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TEASINGLY INCONCLUSIVE? – TEASING OUT FROM THE  
*TRAVAUX PRÉPARATOIRES* THE DRAFTERS' INTENTIONS ON  
THE SO-CALLED 'HOMELAND BATTLEFIELD UNPRIVILEGED  
BELLIGERENTS' UNDER THE 1949 GENEVA CONVENTIONS

By Yutaka Arai-Takahashi\*

INTRODUCTION

This paper will engage in extensive investigations into the legislative history of the 1949 Geneva Convention III Relative to the Treatment of Prisoners of War (hereafter, the "GCIII") and the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (hereafter, the "GCIV"). It seeks to explore if the drafters of the Geneva Conventions (hereafter, the "GCs") excluded from the compass of the GCIV 'unprivileged belligerents' (or 'unlawful combatants') who are trapped on their homeland battlefield (what this author labels as 'homeland battlefield unprivileged belligerents').<sup>1</sup> This issue will necessitate an examination of the negotiators' thoughts on the scope of Part III of the GCIV, which supplies the nucleus of the GCIV's elaborate protections. This paper is purported as a sequence to the article that the present writer has published in the previous volume of this *Yearbook*, which has ascertained strengths and weaknesses of various *interpretive* methods proposed to overcome the same issue.<sup>2</sup>

This paper is based on the present author's empirical examinations of the (published or unpublished) draft records relating to the Diplomatic Conference of Geneva (1949) and to a plethora of its predecessor and preparatory conferences. These include the original stenographic records that are accessible at the Archive of the International Committee of the Red Cross and Red Crescent (hereafter, the "ICRC") and at the Swiss Federal Archive. Based on analyses of all those 'raw materials' which show the drafters' diverging perceptions of the scope of application of the GCIV, this

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<sup>1</sup> For assessment of this issue, see A. Rosas, *The Legal Status of Prisoners of War* (1976) (reprinted in 2005), at 410-413; K. Dörmann, "The Legal Situation of 'Unlawful/Unprivileged Combatants'", 85 *Int'l Rev. Red. Cross.* 45-73 (2003); and J. Callen, "Unlawful Combatants and the Geneva Conventions", 44 *Va. J. Int'l L.* 1025 (2003-4).

<sup>2</sup> Y. Arai-Takahashi, "Unprivileged (Unlawful) Belligerents Captured on a Battlefield and the Geneva Conventions", 48 *Isr. Y.B. Hum. Rts.* 63 (2018).

paper will extrapolate several inferences with regard to ‘homeland battlefield unprivileged belligerents’.

The substantive discussions of this paper are divided into four parts. The first part will present what may be viewed as the structural inconsistency of the GCIV’s scope of application. Faced with this, the second part will defend the method of consulting the *travaux préparatoires*, referring to their special relevance and their weight in interpreting treaties. The third part will investigate the *travaux préparatoires* of the GCIV to explore if the drafters generally excluded ‘homeland battlefield unprivileged belligerents’, or the ‘protected persons’ overall, from the elaborate regulatory framework of its Part III. The fourth part will analyse the *travaux préparatoires* of Articles 3 and 4 of the Stockholm Prisoners of War (POW) Draft (now Articles 4 and 5 GCIII) with a view to ascertaining if the drafters envisioned the GCIV to cover any person left outside the scope of Article 4 of the GCIII.

### I. STRUCTURAL DISHARMONY WITHIN THE GCIV

The literal interpretation of the GCIV suggests that the applicability of the provisions of Part III of the GCIV is confined only to two situations: (1) the territories of the adverse parties to international armed conflict; and (2) the occupied territories. This can be borne out by two textual indicators. First, under the derogation clause contained in Article 5 GCIV, its first paragraph refers to situation (1) while its second paragraph addresses situation (2). Second, the spatial context of those two situations fits the regulatory structure of Part III of the GCIV. Those two geographical localities correspond to the regulatory scope delineated by the first three sections of Part III, which are the core of the GCIV. While the title of Section II (Articles 35-46) speaks of ‘Aliens in the Territory of a Party to the Conflict’, the heading of Section III (Articles 47-78) mentions ‘Occupied Territories’. As suggested by its epithet ‘Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories’, Section I of Part III (Articles 27-34) covers both those situations.<sup>3</sup> In view of these, it seems sound to suggest that for the ‘protected persons’ who are found in a combat zone of their State (including the ‘homeland battlefield unprivileged

<sup>3</sup> Part III of the GCIV contains two more sections: Section IV (Arts. 79-135) addresses issues of administrative detention or internment of protected persons, the legal basis of which is found in specific provisions contained in Sections II (Arts. 41-43), and Section III (Arts. 68 and 78) of Part III. Section V (Arts. 136-141) regulates information bureaux and central agency.

belligerents'), the applicable provisions of the GCIV are limited only to what is left in its Parts I (Articles 1-12, bar Article 5) and II (Articles 13-26).<sup>4</sup>

However, the presumption that Part III (Sections II-IV) leaves gaps in protections is at odds with the concept of 'protected persons' defined under Article 4 of the GCIV. Left outside the broader concept of 'protected persons' are essentially only two categories: (1) those that already fall within the purview of the GCI-III; and (2) the nationals of the States that are not parties to the GCIV.<sup>5</sup> Hence, the textual construction of the GCIV results in the 'structural incoherence' between the general provision (Article 4), on one hand, and the specifically delineated situations contemplated by Article 5 and (the entirety of) Part III of GCIII, on the other hand.

To overcome the problem of such discrepancy in the personal scope of application, this author, in the aforementioned paper in the previous volume of this *Yearbook*,<sup>6</sup> has proposed that at least Section I of Part III (Articles 27-34), whose title does not employ the adjective 'enemy' to qualify the phrase 'territories of the parties to the conflict', be construed as covering any territory of the belligerent parties, including captives' own homeland battlefield. Still, this teleological solution leaves unaddressed the bulk of questions relating to captivity and internment.<sup>7</sup> The preferred approach is the so-called 'Dörmann's theory' that focuses on the eventual change in the legal status of the combat zone in which protected persons come into an adversary's hands or in their possible transfer either to an occupied territory

<sup>4</sup> The provisions of Part II are expressly made the exception. Their scope of application is even broader than that of Art. 4 of the GCIV to cover all civilians, including nationals of the States not parties to the GCIV. The ICRC representative confirmed that while Art. 3 of the Stockholm Civilians Draft (Art. 4 of the GCIV) contemplated only the civilians of enemy nationality, Art. 11 of that Stockholm Draft (Art. 13 of the GCIV) covered 'the entire populations of countries at war': see *Final Record of the Diplomatic Conference of Geneva of 1949* (hereafter, the "*Final Record*"), vol. II-A, at 625, Committee III, 3<sup>rd</sup> Meeting (27 Apr. 1949) (Mr. Pilloud, ICRC). See also *id.*, *Report of Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva*, 812-846, at 816 (presented at 51st meeting, Committee III, 20 July 1949).

<sup>5</sup> Dörmann, *supra* note 1, at 73. Under Art. 4 of the GCIV, the persons who are disentitled to claim the status of 'protected persons' are limited to the following categories: (i) nationals of a State which is not party to the Convention; (ii) nationals either of a party to the conflict or of an occupying power in which hands they are; (iii) nationals of a co-belligerent State, which is able to exercise normal diplomatic representation in the detaining State; (iv) nationals of a neutral State, captured in the territory of a belligerent State, which is able to exercise normal diplomatic representation in the detaining State; and (v) persons who are already covered by the guarantees of GCs I-III.

<sup>6</sup> Arai-Takahashi, *supra* note 2, at 94-96.

<sup>7</sup> Sec. IV of Part III is excluded because its opening provision, Art. 79, prohibits any internment other than in accordance with Arts. 41-43, 68 and 78 of the GCIV. This suggests that Art. 27(4) GCIV is insufficient as a legal basis for invoking Sec. IV.

or to the adversary's home territory.<sup>8</sup> This theory, grounded as it is also on the teleological interpretation pursuant to the humanitarian object and purpose, helps operationalise the expansive legal regime of Part III of the GCIV. Yet, even this theory is not the panacea for the plight of civilians trapped in their homeland battlefield semi-permanently.<sup>9</sup>

Implications of those two approaches aside, it may be contended that the result of interpretation of the GCIV obtained by the methods of interpretation according to Article 31 of the 1969 Vienna Convention on the Law of Treaties (hereafter, the "VCLT") would be 'unreasonable'. As briefly discussed above, the civilians who fall into the adversary's hands in their homeland battlefield would benefit only from the modicum of the GCIV provisions. Those are limited to the combination of the provisions of Parts I & II, and those of Section I of Part III if following the above interpretive approach that focuses on the wording 'territories of the parties to the conflict'. Faced with such apparent lacunae of the GCIV's protections of civilians captured in combat zones of their home country, it can be argued that some doubt is cast on the presumption<sup>10</sup> that the text of the GCIV entertains logical consistency with the context.<sup>11</sup> For this reason, in accordance with Article 32 of the VCLT, recourse can be had to the *travaux préparatoires*<sup>12</sup> of the Geneva Conventions with a view to clarifying the scope of the GCIV contemplated by the negotiators.

Will the draft records confirm or negate the hypothesis that the coverage of Part III of the GCIV was purported to be confined only to the 'protected persons' held in the two spatial settings (the enemy territory and occupied territories)? If a response to this question is in the affirmative, this would challenge another hypothesis that at the Diplomatic Conference of Geneva (1949) there was a generally shared expectation of the GCIV serving as a 'gap-filler' for persons falling outside the valve of the GCIII.

<sup>8</sup> Dörmann, *supra* note 1. See also K. Dörmann & L. Colassis, "International Humanitarian Law in the Iraq Conflicts", 47 *Ger. Y.B. Int'l L.*, 293 (2004).

<sup>9</sup> See Arai-Takahashi, *supra* note 2, at 93-94.

<sup>10</sup> U. Linderfalk, "Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making", 26(1) *Eur. J. Int'l L.* 169., 174 (2015).

<sup>11</sup> See P. Merkouris, "Third Party" Considerations and 'Corrective Interpretation' in the Interpretative Use of *Travaux Préparatoires*: Is It Fahrenheit 451 for Preparatory Work?", in *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on*, 75, 87 (M. Fitzmaurice, P. Merkouris & O. Elias eds., 2010).

<sup>12</sup> According to McNair, the *travaux préparatoires* are defined as "all the documents, such as memoranda, minutes of conferences, and drafts of the treaty under negotiation". Lord A. McNair, *The Law of Treaties* 411 (1961).

## II. RELEVANCE AND RELATIVE WEIGHT OF THE *TRAVAUX PRÉPARATOIRES*

### A. *The Intentionalist v. Textualist Schools of Treaty Interpretation*

Before examining how the *travaux* are understood under Article 32 of the VCLT,<sup>13</sup> it is essential to discuss briefly two historically opposing strands of thought on treaty interpretation (the ‘intentionalist’ and the ‘textualist’), which have provided much doctrinal fervour in the runup to this largely codificatory treaty. Hersch Lauterpacht famously stressed the importance of the intentions of the authors of a treaty,<sup>14</sup> contending that “the object of interpretation is to arrive at the intention of the parties *ex signis maxime probabilibus*.”<sup>15</sup> In his understanding tinged with critical overtones of *Begriffsjurisprudenz*, the *travaux préparatoires* occupied “un élément fondamental, peut-être le plus important, en matière d’interprétation des traités.”<sup>16</sup> In contrast, Fitzmaurice’s textualist interpretation<sup>17</sup> stressed the significance of ascertaining the intentions of the parties in the text.<sup>18</sup> Along this line,<sup>19</sup> the draft VCLT prepared by the International Law Commission

<sup>13</sup> For examinations of the role of the *preparatory work* in interpreting treaties, see H. Lauterpacht, “Some Observations on Preparatory Work in the Interpretation of Treaties”, 48 *Harv. L. Rev.* 549 (1935); McNair, *supra* note 12, ch. XXIII, at 411-23; S. Rosenne, “*Travaux Préparatoires*”, 12 *Int’l & Comp. L. Q.* 1378 (1963); M. S. McDougal, H.D. Laswell and J.C. Miller, *The Interpretation of Agreements and World Public Order*, at 122-32 (1967); B.N. Mehrish, “*Travaux Préparatoires* as an Element in the Interpretation of Treaties”, 11 *Indian J. Int’l L.* 39-88 (1971); M. Ris, “Treaty Interpretation and ICJ Recourse to *Travaux Préparatoires*: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties”, 14 *Boston Coll. Int’l & Comp. L. Rev.* 111 (1991); J. Klabbers, “International Legal Histories: The Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?”, 50(3) *Netherlands Int’l L. Rev.* 267-288 (2003). See also G. Fitzmaurice, “The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points”, 37 *Brit. YB Int’l L.* 203 (1957); H. Lauterpacht, *The Development of International Law by the International Court*, at 116-41 (1982); and I. Sinclair, *The Vienna Convention on the Law of Treaties*, 114-58 (2<sup>nd</sup> ed., 1984).

