requirement of independence refers, in particular, to procedures and qualifications for the appointment of judges, and the actual independence of the judiciary from political interferences.<sup>110</sup> The requirement of impartiality indicates that judges should be free of “personal bias or prejudice, nor harbour preconceptions” (the subjective element), and that the general appearance of the court is also seen impartial (the objective element).<sup>111</sup> While enacting effective and appropriate laws and regulations may ensure the independence and the objective impartiality of the courts even during the time of armed conflict, it is difficult for a national judge to be always free of any hostile feelings against an enemy combatant who will be judged by him/her. Here lies the value of ensuring general positive discrimination against PoWs by commending the exercise of the greatest leniency.

108 1960 Commentary, above note 13, on Art. 83, p. 411.

109 By using the term “same court”, the Convention bans the establishment of an *ad hoc* court only to try PoWs, which, in the ICRC view, is “an essential safeguard against arbitrary action by the Detaining Power”. Commentary, above note 15, on Art. 102, para. 4010. Similarly, the term “same procedure” means that a special procedure may not be set up for PoWs depriving them of the rights and means of defence enjoyed by the members of the Detaining Power’s own forces. *Ibid.*, commentary on Art. 84, para. 3617. The use of the generic term “same procedure” in this Article cannot be only limited to the sentencing stage of judicial proceedings. In the ICRC view, for the purpose of application of the principle of assimilation, “procedural rights under domestic law that are available to one’s own forces during and prior to trial must also be afforded to prisoners of war”. *Ibid.*, commentary on Art. 102, para. 4012. This would consequently bring into play the applicable human rights law during the investigation process. The application of the principle of fair trial to the proceedings as a whole, and not only the trial, is endorsed in Human Rights Committee, General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, UN Doc. CCPR/C/GC/32, 23 August 2007 (General Comment 32). See, also, European Court of Human Rights, *Negulescu v. Romani*, Application no. 11230/12, Judgment, 16 February 2021, paras 39–42.

110 General Comment 32, *ibid.*, para. 19. See, also, Mechanism for International Criminal Tribunals, *Prosecutor v. Augustin Ngirabatware*, Case No. MICT-12-29-R, Order to the Government of the Republic of Turkey for the Release of Judge Aydin Sefa Akay (Appeals Chamber), 31 January 2017, para. 11.

111 General Comment 32, above note 109, para. 21. See also International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1, Appeal Judgment (Appeals Chamber), 21 July 2000, para. 189.

Article 100(3) regarding the issuance of the death sentence against PoWs should also be read and understood on the basis of the above consideration. This Article provides that unless the court’s attention has been drawn to the particular situation of a PoW, the death sentence should not be pronounced. It is said that this Article, reiterating the provision found in Article 87(2), provides extenuating circumstances for the reduction of the punishment.<sup>112</sup> On this basis, it can be argued that the consideration of the particular situation of a PoW in issuing the death sentence can be also seen as a necessary element in ensuring the impartiality of the court.

In addition to the requirements of independence and impartiality, Article 84(2) also prohibits a trial process that takes place without respecting the rights and means necessary for an accused PoW to conduct a proper defence. These rights, as enumerated under Article 105, are the right to have an assistant, to have an advocate or counsel to defend, to call witnesses, to have the services of a competent interpreter, to be informed in due time about his/her rights, to be informed of the charges and other relevant documents, as well as supervision of the trial by the Protecting Power.<sup>113</sup>

Although Article 105 is silent about its application to the appeal process, it is logical to assume that such guarantees and means of defence should be available as well during the appeal proceedings otherwise the process will be devoid of real meaning.<sup>114</sup> It is important to note that Article 106 provides that PoWs shall have the right of appeal or petition “*in the same manner as the members of the armed forces of the Detaining Power*”.<sup>115</sup> The Commentary, however, submits that the right to appeal is a substantive right and a fundamental procedural guarantee of international law that must be available to PoWs,<sup>116</sup> at all times irrespective of the domestic laws applicable to the members of the armed forces of the Detaining Power.

Furthermore, while Article 106 is silent about the application for pardon, in line with the principle of assimilation and the exercise of leniency towards PoWs, the Commentary reflects and endorses the State practice of interpreting the term

112 1960 Commentary, above note 13, on Art. 100, p. 474; and Commentary, above note 15, on Art. 100, para. 3990.

113 This Article, however, is silent about the presence of the PoW at one’s own trial. Yet, Article 99(3), in enumerating the general principles applicable to judicial procedure, commends that no PoW can be convicted “without having had an opportunity to present his defence...”, which suggests that the presence of the accused in the trial is necessary. Commentary, above note 15, on Art. 99, para. 3977, and on Art. 105, para. 4101.

114 *Ibid.*, commentary on Art. 106, paras 4142 and 4149

115 Not all the countries at the time of the adoption of GC III had foreseen the right of appeal for their armed forces; for example, see Canadian Law Concerning Trials of War Criminals by Military Courts, 31 August 1946, in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, 1947–1949, London, 1948, Vol. IV, p. 130. Emphasis added.

116 Commentary, above note 15, on Art. 106, para. 4152. GC III does not encompass any explicit right to appeal from disciplinary measures. Yet, Article 96(5) stipulates that a record of disciplinary punishments shall be maintained for the inspection by representatives of the Protecting Power. Reviewing how the camp commanders exercise their disciplinary powers is, therefore, an essential tool of oversight of the administration of PoW camps.

“petition” in Article 106 as including application for various forms of clemency existing in the legal system of the Detaining Power.<sup>117</sup>

The provisions of Article 84 regarding essential requirements of impartiality and independence, as well as the rights and means of defence and other safeguards,<sup>118</sup> not only extend to trial but should also apply to pre-trial investigations.<sup>119</sup> Therefore, although Article 103 does not entail any specific requirement regarding investigation except that it should be conducted rapidly, the minimum standards of fair trial as well as general obligations under the Convention, such as the principle of legality as well as leniency considerations, should be taken into account. Moreover, the prohibition of any form of moral or physical coercion upon PoWs in order to induce confession, as reflected in Article 99(2), should also be respected during the investigations both in judicial and disciplinary procedures.<sup>120</sup>

GC III does not elaborate on how investigation in disciplinary procedures should be carried out. The ICRC commentaries consider such an investigation as “proper determination of facts”.<sup>121</sup> According to Article 96(4) the accused PoW should be provided with the opportunity of not only “defending himself” but also “explaining his conduct”. Assumably the latter goes beyond providing a legal defence; hence, it can be argued that the “proper determination of facts” may include the consideration of the special situation of the accused PoW that calls for a more lenient approach. This reading can be understood from Article 52(2) of the 1929 Convention which expressly calls for the exercise of leniency “*in appraising facts* in connexion with escape or attempted escape”.<sup>122</sup>

## Exercising leniency in sentencing and executing disciplinary and penal measures

Article 87(2) justifies the implementation of leniency considerations in fixing penalties. This justification derives from the fact that a PoW is not bound to the Detaining Power by any duty of allegiance. Moreover, this Article emphasizes that a PoW is in the hands of the Detaining Power against his/her independent

117 *Ibid.*, commentary on Art. 106, para. 4158.

118 Other safeguards are the conditions of validity set in Article 102 of GC III. See, also, Noam Lubell, Jelena Pejic and Claire Simmons, “Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice”, Geneva Academy of International Humanitarian Law and Human Rights and ICRC, Geneva, September 2019, Guideline 11, paras 154–6.

119 Commentary, above note 15, on Art. 103, para. 4027.

120 According to the ICRC, the coercion in the context of Article 99(2) differs from the notion of torture since, among others, “the conduct constituting coercion does not necessarily need to cause pain or suffering to meet the required threshold of severity for it to constitute torture”. *Ibid.*, commentary on Art. 99, para. 3972.

121 *Ibid.*, commentary on Art. 96, para. 3898; 1960 Commentary, above note 13, on Art. 96, p. 458. GC III, Articles 95 and 96 provide the minimum standards of due process by limiting the instances of PoWs’ confinement awaiting hearing, prescribing an immediate investigation, designating the competent authority and enumerating the means of defence available to the accused.