<sup>14</sup> H. Lauterpacht, “De L’interprétation des traités”, 43(1) *Annuaire de L’Institut de Droit Int’l* Tome I, 366-434, 457-60, especially at 390-402 (1950).

<sup>15</sup> Lauterpacht, *supra* note 13 at 571. See also Lauterpacht, “Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties”, 26 *Brit. YB Int’l L.* 48, at 52, 55, 73, 75 & 83 (1949).

<sup>16</sup> Lauterpacht, *supra* note 14, at 397. See also Lauterpacht, *ibid.*, at 83; Lauterpacht, *supra* note 13, at 571. See also Klabbers, *supra* note 13, at 277; and I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, 3 (2012).

<sup>17</sup> Fitzmaurice, *supra* note 13, at 204.

<sup>18</sup> *Id.*, at 205, 207.

<sup>19</sup> The ILC’s approach was heavily influenced by the views of the two last rapporteurs (Gerald Fitzmaurice and Humphrey Waldock).

(the “ILC”) stated that the text of the treaty should be understood as “the authentic expression of the intentions of the parties.”<sup>20</sup> For textualists, extraneous factors such as the preparatory work are reduced only to a secondary role: they are not supposed to override or change the meaning already arrived at by literal construction.<sup>21</sup> In tune with the established case-law of the International Court of Justice (the “ICJ”),<sup>22</sup> the ILC appeared to restrict the avenues of turning to the preparatory work. It suggested that “where the ordinary meaning of the words is clear and makes sense in the context, there is no occasion to have recourse to other means of interpretation.”<sup>23</sup> For the ILC, even when tangible and extrinsic sources such as the *travaux* are relied upon, the object of interpretation boils down to “the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties.”<sup>24</sup>

### *B. The Purposes of Recourse to the Travaux Préparatoires*

Article 32 of the VCLT provides that “[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.” Literally construed, this provision can be understood as recognising the purposes pursuant to which inquiries into the preparatory work are permissible in interpreting treaties. This point can be corroborated in the commentaries to Article 28 (now Article 32 of the VCLT) of the ILC’s Draft Articles on the Law of Treaties (1966).<sup>25</sup> The ILC stated that apart from the end of confirming the treaty text,<sup>26</sup> such historical investigations are allowed with a view to determining the meaning when the interpretation according to the primary methods laid down in article 27 (now

<sup>20</sup> ILC, *Draft Articles on the Law of Treaties with commentaries* (1966), Rpts. Int’l L. Comm. G.A., (1966-II) *YB Int’l L. Comm.* 223, para. 18.

<sup>21</sup> Fitzmaurice, *supra* note 13 at 220.

<sup>22</sup> ICJ, *Competence of the General Assembly for the Admission of a State to the United Nations*, Adv. Op. 28 May 1948, 1948 *ICJ* 57, at 63. See also ICJ, *Ambatielos Case (Greece v. UK)* (Preliminary Objection), Judgment of 1 July 1952, *ICJ Rpt.* 1952, at 45; ICJ, *Territorial Dispute (Libya/Chad)*, Judgment of 3 February 1994, *ICJ Rpt.* at 21-22, para. 41.

<sup>23</sup> ILC, *supra* note 20, at 222, para. 18.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Id.*, para. 19.

<sup>26</sup> Hersch Lauterpacht, in his earlier writing, referred to the role of “throw[ing] abundant light upon every expression and nuance of expression, upon what is included and what is omitted”, in Lauterpacht, *supra* note 13, at 575. See also *id.*, at 588.

Article 31 of the VCLT) either “[l]eaves the meaning ambiguous or obscure”; or “[l]eads to a result which is manifestly absurd or unreasonable.”<sup>27</sup> This comment shows that the role of the *travaux* in *determining* the treaty text may be divided into two further roles: eliminating ambiguity and obscurity; and curing a manifestly absurd or unreasonable result.<sup>28</sup>

The three purposes for which the *travaux* can be consulted pair with the three functions that they perform.<sup>29</sup> Apart from the confirmatory function,<sup>30</sup> one can refer to two subcategories of the determinative function: the clarificatory function that seeks to elucidate the meaning of the text that remains ambiguous or obscure; and the remedial function that can eschew or mend a manifestly absurd or unreasonable outcome arrived at by the method of interpretation pursuant to Article 31 VCLT.<sup>31</sup> With regard to the confirmatory function, the inquiry into the *travaux* is supposed to validate the interpreters’ working hypothesis in accordance with Article 31 of the VCLT. This function can be justified even when the (provisional) meaning of the treaty text acquired by the ‘general rule’ under Article 31 appears clear.<sup>32</sup> This is because epistemically what is exactly ‘an ordinary meaning’ (or a ‘natural meaning’) of the terms of a treaty remains always open to

<sup>27</sup> ILC, *supra* note 20, at 223, para. 19.

<sup>28</sup> S. Yee, “Notes on the International Court of Justice (Part 6) – The Fourth Use of *Travaux Préparatoires* in the *LaGrand* Case: To Prove the Non-preclusion of an Interpretation”. 16 *Chn. J. Int’l L.* 351-365, at 353-354 (2017).

<sup>29</sup> On top of those three ‘routes’ to the *travaux*, Mortenson suggests that as the fourth pathway, recourse to them is immediately justifiable in case ‘special meaning’ is intended by the parties under Art. 31(4) of the VCLT: J.D. Mortenson, “The *Travaux* of *Travaux*: Is the Vienna Convention Hostile to Drafting History?”, 107 *Am. J. Int’l L.* 780, at 786-787 (2013).

<sup>30</sup> See ICJ, *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment of 27 Aug. 1952, *ICJ Rpt.* 1952, at 209, 211. See also *id.* at 229 (dissenting opinion by Judges Hackworth, Badawi, Levi Carneiro and Rau).

<sup>31</sup> ILC, *supra* note 20, at 222-223, para. 19.

<sup>32</sup> It might seem absurd to invoke the *travaux* when the text is unambiguous or unobscured: K. J. Vandeveld, “Treaty Interpretation from a Negotiator’s Perspective”, 21 *Vand. J. Transnat. L.* 281 at 296 (1988); and R. Gardiner, *Treaty Interpretation*, 365 (2<sup>nd</sup> ed., 2015). See also the comment by M. S. McDougal of the US Delegation to the Committee of the Whole of the Vienna Conference on the Law of Treaties in Vienna Conference on the Law of Treaties, Meetings of the Committee of the Whole, 31<sup>st</sup> Meeting, 26 Mar. – 24 May 1968, A/CONF.39/C.1/SR.31, para. 41, in *Official Records of the United Nations Conference on the Law of Treaties*, First Session (Summary records of the plenary meetings and of the meetings of the Committee of the Whole at 167, available at [http://legal.un.org/diplomaticconferences/1968\\_lot/docs/english/sess\\_1/a\\_conf39\\_c1\\_sr31.pdf](http://legal.un.org/diplomaticconferences/1968_lot/docs/english/sess_1/a_conf39_c1_sr31.pdf)).



variations, depending upon different methods of interpretations.<sup>33</sup> Treaty terms are often imbued with contextually-determinable (subjective) values.<sup>34</sup> The meaning may be validated only after the consultation of the preparatory work.<sup>35</sup>

The outer boundaries of the two ‘determinative functions’ of *travaux* can be stretched to include the case where what is determined is not the meaning of a specific text but substantive issues relating to the operation of a treaty.<sup>36</sup> Writing in 1957, Fitzmaurice recognised the invocation of the preparatory work where “the object is not the interpretation of the text as such, *but the ascertainment or establishment of a point of substance* in relation to the Treaty.”<sup>37</sup> In the case of *Reservations to the Genocide Convention*, the ICJ had recourse to the preparatory work of the Genocide Convention not for the purpose of elucidating any of its particular provisions, but of ascertaining if there existed any right of the parties to enter unilateral reservations to it. The *travaux* were scrutinised with a view to assessing the existence of any implied or tacit understanding to that effect.<sup>38</sup> It is such a pattern of the ‘legitimate’ recourse to preparatory work that this author proposes to be invoked for the purpose of ascertaining the drafters’ intention as to the coverage of the GCIV.

### *C. Post-VCLT Doctrines on the Role of the Travaux Préparatoires*

In the post-VCLT doctrinal landscape, the ILC’s apparent textualist inclination seems to prevail. Inquiries into the preparatory work are justified (only) when the interpretation conforming to Article 31 of the VCLT<sup>39</sup> either ‘leaves the meaning ambiguous or obscure’ or ‘leads to a result which is manifestly absurd or unreasonable’.<sup>40</sup> However, this narrow view overlooks

<sup>33</sup> See Lauterpacht, *supra* note 13, at 571-572. See also *id.*, at 573 (arguing that “the statement that an expression is clear is – or ought to be – the result of the process of interpretation, not the starting point.”).

<sup>34</sup> See Klabbers, *supra* note 13 at 287.

<sup>35</sup> See Lauterpacht, *supra* note 16, at 51.

<sup>36</sup> See Gardiner, *supra* note 33 at 389 (arguing that the preparatory work can be consulted more to support substantive argument than for the purpose of confirmation or determination, though such a pattern being closer to the former purpose).

<sup>37</sup> Fitzmaurice, *supra* note 13, at 218 (emphasis added).

<sup>38</sup> ICJ, Adv. Op., *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 28 May 1951, 1951 ICJ Rep 15, at 22-23, 25-26.

<sup>39</sup> Recourse to the preparatory work may at times be to justify teleological construction pursuant to the object and purpose of the treaty in question. See Lauterpacht, *supra* note 13, at 578.

<sup>40</sup> See also ICJ, Adv. Op., *Conditions of Admission of a State to Membership in the United Nations (Conditions of Admission)*, 1948 ICJ 57, at 63 (holding that the text of Art. 4(1) of the UN Charter was “sufficiently clear”).

that in practice the supplementary means of interpretation laid down in Article 32 VCLT are invoked concurrently or in a unity with the principal means of interpretation laid down in Article 31 of the VCLT.<sup>41</sup> It should also be submitted that such a secondary role assigned to the *travaux* in Articles 31-32 of the VCLT does not necessarily lend itself to the thesis that the VCLT introduces a ‘hierarchy’ in elements of interpretation.<sup>42</sup> McDougal, stressing the law as a value-laden process in furtherance to certain overarching community policies, dismissed any perceived hierarchy between the primary and subsidiary means of interpretation.<sup>43</sup> He ascribed equally important weight to the preparatory work insofar as this is essential for identifying overarching community policies.<sup>44</sup> Indeed, Mortenson’s study unveils that the ILC envisaged Articles 31 and 32 of the VCLT to manifest not a hierarchical order but a single process of logical presentations.<sup>45</sup> Following his finding, this paper assumes that the interpretative apparatus of Articles 31 and 32 of the VCLT should be understood as presenting not so much the ‘threshold conditions’<sup>46</sup> for invoking the *travaux*<sup>47</sup> as the purposes for which they can be consulted.

#### *D. Discordance between the Travaux Préparatoires and the Treaty Text*

One question that arises when investigating the *travaux* of the Geneva Conventions is what to do in case of their disharmony with the meaning of the text (or first impression thereof).<sup>48</sup> It may turn out that the ‘ordinary

<sup>41</sup> Mortenson, *supra* note 29, at 786.

<sup>42</sup> Still, this point has been *implicitly* recognized in the case-law: ICJ, *Legality of Use of Force (Serbia and Montenegro v. Belgium)* (Preliminary Objections), Judgment of 15 Dec. 2004, para. 100. For support of such view, see R. Gardiner, “The Role of Preparatory Work in Treaty Interpretation”, in *40 Years of the Vienna Convention on the Law of Treaties*, ch. 5, at 97-115 (A. Orakhelashvili & S. Williams eds., 2010).

<sup>43</sup> M. McDougal, “The International Law Commission’s Draft Articles Upon Interpretation: Textuality *Redivivus*”, 61 *Am. J. Int’l L.* 992, 995, 997-998.

<sup>44</sup> Ris, *supra* note 13, at 115-116.

<sup>45</sup> Mortenson, *supra* note 29, at 800, 802 & 816-817.

<sup>46</sup> *Id.*, at 787.

<sup>47</sup> *Id.*, at 798, 800 (suggesting that the ILC’s 1964 draft was purported to eliminate the ‘threshold requirements’ for inquiries into the *travaux*, and that the enumeration of those specific avenues was meant not to limit the occasion for consulting the drafting history, but to articulate the purposes for which they can be used).

<sup>48</sup> See the statement of the Portuguese representative, Mr. Crucho de Almeida, Vienna Conference on the Law of Treaties, Meetings of the Committee of the Whole, 33<sup>rd</sup> Meeting, 26 Mar. – 24 May 1968, A/CONF.39/C.1/SR.33, para. 56, in *Official Records of the United Nations Conference on the Law of Treaties*, First Session (Summary records of the plenary meetings and of the meetings of the Committee of the Whole) at 182-183 available at [http://legal.un.org/diplomaticconferences/1968\\_lot/docs/english/sess\\_1/a\\_conf39\\_c1\\_sr33.pdf](http://legal.un.org/diplomaticconferences/1968_lot/docs/english/sess_1/a_conf39_c1_sr33.pdf).

meaning' obtained by the general rule under Article 31 of the VCLT does not represent the intention of the parties.<sup>49</sup> The preparatory work may disclose hidden ambiguity lurking behind the treaty provisions that have hitherto struck interpreters (deceptively) as clear.<sup>50</sup> Trickily, it may well be that the historical tracing uncovers an 'inconvenient truth': a narrower meaning and a more constricted ambit of treaty provisions intended by the negotiators. With respect to treaties such as the Geneva Conventions that are built on humanitarian premises, there is every reason to suggest that the meaning and scope of protections pursuant to the textual construction ought not to be eclipsed by the restrictive interpretation even when backed up by the *travaux*.<sup>51</sup> In contrast, it is possible that the *travaux* may reveal elements that, departing from the literal interpretation, reinforce the teleological interpretation fostering more effective protections of individual persons.<sup>52</sup>

Disaccord between the interpreters' preliminary perception of the meaning of the treaty text and the *travaux* has been the subject of enriched doctrinal debates over decades. In such situations, as noted by Hersch Lauterpacht as early as 1935,<sup>53</sup> there are two options: either to ignore the preparatory work and adhere to the textual meaning, or to override the literal indicator by the discoveries gleaned from the preparatory work.<sup>54</sup> Textualist authors may prefer the first option, contending that the (clear) meaning reached by the interpretation promoted by Article 31 of the VCLT should be prioritized.<sup>55</sup> In contrast, Judge Schwebel has suggested that, given the primary duty to interpret a treaty in good faith, as set out in Article 31(1) of the VCLT, an

<sup>49</sup> Y. Le Bouthillier, "Article 32", in *The Vienna Convention on the Law of Treaties – A Commentary*, 841 at 847, para. 12 (O. Korten & P. Klein eds., 2011).

<sup>50</sup> See the statement by Yasseen (Iran) in the ILC ('...the clearness or ambiguity of a provision was a relative matter; sometimes one had to refer [to] the preparatory work...in order to determine whether the text was really clear and whether the seeming clarity was not simply a deceptive appearance'): ILC, 1964-I *YB Int'l L. Comm.*, at 313, para. 56. See also Gardiner, *supra* note 33 at 355.

<sup>51</sup> Lauterpacht, *supra* note 16, at 61 (arguing that the absence of the relevant common intentions of the parties should not lead to the method of interpretation affiliated to the *Lotus* doctrine such as the restrictive interpretation); Gardiner, *supra* note 33, at 406. Compare A. Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights', (2003) 13 *European Journal of International Law* 529.

<sup>52</sup> Compare Fitzmaurice (1957), *supra* note 13 at 206 (noting that even a textualist terrain is not barren in the idea of using the *travaux*, for instance, to rationalise a teleological construction).

<sup>53</sup> Lauterpacht (1935), *supra* note 13, at 583.

<sup>54</sup> There is also a possible third view suggesting that it is not possible to decide a general and 'abstract' rule on this matter: Mehrish, *supra* note 13, at 87.

<sup>55</sup> E. Canal-Forgues, 'Remarques sur le recours aux travaux préparatoires dans le contentieux international', (1993) *Revue générale de droit international public* 901-937 at 913.

authoritative interpreter such as an international tribunal should even be required to ‘correct’ the ordinary meaning by invoking the *travaux*.<sup>56</sup>

Where the negotiating history disconfirms the *prima facie* plain meaning gained by the method of interpretation under Article 31 of the VCLT, the courts are at liberty to decide whether or not to overrule this by reference to that negotiating history, arguing that on the second thought such meaning proves to be indefinite.<sup>57</sup> They can claim to have overlooked ‘latent ambiguity in the text’.<sup>58</sup> As the second possibility, they may contend, albeit less persuasively, that after reflection, the initial tentative interpretation is found to reveal the concealed outcome that is “manifestly absurd or unreasonable”.<sup>59</sup>

### *E. Evaluating the Recourse to the Travaux Préparatoires*

While the method of invoking the *travaux préparatoires* to infer the drafters’ original intention is crucial, a few cautious remarks ought to be borne in mind. First of all, it can be seriously asked why the intention of the negotiators should carry greater weight than that of the ratifying States.<sup>60</sup> Doubtless, consulting the preparatory work is limited inevitably to deciphering the positions only of the original parties to the treaty,<sup>61</sup> excluding those of acceding (or newly independent) States.<sup>62</sup> In response to such a legitimate question, this author suggests that as long as the *travaux* are published and accessible,<sup>63</sup> there should be no reason to refrain from the

<sup>56</sup> S. Schwebel, ‘May Preparatory Work be Used to Correct Rather than Confirm the ‘Clear’ Meaning of a Treaty Provision?’, in: J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21<sup>st</sup> Century*, (Leiden: Brill, 1996), pp. 541-7. According to Aust, this approach is consistent with the practice: A. Aust, *Modern Treaty Law and Practice*, (Cambridge: Cambridge University Press, 2000), at 197. See also Merkouris, *supra* note 11, at 93-94 (suggesting that the so-called ‘corrective’ role of the *travaux* be understood as part of the ‘determinative’ function of Art. 32 of the VCLT).

<sup>57</sup> Vandeveld, *supra* note 32, at 296-297.

<sup>58</sup> Mortenson, *supra* note 29, at 787.

<sup>59</sup> *Ibid.* With respect to a specific term, there is a third possibility that the *travaux* may disclose the parties’ intention to give ‘special meaning’ to it: *ibid.*

<sup>60</sup> Merkouris, *supra* note 11, at 75-76 (referring to ‘an ossifying effect’ of referring to the *travaux*).

<sup>61</sup> Mortenson, *supra* note 29, at 785.

<sup>62</sup> Klabbers, *supra* note 13 at 280.

<sup>63</sup> In the doctrines, ‘accessibility’ of the preparator work is considered a key criterion for recourse to them: M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, (Leiden: Brill, 2009), at 446.

historical interpretation.<sup>64</sup> In such circumstances, it can be argued that when acceding to it, States are cognizant of the regulatory scheme envisioned by the original framers of the treaty.

Second, while interpretation is purported to throw light on how the text gives expression to the *common* intention of the framers,<sup>65</sup> its very existence may be contestable.<sup>66</sup> The positions of representatives on issues of substance in the drafting process can be bewilderingly divergent.<sup>67</sup> It may transpire that drafters express (different, rivalling and even contradicting) thoughts and proposals.<sup>68</sup> Distilling common understandings (if any) of the negotiators from raw data comprised of their unconsummated exchanges of proposals is a veritable challenge, and hardly an orderly or harmonious exercise.<sup>69</sup> Hence, one is always confronted with an epistemic question of how to discern the (common) intentions of the parties.<sup>70</sup> The VCLT provides little guidance on how the ‘recourse’ to the preparatory work should be made, other than by general reference to the purpose of such recourse as being either to confirm or determine meaning.<sup>71</sup> A way out of such an epistemically vexed situation is to suggest a nuanced and abstract assessment of the ‘common intention of the treaty taken in its entirety’<sup>72</sup> and to reconstruct a presumed common intention of the parties based on shared expectation of the negotiators. For that purpose, it is essential to pay heed to both historical circumstances of a

<sup>64</sup> Merkouris, *supra* note 11, at 81-82 and 87. See also H. Lauterpacht, ‘Les *Travaux Préparatoires* et L’interprétation des Traités’, (1934) 48-II *Recueil des Cours* 709-817, at 808.

<sup>65</sup> See the remarks by the Special Rapporteur, Sir Humphrey Waldock, in (1964-II) *Yearbook of the International Law Commission*, at 58, para. 21 (stressing the primary aim of finding out the general understanding of the parties).

<sup>66</sup> See Lauterpacht (1949), *supra* note 16, at 52 (‘the treaty- far from giving expression to any common intention of the parties -actually registers the absence of any common intention (either in general or in relation to the subject-matter of the dispute)’).

<sup>67</sup> It is uncertain if the *travaux préparatoires* can ‘clearly’ point to a definite legislative intention: R. Gardiner (2010), *supra* note 42, at 99.

<sup>68</sup> Le Bouthillier, *supra* note 48, at 847, para. 12. In some cases, the preparatory work may reveal that the negotiators did not clarify what their common understanding, if any, was: Gardiner (2010), *supra* note 42, at 105.

<sup>69</sup> Gardiner (2010), *ibid.*

<sup>70</sup> Indeed, as most treaties are not adopted by consensus, a quest for any common intention of the parties might be criticised as a futile, if not fallacious, endeavour or even a fiction. See L. Ehrlich, ‘L’Interprétation des traités’, (1928) 24 *Recueil des Cours* 1-145, at 66; C. Djefal, *Static and Evolutive Treaty Interpretation- A Functional Reconstruction*, (Cambridge: Cambridge University Press, 2016), at 104. See also Fitzmaurice (1957), *supra* note 13 at 205 and 217.

<sup>71</sup> See McNair, *supra* note 12, at 411 (“It is not possible to state any rules of law governing the question whether and, if so, to what extent international courts and tribunals...are entitled to look at “preparatory work...”); Gardiner, *supra* note 33, at 382.

<sup>72</sup> Lauterpacht (1949), *supra* note 16, at 76.

treaty's creation and to "its object ascertained by the general tendency of its clauses".<sup>73</sup> The cogency of such historical inquiries stands insofar as they are done in a principled and consistent manner.<sup>74</sup>

### III. TRAVAUX PREPARATOIRES OF THE GCIV

#### *A. Overview*

The preceding doctrinal examinations have upheld that notwithstanding the perceived secondary place assigned to the *travaux* in the VCLT, the importance of their confirmatory and determinative functions stands. This paper has already identified lingering uncertainty surrounding the apparent incongruence of the GCIV between the scope of application of Article 4 and that of Part III (and of Article 5). Confronted with this situation, historical investigations and inductive analyses will focus on the negotiators' intentions in relation to the personal ambit of application contemplated by Article 4 of the GCIV and its precursors formulated in the context of the conferences prior to the Diplomatic Conference (1949).