122 GC III further enumerates certain rights of the accused during the disciplinary procedures such as the right to receive information regarding the alleged offence, and the opportunity to defend, including by calling witnesses, as well as having recourse to an interpreter. GC III, Art. 96(4) (emphasis added).

will. As a result, the courts and competent authorities of the Detaining State are allowed to reduce the penalty for a particular violation or crime to less than the minimum punishment foreseen for members of their armed forces. Additionally, as discussed above, the Convention provides that the Detaining Power in implementing the principle of assimilation is not permitted to impose sanctions and penalties on PoWs in contrast with the provisions of the Convention including Article 13(1). In this section, the impact of leniency considerations in sentencing and executing penalties will be examined. Before doing so, it is important to recall that the domestic laws and regulations that differ from the provisions of GC III prevail whenever these regulations provide for greater protection.<sup>123</sup>

### *General and specific provisions on penal and disciplinary sanctions*

Article 87(3) lays down the most important general prohibitions in fixing and implementing the sanctions. This provision prohibits collective and corporal punishments, imprisonment in premises without daylight, and any form of torture or cruelty in relation to PoWs regardless of whether the punishment in question is penal or disciplinary. These prohibitions also apply regardless of the existence of such penalties in the domestic law of the Detaining Power.

The other important principle that applies to both penal and disciplinary punishments is the principle of *non bis in idem* or prohibition against double jeopardy for the same act or on the same charge pursuant to Article 86. As provided in Article 75(4)(h) of the 1977 Additional Protocol I as well as other international treaties,<sup>124</sup> the principle of *non bis in idem* applies to conviction or a final acquittal. It also bans the imposition of further penalty on a PoW who had already served the term of his/her sentence.<sup>125</sup> The principle of *non bis in idem* arguably is limited to multiple prosecutions by the “same Party” under “the same law and judicial procedure” of the same sovereign State, which seems to exclude any inter-State effect of that principle. But this may lead to numerous practical problems in the case of PoWs who may be subject to transfer to another belligerent or a neutral State.<sup>126</sup> Therefore, in the case of transfer, there is a high possibility that a convicted or acquitted PoW faces a new sentence for the same

123 Commentary, above note 15, on Art. 82, para. 3577. See also the “Applicable legal regime” section.

124 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978). For other treaties see, for example, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, Vol. 999, p. 171 (entered into force 23 March 1976), Art. 14(7); Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 22 November 1984, ETS 117 (entered into force 1 November 1988), Art. 4; Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998 (entered into force 1 July 2002), Art. 20.

125 GC III, Art. 88(4). This provision which bans any form of discriminatory treatment with PoWs who have completed their sentences is rooted in Article 16 of GC III. Such a reading, in accordance with the Commentary, “accords with both the law and principles of equity”. Commentary, above note 15, on Art. 88, para. 3734.

126 GC III, Art. 12(2).

act. Following this consideration, “it has been argued that the *non bis in idem* rule should, in principle, apply to attempts by courts of different States to prosecute the same person for the same act, no less than it applies to such attempts by the courts of a single State”.<sup>127</sup> This argument, which in principle requires a State not to exercise its sovereign (judicial) power, is only justified by exercising the greatest leniency towards PoWs. In other words, it is only based on the leniency considerations that States can be requested not to exercise their sovereign power and adhere to *non bis in idem* in inter-State relations.