#### *B. The Tokyo Draft Text*

The genesis of the Civilians Convention dates back as early as the ICRC's *Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality Who are on Territory Belonging to or Occupied by a Belligerent*, which was adopted at the XVth International Red Cross Conference at Tokyo in 1934 (the "Tokyo Draft").<sup>75</sup> Article 1 of the Tokyo Draft defines the meaning of 'enemy civilians' as follows:

'Les civils ennemis, dans le sens de la présente Convention, sont les personnes qui réunissent les deux conditions suivantes:

- a) ne pas appartenir aux forces armées terrestres, maritimes et aériennes des belligérants, telles qu'elles sont définies par le droit international, notamment par les art. 1, 2 et 3 du Règlement annexé à la Convention de la Haye, N°IV, concernant les

<sup>73</sup> *Ibid.*

<sup>74</sup> Compare Gardiner, *supra* note 33, at 353.

<sup>75</sup> *Projet de convention concernant la condition et la protection des civils de nationalité ennemie qui se trouvent sur le territoire d'une belligérant ou sur un territoire occupé par lui*: Rapports Présentés à la Xve Conférence Octobre 1934, vol. I, Document No. 9, XVeme Conférence internationale de la Croix-Rouge, Tokio, 20 octobre 1934, at 3-4.

lois et coutumes de la guerre sur terre, du 18 octobre 1907 ;

- b) être ressortissant d'un pays ennemi et se trouver sur le territoire d'un belligérant ou sur un territoire occupé par lui ».

The Tokyo Draft envisaged two spatial contexts (a belligerent's territory and occupied territory). At the Tokyo Conference, there was even a suggestion that two separate Conventions should be drafted: one dealing with civilians in the territory of a belligerent State; and the other relating to civilians in occupied territory.<sup>76</sup> While the latter circumstance was already dealt with in the 1907 Hague Regulations, with the civilian population benefiting from its Section III (Articles 42-56), the former scenario was considered new.<sup>77</sup> It might be suggested that the laconic style of the Tokyo Draft entailed a probably unintended advantage. One might contend that the Draft did not necessarily demand that the captor State be the one in whose territory civilians were held, so that this text did not necessarily rule out the civilians trapped in combat zones of their home (or co-belligerent) State. Yet, this is a rather strained interpretation of condition b) of the text that expressly mentioned 'a national of an enemy State *and* finds oneself in the territory of a belligerent....'<sup>78</sup>

### *C. The Draft Civilians Text Proposed by the Conference of Government Experts (CGE)*

In the aftermath of the Second World War, the ICRC submitted its proposals and first drafts to the Preliminary Conference of National Red Cross Societies at Geneva (1946) (July 26 to August 3, 1946).<sup>79</sup> At the subsequent Conference of Government Experts (the "CGE") at Geneva (April 14 to 26, 1947),<sup>80</sup> Article 2 of the CGE's Civilians Draft, which was

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> Emphasis added.

<sup>79</sup> Following a number of suggestions made by National Societies, the ICRC produced comprehensive reports for the Stockholm Conference: ICRC, *XV<sup>th</sup> International Red Cross Conference (Stockholm, August 1948), 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*, No. 4a, at 2 (1948) (hereinafter: "ICRC 1948a").

<sup>80</sup> The Conference was comprised of seventy representatives of only fifteen Governments. *Ibid.*

crafted by the Third Commission,<sup>81</sup> defined its personal scope of application as follows:

The civilians to whom the stipulations of the present Conventions apply, are the persons who fulfill the following cumulative conditions:

- (a) That of not belonging to the armed forces, as defined in the Convention relative to the treatment of Prisoners of War;
- (b) That of being nationals of an enemy country;
- (c) That of being either in the territory of a belligerent, on board a vessel of the latter's nationality, or in territory occupied by him, or of having fallen by any other means into his hands.<sup>82</sup>

Condition (c) of Article 2 of the CGE draft demarcated the spatial context contemplated by its drafters. It recapitulated the two situations delineated by the ICRC's Tokyo Civilians Draft (enemy territory and occupied territory). Again, as with the Tokyo Draft, it might be submitted that the textual structure of the CGE text did not necessarily demand such enemy nationals to be caught in the territory of their adversary.<sup>83</sup>

Another hallmark of condition (c) of Article 2 of the CGE's Civilians Draft was the expression "or of having fallen by any other means into his hands".<sup>84</sup> This expression could be understood as covering any conceivable way in which civilians could come into adversary's hands.<sup>85</sup> Hence, its potential role as a safety-net would have been of special relevance to persons of temporary status such as asylum-seekers, travelers, and international humanitarian

<sup>81</sup> See ICRC, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims (Geneva, April 14-26, 1947)*, Series I, No. 5b (1947) (hereinafter "*Report of the CGE*"). For instance, the Report of the Third Commission referred to the expression 'civilian enemy aliens'. *Id.*, at 269 and 272.

<sup>82</sup> *Ibid.*, at 273.

<sup>83</sup> The first limb of condition (c), i.e., "[t]hat of being either in the territory of a belligerent' did not append the word 'enemy' or 'adverse'. This is similar to the title of Sec. I of Part III under the GCIV.

<sup>84</sup> *Report of the CGE*, *supra* note 80, at 273 (emphasis added).

<sup>85</sup> According to the *Report of the CGE*, this expression was "added to cover *all future contingencies*". *Ibid.* (emphasis added). This expression was purported to go even beyond Art. 12 of the Tokyo Draft. The latter provided that "[e]nemy civilians who for any reason may be brought into the territory of a belligerent during hostilities shall benefit by the same guarantees as those who were in the territory at the outset of military operations".



(relief) or health care workers dispatched to address urgent need in the belligerent's territory.

In parallel to the CGE text, the ICRC proposed the following text with two cumulative conditions:

- (a) That [the condition] of not belonging to the armed forces, as defined in the PW [Prisoners of War] Convention;
- (b) That of being nationals of an *enemy* country *and* of *residing* in the territory of a belligerent, or in a territory occupied by him.<sup>86</sup>

As compared with the CGE text, the ICRC's parallel text was more restrictive. Its condition (b), requiring *enemy* nationals to be *resident* in a belligerent's territory, seemed to reinforce the preclusion of civilians captured in the invaded zone of their own belligerent State. It did not matter whether they had taken up arms or otherwise participated in hostilities when captured. The narrower ambit of the ICRC text was discernible also in excluding persons who entered a belligerent territory on temporary ground (such as travelers, asylum-seekers, and workers for humanitarian or relief societies sent for emergency).

#### *D. From the ICRC's Post-CGE Civilians Draft Text to the Stockholm Civilians Draft*

Following intense consultations in the wake of the CGE (1947), the ICRC submitted its revised text of the draft Civilians Convention<sup>87</sup> to the Stockholm Conference in 1948.<sup>88</sup> The first sentence of Article 3(1) of the ICRC's post-CGE Civilians Draft provided that "[t]he persons protected by the present Convention are those who, at a given moment and in whatever manner, find themselves, in the case of a conflict or occupation, in the hands of a Power of which they are not nationals".<sup>89</sup> Two hallmarks of this post-

<sup>86</sup> *Ibid.* (emphasis added).

<sup>87</sup> ICRC 1948a, *supra* note 78, at 2.

<sup>88</sup> The Conference (20-30 Aug. 1948) was attended by fifty Governments and fifty-two National Red Cross Societies. ICRC, *Revised and New Draft Conventions for the Protection of War Victims – Texts Approved and Amended by the XVII<sup>th</sup> International Red Cross Conference (Revised Translation)*, at 5 (1948) (hereinafter, "ICRC 1948b").

<sup>89</sup> The entirety of Art. 3 provides as follows:

The persons protected by the present Convention are those who, at a given moment and in whatever manner, find themselves, in the case of a conflict or occupation, in the hands of a Power of which they are not nationals. Furthermore, in case of a conflict not international in character,

CGE text ought to be underscored. First, the concept of ‘civilians’, which had been used in the CGE text, was replaced by that of ‘protected persons’. Second, as is of special significance to the central theme of this paper, Article 3 of the post-CGE Civilians text eliminated any reference to ‘the territory of a belligerent’. Curiously, exactly what lay behind such a decision entailing potentially crucial implications remains unexplained in the draft records.

The XVII<sup>th</sup> International Red Cross Conference at Stockholm (August 1948) approved and amended the new Draft Civilians Convention<sup>90</sup> alongside three other post-CGE draft texts of the GCI-III. Article 3 of this Stockholm Civilians Draft set its personal parameters, with only cosmetic changes in the above post-CGE ICRC text. This provision read:

Persons protected under the present Convention are those who, at a given moment and in whatever manner, find themselves, in the case of a conflict or occupation, in the hands of a Power of which they are not nationals; furthermore, in case of a conflict not international in character, the nationals of the country where the conflict takes place *and who are not covered by other international conventions*, are likewise protected by the present Convention. [Emphasis added].

The provisions of Part II are, however, wider in application, as defined in Article 11.

Persons such as prisoners of war, the sick and wounded, the members of medical personnel, who are the subject of other international conventions, remain protected by the said conventions.<sup>91</sup>

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the nationals of the country where the conflict takes place and who do not participate in hostilities, are equally protected by the present Convention.

The provisions of Part II are, however, wider in application, as defined in Article 11.

Persons such as prisoners of war, the sick and wounded, the members of medical personnel, who are the subject of other international Conventions, remain protected by the said Conventions.

XVII<sup>th</sup> International Red Cross Conference (Stockholm, Aug. 1948), ICRC 1948a, *supra* note 78, at 154.

<sup>90</sup> ICRC 1948b), *supra* note 87.

<sup>91</sup> *Final Record*, vol. I, at 114-115 (emphasis in original), indicating the amendment adopted at the Stockholm Conference (1948).

It was this Stockholm Civilians Draft<sup>92</sup> that provided the basis for deliberations for Committee III of the subsequent Diplomatic Conference at Geneva (1949).

*E. The Scope of Application of the Draft Civilians Convention  
Discussed at Committee III of the Diplomatic Conference (1949)*

*1. Overview*

Before embarking upon detailed analyses, it can be commented that Committee III, which approved the text of Article 3 of the Stockholm Civilians Draft,<sup>93</sup> did not engage in elaborate discussions on the personal scope of this provision or of the Civilians Convention as a whole. The relative paucity of Committee III's debates relating specifically to unprivileged belligerents marks a contrast to Committee II's elaborate discussions on this subject under the Stockholm POW Draft, as will be explored below.

For the purpose of examining the scope of the application of the GCIV, it is essential to ascertain Committee III's discourse on three aspects of the Civilians Draft.<sup>94</sup> First, inquiries will be made into the debates on the general rule contained in Article 3 (now Article 4 GCIV), focusing on how the drafters understood the concept of the 'protected persons' in relation to unprivileged belligerents. Second, examinations will turn to the draft records of Article 3A (now Article 5 of the GCIV) for the purpose of ascertaining how its scope of application was conceived. This general derogation clause, which had not appeared in the Stockholm Draft, was first introduced at the Diplomatic Conference. As explained above, this clause lacked a specific paragraph dealing with active combat zones. Third, examinations will focus on the draft records of Section I of Part III of the GCIV with a view to discovering if the negotiators of the GCIV intended the provisions of Section I of Part III to encompass 'protected persons' captured on battlefield. Such examinations will be of crucial significance for testing the strength of the teleological interpretation discussed above.

<sup>92</sup> Art. 3 of this Stockholm Draft differed from the post-CGE ICRC text in two respects: (i) the omission of reference to the clause "who do not participate in hostilities" in the context of non-international armed conflict; and (ii) the introduction of the exclusionary clause "and who are not covered by other international conventions".

<sup>93</sup> It was adopted by 28 votes to nil, with 11 abstentions: *Final Record*, vol. II-A, at 796, Committee III, 48<sup>th</sup> Meeting, 18 Jul. 1949.

<sup>94</sup> The outcome was with 38 votes to none with 8 abstentions: *id.*, at 801-802, Committee III, 50<sup>th</sup> Meeting, (19 Jul. 1949). *See also Report of Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva, ibid.*, at 812.

## 2. *Debates on Article 3 of the Stockholm Civilians Draft*

In Committee III, some delegates took issue with the wide scope of Article 3 of the Stockholm Civilians Draft. The United Kingdom delegate objected that “[i]f Article 3 remained unchanged...[this] would also cover individuals participating in hostilities in violation of the laws of war”.<sup>95</sup> His rationale was that “[t]he whole conception of the Civilians Convention was the protection of civilian victims of war and not the protection of illegitimate bearers of arms, who could not expect full protection under rules of war to which they did not conform”.<sup>96</sup> Extending protections to ‘illegitimate bearers of arms’ such as ‘criminals and saboteurs’ was considered to jeopardise “the interests of the regular soldier and of the general conduct of war, as all persons engaged in hostilities should conform to the rules of war”.<sup>97</sup> By ensuring that such “persons who were not entitled to protection under the Prisoners of War Convention would receive exactly the same protection by virtue of the Civilians Convention”, regardless of their adherence to laws of war, Article 3 of Draft Civilians Convention was deemed hardly to incentivize compliance with such laws.<sup>98</sup> Still, it might be contended that the United Kingdom delegation’s main concern was to preclude unprivileged belligerents wherever they were found. This might not have necessarily excluded unarmed civilians stranded in their homeland combat zones.

At the Plenary, the USSR delegate’s cardinal assumption as to the compass of the proposed GCIV was revealed when he proposed to delete the first sentence of Article 3(2) of the Stockholm Civilians Draft (which denied the applicability of the Convention to nationals of States not signatory to it).<sup>99</sup> He asserted that the elementary rules of humane treatment “should apply, in the same degree, to *any category of protected persons, regardless of their civilian status*”.<sup>100</sup> What can be gathered from his comment no less obliquely

<sup>95</sup> See *id.*, at 621, Committee III, 2<sup>nd</sup> Meeting, 26 Apr. 1949 (Brigadier General Page, UK). See also *id.* (Colonel Du Pasquier, Switzerland & Mr. Castberg, Norway).

<sup>96</sup> *Ibid.* See also the view of Colonel Du Pasquier (Switzerland) and Mr. Castberg (Norway) that highlighted the minimum humane treatment for unlawful combatants. *Ibid.*

<sup>97</sup> *Id.*, at 620-621, Committee III, 2<sup>nd</sup> meeting, 26 Apr. 1949 (Brigadier General Page, UK). For the consistent British stance as to the question of independent militia since the 1899/1907 Hague Peace Conferences, see K. Nabulsi, *Traditions of War – Occupation, Resistance, and the Law*, 6-11 (1999).

<sup>98</sup> *Final Record*, vol. II-A, at 620-621, Committee III, 2<sup>nd</sup> meeting, 26 Apr. 1949. Further, the UK delegate suggested that civilians in occupied territory owed the “duty to behave in a peaceful manner and not to take part in hostilities”. *Ibid.*

<sup>99</sup> The first sentence of the second paragraph had been introduced by the majority of the Drafting Committee of Committee III on the proposal of Professor Castberg (Norway); *Final Record*, Vol. II-B, at 376, 23<sup>rd</sup> Plenary Meeting, 1 Aug. 1949 (Mr. Wershof, Canada).

<sup>100</sup> *Ibid.* (emphasis added).

was his presumption that the Civilians Convention should serve as the ‘gap-filler’ for any person that would fall outside the purview of the GCIII. Accordingly, it can be surmised that the Soviet delegate grasped even unprivileged belligerents captured on a battlefield to be ‘saved’ by the Draft Civilians Convention. Nevertheless, it turned out that when the entire text of Article 3 was voted,<sup>101</sup> the USSR amendment, which could have served as a lead-in to potentially wider discussions on the coverage of the GCIV, was rejected decisively.<sup>102</sup>

### 3. Debates on Article 3A of the Draft Civilians Convention (Article 5 of the GCIV)

Back in Committee III, the Australian delegation proposed a derogation clause into the draft Civilians Convention.<sup>103</sup> Their rationale was that the rights of the State to deal with irregulars, such as spies, saboteurs, fifth columnists and traitors, were insufficiently defined.<sup>104</sup> In response, the Drafting Committee introduced a new provision, Article 3A (the precursor to Article 5).<sup>105</sup> The first paragraph of this provision read that “[w]here in the territory of a belligerent, the Power concerned is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under this Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State”.<sup>106</sup>

On closer inspection, there was a difference between the first paragraph of Article 3A of the Draft Civilians Convention and the corresponding paragraph of the GCIV (the first paragraph of Article 5). This concerns none other than the question of applicability of the derogation clause to unprivileged belligerents captured in a combat zone of their home or co-belligerent territory. The text of Article 3A(1) was drawn up with the proclamation that “[w]here in the territory of a *belligerent, the Power*

<sup>101</sup> *Ibid* (by 31 votes with no opposition and with 9 abstentions).

<sup>102</sup> *Id.*, at 376-377 (by 28 votes to 9, with 5 abstentions). Note the criticism of Mr. Wershof (Canada) that giving protections of the Civilians Convention to nationals of the enemy State not signatory to it even would be a ‘danger’, *see ibid*.

<sup>103</sup> This new draft Art. 3A was adopted by 5 votes (Canada, US, France, UK and Switzerland) at the Drafting Committee. While the Norwegian delegation abstained from voting, the USSR delegate urged its deletion; *id.*, at 796, 49<sup>th</sup> Meeting of Committee III. *See also Final Record*, vol. III (Annexes), at 100-101, para. 195.

<sup>104</sup> *Final Record*, vol. II-A, at 622, Committee III, 2<sup>nd</sup> Meeting, 26 Apr. 1949 (Colonel Hodgson, Australia).

<sup>105</sup> *Ibid*.

<sup>106</sup> *Final Record*, vol. III (Annexes), at 100-101, para. 195.

concerned is satisfied....”<sup>107</sup> Hence, it left the possibility that the territorial belligerent State might not have to be *identical* to the ‘Power concerned’ who would capture suspicious civilians.<sup>108</sup> This should be compared to Article 5(1) of the GCIV, which decrees that “[w]here, in the territory of a Party to the conflict, *the latter* is satisfied....” The addressee of Article 3A was precise. It demanded that the territorial State in which protected persons are found should be the one that takes certain controlling measures over the impugned protected persons.<sup>109</sup>

Subsequently, the wording of Article 3A(1) of the Working Draft was slightly changed by Drafting Committee, which moulded the latter into the current textual formula of Article 5(1) GCIV. There was no discussion on any potential ramification of this change (much less on the seldom noticeable consequence that the text would no longer be capable of encompassing the case of unprivileged belligerents captured by the invading adversary in their homeland battlefield). It seemed that the delegates were distracted by a more pressing question: whether it was proper to introduce Article 3A as the *general* clause of derogation, rather than to append a specific escape clause to a particular provision.<sup>110</sup> Following the amendment entered by Drafting Committee, Committee II adopted the text of Article 3A.<sup>111</sup>

At the Plenary, of special relevance to assessing the ambit of the GCIV was the USSR’s criticism that the text of Article 3A entailed the risk of the collective application of sweeping measures.<sup>112</sup> The USSR Delegation proposed that this derogation clause<sup>113</sup> should be replaced by a provision of more moderate nature; a clause that would constrain the material scope of

<sup>107</sup> *Ibid.*, emphasis added.

<sup>108</sup> As seen above, this is akin to Art. 1 of the 1934 Tokyo Draft and Art. 2 of the 1947 CGE Civilians Draft.

<sup>109</sup> See also the unsuccessful proposal submitted by six states (Austria, Burma, France, Sweden, Switzerland and Turkey) to the Plenary Assembly for reconsideration of Art. 3A, which retained such original wording concerning the addressee; see *Final Record*, vol. III (Annex), at 101, para. 196.

<sup>110</sup> See *ibid.*, at 796-797, 813-815 (criticisms raised by three former communist States, USSR, Bulgaria and Czechoslovakia, and *Report of Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva*).

<sup>111</sup> *Final Record*, Vol. II-A, at 798, Committee III, 49<sup>th</sup> Meeting, 18 Jul. 1949, 3pm (by 29 votes to 8, with 7 abstentions). For the definition of activities “hostile to the security of the State”, see *The Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, at 56 (J. Pictet ed., 1958) (hereinafter: “*Pictet’s Commentary to GCIV*”), at 56 (defining them as “probably above all espionage, sabotage and intelligence with the enemy Government or enemy nationals”).

<sup>112</sup> *Final Record*, vol. II-B, at 377-378.

<sup>113</sup> *Ibid.*, at 379, 23<sup>rd</sup> Plenary Meeting, 1 Aug. 1949 (Mr. Morosov, USSR).

derogation only to the rights of communications, and its personal ambit only to the persons convicted of espionage and sabotage.<sup>114</sup> The USSR's working assumption seemed to be that while proposing such an amendment to Article 3A, spies and saboteurs fell within the *general* coverage of the GCIV. However, this cogent proposal was outweighed by the objection that to limit the effect of derogation only to those convicted of espionage or sabotage would be too restrictive for the occupying power to deal effectively with its legitimate security concern.<sup>115</sup> In the end, the USSR's amendment, as modified by Bulgaria's sub-amendment,<sup>116</sup> was defeated<sup>117</sup> whilst the text of Article 3A was endorsed by the Plenary Assembly.<sup>118</sup>

#### *4. The Drafters' Thought on the Scope of Application of Section I of Part III of the GCIV*

To recall, the literal interpretation arrives at a hypothesis that under the GCIV the drafters considered civilians trapped in their homeland battlefield to be barred from the ambit of Section I of Part III. The investigations into the *travaux* confirms such a hypothesis. At the Diplomatic Conference of Geneva, Committee III never bothered to query if there would be any ramification of the absence of the adjective 'alien' or 'enemy' before the word 'Territories' in the title of Section I of Part III.<sup>119</sup> Such an editorial change was perceived as entailing no more than a paltry effect.

Indeed, the *Report of Committee III to the Plenary Assembly* (the "*Report*") provides two indicia for supporting this hypothesis. First, when explaining the parameters of Section I of Part III, the *Report* expressly mentioned that this section would apply to '*aliens in the territory of a belligerent State*' alongside "the population - national or alien - resident in a country occupied by the enemy".<sup>120</sup> Second, a more compelling indication for supporting this hypothesis can be extrapolated from the *Report's* commentary to Article 4 of the Stockholm Civilians Draft (now Article 6 of the GCIV). This provision set forth that certain provisions would be maintained in force throughout the

<sup>114</sup> This proposal had already been refuted at Committee III; *Final Record*, Vol. II-B, at 377, 23<sup>rd</sup> Plenary Meeting, 1 Aug. 1949.

<sup>115</sup> *Id.*, at 380, 23<sup>rd</sup> Plenary Meeting, 1 Aug. 1949 (Mr. Ginnane, US).

<sup>116</sup> Bulgaria suggested that the GCIV should cover even "persons judicially prosecuted for espionage and sabotage": *id.*, at 381-382 (Mr. Mevorah).

<sup>117</sup> *Id.*, at 383 (25 votes to 9, with 6 abstentions).

<sup>118</sup> *Id.*, at 383 (by 29 votes to 8, with 4 abstentions).

<sup>119</sup> *Final Record*, vol. I, at 122.