Specific provisions of GC III on penal and disciplinary sanctions in some cases, on the basis of leniency considerations, require the Detaining Power to punish a violation only through disciplinary measures.<sup>128</sup> This, in particular, includes those acts committed by PoWs that are not punishable if committed by a member of the armed forces of the Detaining Power,<sup>129</sup> or acts such as unsuccessful escape,<sup>130</sup> facilitating an escape,<sup>131</sup> aiding or abetting an escape,<sup>132</sup> and an attempt to escape.<sup>133</sup> These offences, as well as other disciplinary offences, are only punishable by the list of sanctions mentioned in Article 89. This Article provides an exhaustive list of possible disciplinary punishments. The ICRC Commentary describes this Article as an “important innovation [of] a limitative enumeration of the various forms of disciplinary punishments applicable to prisoners”.<sup>134</sup> This is because prior to 1949 and even today<sup>135</sup> there exists a divergence in the systems of disciplinary sanctions imposed on armed forces of different States. This uncertainty on the concept and domain of disciplinary

127 Commentary, above note 15, on Art. 86, para. 3659. See, also, Christine Van den Wyngaert and Guy Stessens, “The International *Non Bis In Idem* Principle: Resolving Some of the Unanswered Questions”, *International and Comparative Law Quarterly*, Vol. 48, No. 4, 1999.

128 According to Article 96(2), disciplinary punishments may be imposed by superior military authorities, the camp commander, a responsible officer according to the established rules, an officer to whom the camp commander has delegated such a power, or on some occasions, by courts.

129 GC III, Art. 82(2).

130 GC III, Art. 92(1). In the case of successful escape when the person is recaptured, pursuant to Article 91(2), he/she should benefit from the privilege of impunity and shall not be liable to any punishment in respect of the previous escape. In this respect, the Commentary argues that “it seems reasonable to consider that the privilege of immunity also applies to [connected] offences which would otherwise occasion disciplinary sanctions”. Commentary, above note 15, on Art. 93, para. 3865. See, for example, Magistrate’s Court of the County of Renfrew, Ontario, Canada *Rex v. Krebs*, Case No. 780 CAN. C.C. 279, 1943, concerning a German PoW interned in Canada, who during his escape, broke into a cabin to get food, articles of civilian clothing, and a weapon. The court held that, since these acts were done in an attempt to facilitate his escape, therefore, he committed no crime.

131 GC III, Art. 93(2).

132 “Aiding and abetting” is not defined in the Geneva Conventions or any other international treaty. Nonetheless, the leniency considerations require the Detaining Power to interpret the term in a narrow way. Commentary, above note 15, on Art. 93, para. 3870.

133 GC III, Art. 93(3). The Commentary also argues that in the case of aiding and abetting of an escape and connected crimes, if “the prisoners who aided or abetted did not know, or could not foresee, that the escapee would commit such offences [...] they should be subject to disciplinary punishment only for aiding or abetting the escape or escape attempt”. Commentary, above note 15, on Art. 93, para. 3871.

134 Commentary, *ibid.* on Art. 89, para. 3740.

135 Peter Rowe, “Penal or Disciplinary Proceedings Brought against a Prisoner of War”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 1026.

sanctions, as described by the 1960 Commentary, could present many disadvantages and “is likely to result in different treatment for the same offence, in a world where conceptions were and still are divergent”.<sup>136</sup> The possible disciplinary punishments are fine, discontinuance of privileges granted over and above the treatment provided for by GC III, fatigue duties and confinement. No other form of disciplinary punishment is permissible.

Article 90(1) limits the duration of any single disciplinary punishment to a maximum of thirty days which may not be exceeded, even if the PoW is accountable for several disciplinary offences at the time when he is awarded punishment, whether such acts are related or not.<sup>137</sup> Yet, Article 89 does not prohibit cumulating the listed sanctions for a single offence.<sup>138</sup> In any case, in accordance with Article 87(1), the Detaining Authority “would need to ensure that the chosen punishment corresponds in its severity to the punishment provided for in respect of members of its armed forces who have committed the same acts”.<sup>139</sup> Moreover, in accordance with Article 87(2), the Detaining Power shall exercise leniency to reduce the disciplinary measure to less than the penalties prescribed.