<sup>120</sup> *Final Record*, vol. II-A, at 821 (emphasis added). Admittedly, the Report did not mention that Sec. I of Part III would apply *only* to those two situations. Yet, it seems to be an overstatement to argue the Report implicitly recognised the applicability of this section to nationals captured in their homeland battlefield.

period of occupation. The *Report* stated that “[a]ll provisions of Section I of Part III, *excepting Article 24, which only applies during active hostilities, would be retained*”.<sup>121</sup> Article 24 of the Stockholm Civilians Draft, part of which has survived to become the text of Article 28 of the GCIV,<sup>122</sup> provided that “[n]o protected person may at any time be sent to, or detained in areas which are particularly exposed, nor may his or her presence be used to render certain points or areas immune from military operations”.<sup>123</sup> Referring to the ‘areas which are particularly exposed’, the regulatory scope contemplated by Article 24 (at least by its first clause) seemed to verge on active combat zones.<sup>124</sup> From the above comment of the *Report*, it can be inferred that except for Article 24, the other provisions in Section I of Part III of the Draft Civilians Convention were not comprehended as applicable to protected persons caught in battlefield (whether of their home state or of adversary).

Subsequently, at the Diplomatic Conference, the first clause of Article 24 was eliminated. It makes sense to suppose that this was considered out of tune with the remainder of Section I of Part III, which were purported to apply only to the situation other than that of active hostilities. Surely, one might counter that those other provisions of Section I of Part III were understood as applicable *both* during active combat and during the phase of occupation. Yet, such argument is to overread the negotiators’ purport. If their shared thought supported the broader coverage of the provisions of Section I of Part III, why should not those provisions have been introduced in Part II, which was intended to be wider in application to encompass combat zones? All in all, the preparatory work suggests that the drafters were largely of the opinion that the provisions of Section I of Part III, with the exception of Article 28 GCIV, were not destined for civilians trapped on battlefield.

*F. Overall Assessment of the Inferences Drawn from the Travaux  
Préparatoires of the GCIV in Relation to Battlefield Unprivileged  
Belligerents*

From the tenor of discussions of Committee III at the Diplomatic Conference, one can infer the negotiators’ general acknowledgement that the

<sup>121</sup> *Id.*, at 816, (emphasis added).

<sup>122</sup> The Diplomatic Conference eliminated the first part of Art. 24 of the Stockholm Civilians Draft, which related to the transfer of the protected persons to, and their detention in, combat zones.

<sup>123</sup> *Final Record*, vol. I at 122.

<sup>124</sup> See *Pictet’s Commentary to the GCIV*, at 209 (explaining that Art. 28 of the GCIV “applies to the belligerents’ own territory as well as to occupied territory”).



scope of Part III of the GCIV was circumscribed only to the protected persons held in two situations: the adversary's territory and occupied territory.<sup>125</sup> The majority of the negotiators did not uphold the thesis that the breadth of Part III of the draft Civilians Convention should be sufficient to cover civilians caught in (their homeland) battle zones.<sup>126</sup> Insofar as unprivileged belligerents were concerned, the prevailing assumption seemed to be that if applicable, the Draft Civilians Convention could be applied only to those captured in the two aforementioned situations. Indeed, some (Western) States went further, challenging the very applicability of the draft Civilians Convention to any unprivileged belligerents. As seen above, they were opposed to the wider ambit of protection suggested by Article 3 of the Stockholm Civilians Draft (Article 4 GCIV). In contrast, the influential minority opinions (proffered by the USSR and other socialist allies) suggest their conviction that the protections of the Draft Civilians Convention should be as comprehensive as possible. They seemed to contemplate the Civilians Convention as the safety net for all persons excluded from the framework of the Draft POW Convention, including battlefield unprivileged belligerents.

#### IV. BATTLEFIELD UNPRIVILEGED BELLIGERENTS CONSIDERED IN THE *TRAVAUX PRÉPARATOIRES* OF THE GCIII

##### *A. Overview*

Analyses of this section will concentrate on three specific provisions of the 1948 Stockholm POW Draft: Article 3(1) (Article 4A GCIII); Article 4(2) (Article 5 GCIII); and Article 3(3), which provided the minimum humane treatment for all persons falling outside the compass of any other Geneva Convention. With respect to the first paragraph of Article 3 of the Stockholm POW Draft, the historical inquiries will explore whether and, if so, to what extent this was understood as encompassing unprivileged belligerents. Turning to the third paragraph of this provision, its implications on the ambit of protection of the draft Civilians Convention provide ample fodder for inductive reasoning. This section will investigate if this paragraph was perceived as the only safety net for civilians trapped on a battlefield (including, above all, homeland battlefield unprivileged belligerents) whom, according to the finding of the previous section, most drafters barred from

<sup>125</sup> *Final Record*, vol. II-A, *id.*, at 620-623, Committee III, 2<sup>nd</sup> meeting, 26 Apr. 1949.

<sup>126</sup> See the statement of Mr. Pictet at the 6<sup>th</sup> Meeting of the XVII<sup>th</sup> International Conference of the Red Cross at Stockholm in 1948; Observations concernant le compte-rendu de la 6<sup>ème</sup> séance, Projet 'Civils' Réduit (deposited in ICRC Archives). Even the draft documents unearthed at the ICRC archive and the Swiss Federal Archive (the depository of all the records of the 1949 Geneva Conventions) revealed no indication that such a thesis was sustained by most delegates.

the ambit of Part III of the GCIV. The negotiators' deliberations on the text of Article 4(2) of the Stockholm POW Draft are of special relevance because most of them perceived this as the viable alternative to the third paragraph of Article 3 of the Stockholm POW Draft.

This section will start with dissecting various proposals to expand the list of the POW candidates that were put forward from the Conference of Government Experts of 1947 (the "CGE") to the end of the Diplomatic Conference. In this regard, special attention will be paid to the definition of partisans (organised resistance movements), and to the motions to broaden the scope of the *levée en masse* and to introduce civilian participants in hostilities as new POW classes. The second half of this section will extrapolate inferences from heated debates over the fate of Article 3(3) of the Stockholm POW Draft.

*B. Recognition of Partisans and Organized Resistance Movements at the Conference of Government Experts (CGE) (1947)*

At the CGE at Geneva (1947),<sup>127</sup> the Second Commission, which addressed issues of prisoners of war, examined the conditions for partisans to qualify for the POW status.<sup>128</sup> The representatives of the CGE defined the term 'partisans' as "persons in occupied territory who take up arms against the occupying Power and its allies".<sup>129</sup> Among the eight proposed classes of persons that would benefit from the POW status listed in Section 2 of the CGE Report,<sup>130</sup> partisans were featured in paragraph 4. They were defined as "[p]ersons in occupied territory who form a military organisation to resist the occupying Power and fulfil certain conditions, to be determined". They were

<sup>127</sup> ICRC, *Report of the CGE*, *supra* note 80, at 1-2.

<sup>128</sup> During World War II, the ICRC, on many occasions, urged belligerent parties to accord POW status to enemy partisans falling into their hands, if they had respected the laws and customs of war; *id.*, at 107-108.

<sup>129</sup> *Ibid.* As noted by the delegates of the CGE, there was no treaty defining the concept of partisans; ICRC, *Report of the CGE*, *supra* note 80, at 107. Art. 81 of the Lieber Manual defines partisans as "soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy". They are recognised as entitled to post-capture POW status. This is distinguished from a similar concept of 'war-rebels' in occupied territories. Art. 85 of the Lieber Manual defines 'war-rebels' as "persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same". According to this provision, unlike partisans, war-rebels are divested of the POW status in case of capture.

<sup>130</sup> Those eight classes correspond to the current text of Arts. 4A & 4B of the GCIII. Two differences were (i) the absence of the clause corresponding to Art. 4A(3); and (ii) the recognition of a military organisation in occupied territories; ICRC, *Report of the CGE*, *supra* note 80, at 103-104.

classified separately from independent militia or volunteer corps set forth in the second paragraph.<sup>131</sup> For most representatives at the CGE, the preliminary condition for the partisans to qualify for the POW status was that they had to form an armed or military organization.<sup>132</sup> When discussions of the CGE turned on the temporal span in which the partisans had to fulfil specific conditions,<sup>133</sup> the representatives were confronted with issues of “persons who...were employed on the land during the day and joined in raids by night”.<sup>134</sup> The crux of those issues, which was all too familiar in the modern context of asymmetrical warfare and of the ‘revolving-door’ theory, hinged on the temporal scope of the question: “[f]rom what moment do partisans fulfil the required conditions?”<sup>135</sup>

It might be argued that since the CGE Draft confined the operating sphere of partisans only in occupied territory, the drafting records on partisans were not germane to issues of battlefield unprivileged belligerents. However, as will be discussed below, at the subsequent Diplomatic Conference (1949), when the concept of ‘organised resistance movements’ was integrated into the specific sub-paragraph of the revised text that addressed independent armed units, the proposal to tie its operative sphere to an occupied territory was dropped to admit of its operation anywhere, including combat zones.

### *C. Article 3 of the Post-CGE POW Draft in Preparation for the Stockholm Conference*

Article 3 of the post-CGE POW Draft, which was entitled ‘Prisoners of war’, corresponds to the current text of Articles 4A and 4B of the GCIII. It included the list of eight categories of persons entitled to POW status. The sixth sub-paragraph of Article 3(1), which related to armed organised movements in occupied territory, reflected the fourth paragraph of the CGE Report seen above. The sixth sub-paragraph of Article 3(1) recognises as prisoners of war:

<sup>131</sup> *Id.*, at 104. Reference to ‘certain conditions’ was purported to refer, at least, to the four conditions derived from Art. 1 of the Hague Regulations.

<sup>132</sup> *Id.*, at 109.

<sup>133</sup> The specific conditions suggested by the CGE were more or less the recapitulation of the traditional rule contained in Art. 1 of the Hague regulations: *ibid.*, at 108.

<sup>134</sup> *Id.*, at 110.

<sup>135</sup> *Ibid.*

(6) Persons belonging to a military organization constituted in an occupied territory with a view to combating the occupying Power, on condition:

(a) that this organization has notified its participation in the conflict to the occupying Power, either through its responsible commander, or through the intermediary of a Party to the conflict, or that it has secured the effective, albeit temporary control of a determined area;

(b) that its members are placed under the orders of a responsible commander; that they constantly wear a fixed distinctive emblem, recognizable at a distance; that they carry arms openly; that they act in obedience to the laws and customs of warfare; and in particular that they treat nationals of the occupying Power who may have fallen into their hands, according to the provisions of the present Convention.<sup>136</sup>

As can be seen from this text, condition (a), which relates to the group requirement, consists of two alternative conditions (notification; or territorial control). Condition (b), which addresses the requirement for individual members, contains five specific conditions (the four traditional conditions derived from Article 1 of the 1899/1907 Hague Regulations; and the new requirement of reciprocity with regard to treatment of nationals of an occupying power).

#### *D. Article 3 of the Stockholm POW Draft (1948)*

When the post-CGE Draft texts prepared by the ICRC were approved by the XVII<sup>th</sup> International Red Cross Conference at Stockholm (1948), only slight amendments were made. The first paragraph of Article 3 of the Stockholm POW Draft (the immediate precursor to Article 4 GCIII) listed again eight categories of potential beneficiaries of the POW status.

The first paragraph of Article 3 provided that:

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

<sup>136</sup> XVII<sup>th</sup> International Red Cross Conference (Stockholm, Aug. 1948), ICRC 1948a, *supra* note 78, at 52-53.

(1) Members of the armed forces of the Parties to the conflict, including members of voluntary corps which are regularly constituted.

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

(3) Persons who accompany the armed forces without actually being members thereof, such as civil members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the military, provided they are in possession of identity cards similar to the annexed model and issued by the armed forces which they are accompanying.

(4) Members of crews of the merchant marine of the Parties to the conflict who do not benefit by more favourable treatment, under any other provisions in international law.

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

(6) Persons belonging to a military organization or to an organized resistance movement constituted in an occupied territory to resist the occupying Power, on condition:

(a) that such organization has, either through its responsible leader, *through the Government which it acknowledges*, or through the mediation of a Party to the conflict, notified the occupying Power of its participating in the conflict.