In GC III, the term “confinement” refers both to a type of permissible disciplinary sanction and a pre-hearing period of deprivation of liberty.<sup>140</sup> In principle, pre-hearing confinement either before disciplinary proceedings or criminal trial is not allowed,<sup>141</sup> unless a member of the armed forces of the Detaining Power would be so kept if he were accused of a similar offence.<sup>142</sup> The other exception is when the confinement is essential in the interests of camp order and discipline,<sup>143</sup> or when, in the case of judicial proceedings, the interests of the essential national security of the Detaining Power so requires.<sup>144</sup> In regard to the latter exception, the Commentary stipulates that in interpreting the exception in Article 95(1), confinement awaiting disciplinary hearing is limited only to “absolutely necessary” or “extremely important” cases.<sup>145</sup> Likewise, in the cases of pre-trial confinement pursuant to Article 103(1), bearing in mind that “the relevant national security standard would require an additional threat beyond that person’s status as a member of the enemy armed forces”,<sup>146</sup> the Commentary states that the term “essential” should be interpreted in a very limited nature to only cover “reasons that are ‘absolutely necessary’ or

136 1960 Commentary, above note 13, on Art. 89, p. 435.

137 GC III, Art. 90(2).

138 Commentary, above note 15, on Art. 89, para. 3744.

139 *Ibid.*, para. 3743.

140 Internment of PoWs under Article 21 of GC III is different from confinement. “Internment has a preventive, not a punitive, purpose, contrary to the detention of prisoners of war for disciplinary or penal reasons.” *Ibid.*, commentary on Art. 21, para. 1919. See, also, Anne Quintin, “The Authority to Intern Prisoners of War in International Armed Conflict”, in A. Quintin, *The Nature of International Humanitarian Law, A Permissive or Restrictive Regime?*, Elgar, Cheltenham, 2020.

141 GC III, Arts 95(1) and 103(1).

142 *Ibid.*

143 GC III, Art. 95(1).

144 GC III, Art. 103(1).

145 Commentary, above note 15, on Art. 95, para. 3889.

146 *Ibid.*, commentary on Art. 103, para. 4033.

‘fundamental’ to the national security interests in question”.<sup>147</sup> The Commentary obliges the Detaining Power to consider alternatives and lesser measures than confinement capable of neutralizing the relevant threat.<sup>148</sup> Although the Commentary, following the silence of GC III, does not discuss any threshold of necessity for pre-hearing confinement carried out in accordance with the principle of assimilation (the first exception), observation of leniency considerations may justify adhering to the same criterion of necessity for the case of such pre-hearing confinement. This is because PoWs are already under the control of the Detaining Power and therefore the risk of escape is not high. Hence, it can be suggested that, based on leniency considerations, there should be other reasons than the mere permission of confinement under national laws to justify such confinement.

Capital punishment remains as one of the penal sanctions which may be imposed on PoWs, while in accordance with Article 100(3), the leniency considerations, as previously discussed,<sup>149</sup> may to some extent prevent the courts of the Detaining Power from pronouncing the death sentence.<sup>150</sup> In any case, pursuant to Article 101, the death sentence shall not be executed before the expiration of a period of at least six months from the date when the Protecting Power receives the detailed communication provided for in Article 107. The Commentary calls this provision a “strict condition for the execution of a death sentence”<sup>151</sup> and states that non-compliance will amount to a grave breach of the Convention,<sup>152</sup> even in the case of the absence of a Protecting Power or a substitute.<sup>153</sup>

### *Protection of women and children PoWs*

Due to the involvement of women in armed conflicts,<sup>154</sup> GC III also contains provisions that provide specific protection for women PoWs, in general, as well

147 *Ibid.*

148 *Ibid.*

149 See the “Exercising leniency during the proceedings” section.

150 From eighty-nine States that have ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, only Azerbaijan, Brazil, Chile, El Salvador and Greece have formulated reservations in accordance with Article 2 for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime. To see the content of their reservations, see United Nations Treaty Collections, Depository, Chapter IV, 12, available at: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mdsg\\_no=IV-12&chapter=4](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mdsg_no=IV-12&chapter=4) (status at January 2022).

151 Commentary, above note 15, on Art. 101, para. 4000.

152 *Ibid.*, para. 4002.