(b) That its members are under the command of a responsible leader; that they wear at all times a fixed distinctive emblem, recognizable at a distance; that they carry arms openly; that they conform to the laws and customs of war; and in particular, that they treat nationals of the occupying Power who fall in to their

hands in accordance with the provisions of the present Convention.<sup>137</sup>

The second paragraph of Article 3, which has turned into the current text of Article 4B of the GCIII, stipulated that:

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

(1) Persons who are, or who have been members of the armed forces of an occupied country, if by reason of such membership the occupying Power considers it necessary to intern them for reasons of security.

(2) Persons belonging to one of the categories designated in the present Article, who have been accommodated by neutral or non-belligerent Powers in their territories, subject to the rules of international law peculiar to maritime warfare. The Convention shall apply to these persons without prejudice to any more favourable treatment which the said Powers may think fit to grant them, and with the reservation of the provisions contained in Articles 7, 9, 14 (par. I), 28 (par. 5), 49-57 inclusive, 72-107 inclusive and 116. The situations governed by the said Articles may be made the subject of special agreements between the Powers concerned.<sup>138</sup>

Lastly, the third paragraph of Article 3 of the Stockholm POW Draft reads that:

The present Convention shall also provide a minimum standard of protection for any other category of persons who are captured or detained as the result of an armed conflict and whose protection is not specifically provided for in any other Convention.<sup>139</sup>

With specific regard to the ‘chapeau’ of the sixth subparagraph of Article 3(1), the salient difference from the post-CGE Draft was the inclusion of the concept of ‘an organised resistance movement’, and this, on an equal footing to a ‘military organization’. It was the Stockholm Conference that proposed

<sup>137</sup> *Final Record*, vol. I, at 73-74 (italics in original, suggesting the amendment done at Stockholm).

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid* (the third paragraph in original written in italics, showing its adoption as an amendment at the Stockholm Conference).

the recognition of the former concept.<sup>140</sup> As with the post-CGE text, condition (a) displayed a group requirement while condition (b) addressed an individual prerequisite. Yet, unlike the post-CGE text, subparagraph (a) eliminated the condition of territorial control.

What was most noteworthy of the Stockholm POW Draft was the introduction of the third paragraph to Article 3, which was proposed by the US delegation.<sup>141</sup> The question how this ‘minimum protection clause’ was perceived by the negotiators is closely interwoven with that of applicability of the Civilians Convention to the battlefield unprivileged belligerents. The analytical prism of the subsequent investigations will fixate on the key question highlighted earlier, namely, whether it was this clause of the Stockholm POW Draft (rather than the Draft GCIV) that the negotiators regarded as the safety net for any person that would fall outside the purview of the GCIII.

*E. Different Proposals to Expand the POW Candidates under Article 3(1) of the Stockholm POW Draft at the Diplomatic Conference and Their Implications on Battlefield Unprivileged Belligerents*

*1. Overall Remarks*

At Committee II of the Diplomatic Conference (which was assigned to examine the Stockholm POW Draft)<sup>142</sup> there were protracted discussions on Article 3 of the Stockholm POW Draft. Two internal subcommittees were set up: a Special Committee assigned to deal with specific provisions (including Articles 3 of the Stockholm POW Draft)<sup>143</sup> and a Working Party entrusted by the latter to examine the question of organized resistance movements laid down in the sixth subparagraph of Article 3(1).<sup>144</sup> At the Special Committee of Committee II, three salient approaches to broadening the scope of the POW beneficiaries under Article 3(1) of the Stockholm Draft were discernible. Two approaches were purported to extend the parameters of two different classes of persons that were already entitled to

<sup>140</sup> *Id.*, at 51. A ‘military organisation’ in occupied territory had been introduced as a new class of belligerents for the first time in the fourth paragraph of the *CGE Report* (and transposed to the sixth paragraph of post-CGE text). A footnote to that sub-paragraph explains that the requirement of territorial control by such a ‘military organisation’ was obliterated at the Stockholm Conference; *id.*, at 52-53. See also *Final Record*, vol. II-A, at 240.

<sup>141</sup> See *Final Record*, vol. II-A, at 431, 433, Special Committee of Committee II, 7<sup>th</sup> Meeting, 19 May 1949 (General Parker, US, and Mr. Wilhelm, ICRC).

<sup>142</sup> The Committee II held 36 meetings, stretching from 25 April to 22 July 1949.

<sup>143</sup> *Final Record*, vol. II-A, at 413.

<sup>144</sup> *Id.*, at 423-424.

the POW status under the Stockholm POW Draft. These were: (1) the proposal to facilitate members of organised resistance movements to acquire the POW status by easing the conditions; and (2) the motion to extend the operative sphere of the *levée en masse*. The third approach was to create an entirely new class of the POW candidates, civilians defending against the adversary in an unorganised and unspontaneous manner in their homeland in the throes of invasion. As will be explained below, only the first proposal proved to be successful.<sup>145</sup>

*2. The Proposal to Introduce the Organised Resistance Movement as a Subcategory of Independent Militia or Volunteer Corps*

As seen above, in the sixth subparagraph of Article 3(1) of the Stockholm POW Draft, the ‘organised resistance movement’ was already introduced alongside a ‘military organization’ as a new class of persons entitled to the POW status. What was distinctive (albeit modestly) about the proposal in the Special Committee was that an organised resistance movement was introduced as a *subcategory* of independent militia or volunteer corps, rather than as an autonomous *genre* of the POW beneficiaries. Further, the conditions laid down in that subparagraph were eased. The text proposed and adopted along this line now features as Article 4A(2) GCIII.

In the Special Committee, its Rapporteur revised the entire text of Article 3(1) of the Stockholm POW Draft.<sup>146</sup> The first subparagraph was modified to chime in with Article 9 of the Brussels Declaration (1874)<sup>147</sup> and Article 1 of the Hague Regulations, referring explicitly to the four established conditions. This subparagraph read:

- (1) members of armed forces who are in the service of an adverse belligerent, as well as members of militia or volunteer corps belonging to such belligerent, and fulfilling the following conditions:
  - (a) That of being commanded by a person responsible for his subordinates;
  - (b) That of wearing a fixed distinctive sign recognizable at a distance;
  - (c) That of carrying arms openly;

<sup>145</sup> This is incorporated into the text of Art. 4A(2) of the GCIII.

<sup>146</sup> *Final Record*, vol. II-A, at 465, Special Committee of Committee II, 21<sup>st</sup> meeting, 23 Jun. 1949.

<sup>147</sup> The Brussels Project of an International Declaration concerning the Laws and Customs of War (Brussels, 27 Aug. 1874).



(d) That of conducting their operations in accordance with the laws and customs of war.<sup>148</sup>

Later at the Special Committee, Chairperson of the Working Party split the first subparagraph of Article 3(1) of the Working Text into two subparagraphs.<sup>149</sup> Presumably, he must have sensed that this draft provision failed to differentiate between the members of integrated militia (or volunteer corps) and those of independent militia (or volunteer corps), *i.e.*, the binary structure that had already been recognized since the Brussels Declaration. After this revision, those two subparagraphs read:

- (1) Members of armed forces of a Party to the conflict, as well as members of militia or volunteer corps belonging to these armed forces;
- (2) Members of other militia or other volunteer corps of that Party to the conflict who fulfil the following conditions: . . .<sup>150</sup>

This decision necessitated the renumbering of the ensuing four (third to sixth) subparagraphs of Article 3(1).<sup>151</sup> Subsequently, in order to eliminate the new seventh (ex-sixth) subparagraph whose reference to the four conditions of Article 1 of the Hague Regulations (1907) were duplicated in the new second subparagraph,<sup>152</sup> the Working Party expressly mentioned organized resistance movements as a subcategory of the independent militia in the latter subparagraph.<sup>153</sup> The new second subparagraph, which was almost identical to the present second paragraph of Article 4A(2) GCIII, stipulated:

<sup>148</sup> *Final Record*, vol. II-A, at 465, Special Committee of Committee II, 21<sup>st</sup> meeting, 23 Jun. 1949.

<sup>149</sup> *Id.*, at 477, Special Committee of Committee II, 25<sup>th</sup> meeting, 5 Jul. 1949.

<sup>150</sup> *Ibid.*

<sup>151</sup> While this Working Text resulted in duplicating the four classic POW conditions in the second subparagraph (addressing independent militia or volunteer corps) and in the new seventh subparagraph (sixth subparagraph under the Stockholm Draft), no action was immediately taken; *id.*, at 465, Special Committee of Committee II, 21<sup>st</sup> meeting, 23<sup>rd</sup> Jun. 1949.

<sup>152</sup> This was in accordance with the Dutch proposal that the sixth paragraph (or seventh paragraph of the Working Text) be eliminated; *id.*, at 469, 478 & 479, Special Committee of Committee II, 22<sup>nd</sup> meeting, 24 Jun. 1949; 25<sup>th</sup> meeting, 5 Jul. 1949; and 26<sup>th</sup> meeting, 7 Jul. 1949.

<sup>153</sup> This was, for a brief period, renumbered as the seventh sub-paragraph; *id.*, at 479, Special Committee of Committee II, 26<sup>th</sup> Meeting, 7 Jul. 1949. *See also id.*, at 386-389, Committee II, 30<sup>th</sup> Meeting, 12 Jul. 1949.

Members of militias and voluntary corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory even if this territory is occupied, provided that these militias or voluntary corps, including these organized resistance movements, fulfil the following conditions:...(the four conditions remaining unaltered).<sup>154</sup>

This new second subparagraph, when compared with the sixth subparagraph of Article 3(1) of the Stockholm Draft, reveals two salient differences. First, it obliterated the requirement of both notification and territorial control. It streamlined the requirement, focusing only on the four conditions derived from Article 1 of the Hague Regulations. Second, as briefly noted above, any requirement that such irregular armed groups be connected to an occupied territory was removed to cover combat zones as their operative spheres, the aspect that was of special pertinence to “*organised* battlefield unprivileged belligerents”. [Emphasis added].

### 3. *The Proposed Concept of a ‘New Category of Levée en Masse’*

The second approach proposed at Special Committee of Committee II was the aborted attempt to expand the scope of *levée en masse* to cover different forms of unorganised resistance while maintaining the condition of carrying arms openly. One such proposal was to recognise a mass civilian rising that would occur without spontaneity “in response to an order broadcast by a government or by a military chief”.<sup>155</sup> However, this proposal was defeated<sup>156</sup> owing to the risk of jeopardising the security of combatants.<sup>157</sup> Another suggestion was to recognise a mass civilian rising *in the presence of* the occupying forces.<sup>158</sup> Yet, this failed to clarify the meaning of the phrase ‘the presence of an occupying power’. There was a further proposition to

<sup>154</sup> *Id.*, at 479, Special Committee of Committee II, 26<sup>th</sup> meeting, 7 Jul. 1949. Its adoption (by 14 votes to nil) resulted in the elimination of the seventh subparagraph. In the same meeting, the Special Committee made some cosmetic changes, adding: (i) the word ‘other’ before the words ‘militias’ and ‘volunteer corps’; and (ii) the words ‘those of’ between the words ‘including’ and ‘organized resistance movements’; *ibid.* Such changes were purported to highlight that this sub-paragraph would deal with *irregular/independent* militia or volunteer corps.

<sup>155</sup> *Id.*, at 420, Special Committee of Committee II, 3<sup>rd</sup> Meeting, 12 May 1949 (Major Steinberg, Israel).

<sup>156</sup> *Id.*, at 421 (7 votes to 3).

<sup>157</sup> *Id.*, at 420 (Mr. Gardner, UK).