153 *Ibid.*, para. 4001. The Commentary highlights that in such a case the ICRC acts in the interests of PoWs facing the death penalty. *Ibid.* For further discussion on the discharge of the humanitarian duties of the Protecting Power by the ICRC, see Hans-Peter Gasser, “Respect for Fundamental Judicial Guarantees in Time of Armed Conflict: The Part Played by ICRC Delegates”, *International Review of the Red Cross*, Vol. 32, No. 287, 1992, pp. 131–2. See, also, Howard S. Levie, “Prisoners of War and the Protecting Power”, *American Journal of International Law*, Vol. 55, No. 2, 1961.

154 See William Paul Skelton and Nadine Khouzam Skelton, “Women as Prisoners of War”, *Military Medicine*, Vol. 160, No. 11, 1995; Noelle Quenivet, “Special Rules on Women”, in A. Clapham, P. Gaeta and M. Sassoli (eds), above note 135.



as those who are under sanction, in particular.<sup>155</sup> In addition to these specific protections, it is obvious that the general obligations of the Detaining Power in regard to the sanction regime of PoWs including the exercise of the greatest leniency will be applied to women PoWs as well.

Conversely, the Chapter on penal and disciplinary sanctions does not address directly the specific protection of children. The Commentary with reference to Articles 75(5) and 77(4) of the Additional Protocol I perceives that “infants or very young children generally must be accommodated with their parents”.<sup>156</sup> It further requires that if a PoW is under 18 years old, he/she must be separated from adults, except where families are accommodated as a unit.<sup>157</sup> The Commentary also refers to the 1989 Convention on the Rights of the Child,<sup>158</sup> and stipulates that the best interest of the child must be considered in all cases.<sup>159</sup> The ICRC holds the view that based on international law “children are entitled to special respect and protection, including in the matter of disciplinary or judicial proceedings”.<sup>160</sup> In particular, the juvenile justice system should govern any sentencing process against a child PoW. Furthermore, in the case of child soldiers recruited by one of the belligerents, in conformity with Article 87(2) and the obligation to exercise the greatest leniency, the fact that the child is actually a victim of the violation of international law and his/her participation in armed conflicts is in essence against his/her free will, has also to be considered.<sup>161</sup>

155 For example, Article 88(2) stipulates that a woman PoW shall not be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than the female members of the armed forces of the Detaining Power dealt with for a similar offence. In any case, the punishment of women PoWs cannot be more severe than male members of the armed forces of the Detaining Power for a similar offence. GC III, Art. 88(3). Article 97(4) requires that women PoWs undergoing disciplinary punishment shall be confined in separate quarters from men and shall be under the immediate supervision of women. Similarly, Article 108(2) stipulates the same in the case of criminal conviction. The Convention does not consist of any provision to protect lesbian, gay, bisexual and transgender (LGBT) PoWs. However, the Commentary, in an implicit way, requires that “the requirement of separate quarters may also extend to other categories of persons with distinct needs or facing particular risks where not doing so would violate the obligation of humane treatment”. Commentary, above note 15, on Art. 108, para. 4215. For further analysis on the subject, see Jason A. Brown and Valerie Jenness, “LGBT People in Prison: Management Strategies, Human Rights Violations, and Political Mobilization”, in *Oxford Research Encyclopedia of Criminology and Criminal Justice*, Oxford University Press, Oxford, 2020, available at: <https://oxfordre.com/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-647?rskkey=GhpWvQ&result=18>.

156 Commentary, above note 15, on Art. 108, para. 4214. Article 76(3) of Additional Protocol I provides that “[t]o the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.” In the same vein Article 6(5) of the International Covenant on Civil and Political Rights provides that “sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women”.

157 Commentary, *ibid.*

158 Convention on the Rights of the Child, UN Doc. E/CN.4/RES/1990/74, 7 March 1990 (entered into force 2 September 1990).

159 Commentary, above note 15, on Art. 108, para. 4214.

160 *Ibid.*, para. 4200.

161 *Ibid.* Notably, Trial Chamber IX of the International Criminal Court, in the *Dominic Ongwen Case*, took into account Ongwen’s personal history for issuing his sentence including the fact that “he himself had in

These considerations may also advise the judge to exercise a lenient approach when the accused PoW perpetrated the crimes prior to capture during his/her childhood. For example, in the subsequent Nuremburg trials, the death sentences announced against German PoWs involving the shooting of surrendered prisoners at the Battle of the Bulge, known as Army cases, were commuted to life or to a period of years during the review process as most of these cases “involved privates or junior officers who had joined the army in their teens or early manhood and from youth had never known a life free from Nazi ideology”.<sup>162</sup>

### *Repatriation of accused or convicted PoWs*

Another reflection of the general obligation to exercise the greatest leniency in the execution of sanctions exists in the Chapter on the termination of captivity. Article 115(1) in line with leniency considerations indicates that not undergoing or non-completion of a disciplinary punishment does not deprive eligible wounded or sick PoWs from repatriation or from accommodation in a neutral country. The ICRC states that the purpose of this provision “is to alleviate the potentially negative effects of long-term internment on the mental, and sometimes physical, health of prisoners of war”.<sup>163</sup> Accordingly, it appears that the same considerations may justify exercising the greatest leniency with respect to those PoWs who are not wounded or sick but are subjected to disciplinary punishment while awaiting repatriation or internment in a neutral country pursuant to an agreement based on the second sentence of Article 109(2).

Article 115(2) contains the same regulation concerning eligible PoWs detained in connection with a criminal prosecution or conviction, with the difference that for their repatriation or accommodation in a neutral country the consent of the Detaining Power is required. Pursuant to this provision, the Detaining Power is allowed to keep the sick or wounded PoWs in its hands for the duration of the judicial proceedings or until they have served their penal sentences. However, it seems acceptable to argue that for a PoW who is detained in relation to the prosecution of a minor offence or, using the analogy with the disciplinary confinement, is convicted for less than one month’s imprisonment,

the past been a victim of the same crime, having been abducted as a child and integrated as a fighter”, International Criminal Court, *The Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, Sentence (Trial Chamber IX), 6 May 2021, paras 370 and 373. For a comprehensive discussion on the protection of children in armed conflict, see Shaheed Fatima, *Protecting Children in Armed Conflict*, Hart Publishing, Oxford, 2018.

162 Henry L. Shattuck, “The Interim Mixed Parole and Clemency Board”, *Proceedings of the Massachusetts Historical Society*, Third Series, Vol. 76, 1964, p. 77. Other factors considered, in the words of General Thomas T. Handy, were: “First, the offenses are associated with a confused, fluid and desperate combat action, a least attempt to turn the tide of Allied successes and to reestablish a more favorable tactical position for the German Army. The crimes are definitely distinguishable from the more deliberate killings in concentration camps. Moreover, these prisoners were of comparatively lower rank and ... they were neither shown to be the ones who initiated, nor, as far as we know, advocated the idea of creating a wave of frightfulness ...” *Ibid*.

163 Commentary, above note 15, on Art. 115, para. 4397.

or only one month of his/her imprisonment has left to serve,<sup>164</sup> it is justified to request the Detaining Power to exercise the greatest leniency and not to prevent the repatriation or accommodation of these PoWs.<sup>165</sup>

## Concluding remarks

The obligation to exercise leniency towards PoWs is a continuation of the principle of humanity, which lies at the core of GC III. This paper, in light of the ICRC updated Commentary, demonstrates how the application of leniency considerations on the GC III provisions on disciplinary and judicial measures as a whole contributes to achieving the Convention’s aims. While the principle of humanity sets the minimum standard of treatment, leniency is an appeal to go beyond this threshold. In the context of disciplinary and judicial measures, the greatest leniency that a Detaining Power is obliged to apply in adjudicating the offences committed by PoWs does not necessarily lead to solid outcomes. Yet, it requires the Detaining Power to interpret and implement its obligations under Chapter III in a way that is more favourable towards those PoWs who face allegations and sanctions.

164 The one-month period is the maximum length of disciplinary confinement allowed under Article 90(1). On the basis of analogy, this duration was applied in the current discussion.

165 See the discussion on Article 155(2) in the 1960 Commentary, above note 13, p. 536.