<sup>158</sup> *Id.*, at 421 (Mr. Baistrocchi, Italy). *See also ibid.*, at 435, Special Committee of Committee II, 8<sup>th</sup> Meeting, 23 May 1949 (Mr. Gardner, UK).

extend the *levée en masse* to cover the civilian population fighting during the ‘first period of occupation’. This proposed new (seventh) class of the POW candidates<sup>159</sup> was intended to ‘protect civilian populations which continued fighting under enemy occupation’, namely, ‘combatants who had no time to organize themselves, and ran the risk thereby of being treated as *francs-tireurs*’.<sup>160</sup> The importance of this motion was to underscore practical difficulty in demarcating the line between the end of the invasion phase and the beginning of the phase of occupation.<sup>161</sup> However, its deficiency was the similar ambiguity in delimiting ‘the first period of occupation’.<sup>162</sup> Overall, all of those three proposals to (over)stretch the definitional scope of *levée en masse* to cover civilians engaged in unorganised armed resistance even in the phase of occupation (or in the transitional phase) was unable to override the preponderant objection that if civilians wished to continue resistance they had to form an organised armed unit (an independent militia or volunteer corps). Otherwise, in the mind of most delegates, there loomed substantial risk of diluting the security interest of the occupying administration.<sup>163</sup>

#### *4. The Danish Proposal to Add ‘Civilians’ Defending their Country against Invading Forces*

The third noteworthy approach was to propose that POW rights be extended to unorganised participants in hostilities, namely, to ‘civilians’ who got involved in armed resistance against invading forces without, however, referring to the condition of bearing weapons openly. Earlier at Committee II, the Danish delegate had expressed concern over the insufficient protection provided by sub-paragraph 6 of Article 3(1) of the Stockholm POW Draft in relation to two specific kinds of civilians: civilians acting in self-defence against ‘illegal acts’, and patriotic civilians participating in the defence of their country ‘in the event of aggression or of illegal

<sup>159</sup> *Id.*, at 422 (Major Steinberg, Israel). This amendment read that “[i]nhabitants who, having taken up arms in the conditions provided by sub-paragraph (5), continue to resist during the first period of occupation, without having had the possibility of setting up an Organization in conformity with the conditions set forth in sub-paragraph (6), provided they carry arms openly and conform to the laws and customs of war.

<sup>160</sup> *Ibid.*

<sup>161</sup> See the comment by the Soviet delegate (Mr. Morosov), *ibid.* at 421, Special Committee of Committee II, 3<sup>rd</sup> meeting, 12 May 1949.

<sup>162</sup> As criticized by the US (Mr. Yingling) and the UK delegates (Mr. Gardner). This was defeated by seven votes to three; *ibid.* See also *Report of Committee II to the Plenary Assembly of the Diplomatic Conference of Geneva, id.*, at 562.

<sup>163</sup> See Special Committee of Committee II, 3<sup>rd</sup> Meeting, 12 May 1949, *id.*, at 422 (Mr. Yingling, US; and Mr. Gardner, UK).

occupation'.<sup>164</sup> His amendment, which introduced those new POW beneficiaries to the proposed (seventh) sub-paragraph of Article 3(1),<sup>165</sup> was a verbose, clumsy cocktail comprised not only of the conditions for their qualification, but also of references to some human rights, including the ban on summarily shooting captives in a zone of invasion. In the Special Committee of Committee II, presumably inspired by Article 4 of the Stockholm Draft (now Article 5 GCIII),<sup>166</sup> Denmark proposed to ensure procedural safeguard of captives, contemplating 'an impartial Court' that would determine their status and treatment in case of doubt.<sup>167</sup> This proposal, while gaining a considerable purchase from the USSR and other States,<sup>168</sup> was doomed. It met with the 'mainstream' criticism that this would emasculate the distinction between combatants and non-combatants in the traditional Hague rules.<sup>169</sup> In the end, the Danish delegate himself countermanded this proposal.<sup>170</sup>

Still, it is worth inquiring into the debates surrounding the abandoned Danish amendment, as they helped infer the negotiators' thought on how the GCIV's parameters of protection should be demarcated in its correlation to the Stockholm POW Draft. When several delegates suggested that the Danish proposal should be more adequately dealt with in the context of the

<sup>164</sup> *Id.*, at 240, Committee II, 2<sup>nd</sup> meeting, 26 Apr. 1949 (Mr. Cohn, Denmark). As the new class of persons eligible for the POW status, the Danish proposal referred to "[c]ivilians acting in lawful defence against unlawful acts, or who defend themselves against other aggressions on the part of belligerents, for instance in defending the lives, health or living conditions of persons, or property, against enemy aggression or who participate in the defence of their country against illegal aggression or occupation"; *ibid.* As an aside, the obligation by the occupying power to respect the sense of 'patriotism' of the local population was expressly recognised in Part IV, Art. 3 of the 1934 Draft Convention adopted in Monaco (Sanitary Cities and Localities). See M. Inazumi, "Bunmin no Hogo" ("Civilian Protection"), in *Buryoku-funso no Kokusai-ho (International Law of Armed Conflict)*, (S. Murase & Z. Mayama eds, 2004) 531-557, at 537, 555.

<sup>165</sup> Final Record, vol. III (Annexes), at 58-59, No. 85. See also Final Record, vol. II-A, at 240, Committee II, 2<sup>nd</sup> Meeting, 26 Apr. 1949.

<sup>166</sup> This required the legal status of doubtful captives to be determined by 'a responsible authority'; *Final Record*, vol. II-A, at 425-426, Special Committee of Committee II, 5<sup>th</sup> Meeting, 16 May 1949, (Mr. Cohn, Denmark).

<sup>167</sup> *Ibid.*

<sup>168</sup> *Id.*, at 426, Special Committee of Committee II, 5<sup>th</sup> Meeting, 16 May 1949 (See, above all, the statement by General Slavin, USSR and Major Steinberg, Israel).

<sup>169</sup> *Ibid.*, Special Committee of Committee II, 5<sup>th</sup> Meeting, 16 May 1949 (Miss Gutteridge, UK; General Devijver of Belgium; General Dillon, US; and Captain Mouton, Netherlands). See also *ibid.*, at 434, Special Committee of Committee II, 8<sup>th</sup> Meeting, 23 May 1949 (Mr. Stroehlin, Switzerland).

<sup>170</sup> *Id.*, at 435-436 (submitting a new amendment to Art. 3), Special Committee of Committee II, 9<sup>th</sup> Meeting, 23 May 1949.

Civilians Convention,<sup>171</sup> the Danish representative was adamant that he had no intention to submit his amendment to Committee III (the committee that, as seen above, was assigned to draft the Civilians Convention). This was because “in his opinion it referred solely to the Prisoners of War Convention”.<sup>172</sup> Focusing exclusively on the draft POW Convention, he seemed to be convinced that ‘civilians’ taking up arms and captured in a combat zone of their territory should be governed by the POW Convention, and not by the Civilians Convention.<sup>173</sup> As a corollary, according to his assumption, such ‘homeland battlefield unprivileged belligerents’ would fall outside the ambit of the draft Civilians Convention. In contrast, as an alternative possible inference, it might be reasoned that when insisting that his amendment be submitted to the draft POW Convention, the Danish Delegate did not necessarily exclude the possibility of the draft Civilians Convention covering the kind of battlefield unprivileged belligerents that he had in mind. According to this hypothesis, the Danish representative may have believed that such persons should be entitled to *supplementary* protections under the POW Convention *on top of* the Civilians Convention. Still, drawing such inferences seems to overread the Danish delegate’s thought.

*F. The ‘Minimum Protection Clause’ Contained in the Third Paragraph of Article 3 of the Stockholm POW Draft*

*1. General Remarks*

It has been explained that the third paragraph of Article 3 of the Stockholm POW Draft was purported as the ‘minimum protection clause’ or the gap-filler for all captives falling outside any of the eight classes of persons mentioned under Article 3(1) and (2). As discussed above, the crux is to explore whether the delegates believed this ‘minimum protection clause’ to be the *only* safety net for unprivileged belligerents failing to satisfy the POW conditions under the Stockholm POW Draft (in particular, for those captured on their homeland battlefield).<sup>174</sup> If that proves to have been the case, this can be brought to enervate the hypothesis that the negotiators believed the GCIV to be all-embracing. In the end, the third paragraph of Article 3 did

<sup>171</sup> *Id.*, at 426, Special Committee of Committee II, 5<sup>th</sup> Meeting, 16 May 1949 (General Dillon, US; Captain Mouton, Netherlands). *See also id.*, at 434, Special Committee of Committee II, 8<sup>th</sup> Meeting (Mr. Baistrocchi, Italy and Mr Stroehlin, Switzerland).

<sup>172</sup> *Id.*, at 427, Special Committee of Committee II, 5<sup>th</sup> Meeting, 16 May 1949.

<sup>173</sup> *See, e.g.*, Callen, *supra* note 1 at 1055-60.

<sup>174</sup> *Id.*, at 1055-1065.

not muster enough support to survive, with even its originator (the US) coming to abandon it.<sup>175</sup>

## 2. *The ‘Minimum Protection Clause’ Discussed at Committee II*

At Committee II, the UK proposed the expurgation of the third paragraph of Article 3, submitting an alternative text that addressed ‘members of partisan organizations’ and their conditions for the POW status.<sup>176</sup> The amendment contemplated the case where partisans would be captured other than in an occupied territory. Yet, it excluded combat zones of their home State.<sup>177</sup> While no elaborate rationale was presented by delegates who endorsed the UK proposal rather indolently,<sup>178</sup> Denmark put prime emphasis on its gap-filling role for all participants in hostilities who would not qualify for the POW status.<sup>179</sup> His insistence on preserving this clause corroborates his belief that the coverage of the GCIV was woefully wanting with respect to ‘civilians’ involved in armed resistance against invaders in their home territory. Here again, it seems far-fetched to speculate that the Danish strategy was to obtain for such unprivileged belligerents the supplementary safeguard of the GCIII alongside the safety net already provided by the GCIV.<sup>180</sup>

## 3. *The ‘Minimum Protection Clause’ Discussed at Special Committee of Committee II*

When the locus of examinations of the ‘minimum protection clause’ shifted to the Special Committee (of Committee II), the delegates were again polarised. On one hand, the ‘retentionist’ camp led by Denmark considered this clause vital for shielding the kind of irregular participants in hostilities contemplated by its delegate from inhuman treatment or summary

<sup>175</sup> *Final Record*, vol. II-A, at 431, Special Committee of Committee II, 7<sup>th</sup> Meeting, 19 May 1949 (General Parker).

<sup>176</sup> By highlighting the requirement of an armed organisation, it excluded lonely ‘freedom fighters’ taking up arms and captured on a battlefield.

<sup>177</sup> *Final Record*, vol. III (Annexes), at 60, No. 89.

<sup>178</sup> *Final Record*, Vol. II-A, at 242-243, Committee II, 3<sup>rd</sup> meeting, 27 Apr. 1949 (Mr. Gardner, UK; Mr. Baistrocchi, Italy; General Parker, US; and Mr. Bellan, France). The only possible exception was Belgium that invoked the risk of undermining the primary purpose of according effective safeguards to resistance movements through uncertain expansion of POW candidates (General Devijver, Belgium).

<sup>179</sup> See also *ibid.* (Mr. Szabó, Hungary; and General Sklyarov, USSR).

<sup>180</sup> Indeed, as seen above, the Danish delegate was actively engaged in securing, albeit without success, civilian participants in defensive acts of hostilities as an additional POW candidate. This shows that he considered the GCIV insufficient to safeguard the kind of persons he had in mind.

execution.<sup>181</sup> Endorsing this clause, the USSR delegation articulated its conviction that the personal scope of the POW Convention ought to be set as broad as possible.<sup>182</sup> On the other hand, the ‘abolitionists’ with respect to the third paragraph of Article 3 criticised this clause for impairing the textual integrity of Article 3 of the Stockholm POW Draft, which was earmarked first and foremost for defining the classes of persons entitled to the POW status. More cogently, they objected to a general clause of protection in the very provision defining qualifications for the POW status. In their view, this would disincentivize fighters to comply with the POW conditions while undermining the security of the ‘regulars’.<sup>183</sup> Of special interest on this score is the stance of the ICRC representative.<sup>184</sup> Counter-intuitive as it may be, his opinion was scarcely receptive to the idea of affording protections of the Civilians or the POW Draft to unprivileged belligerents.<sup>185</sup> He went so far as to suggest that “[a]lthough the two Conventions [GCIII and GCIV] might appear to cover all the categories concerned, irregular belligerents were not actually protected’.<sup>186</sup> Indeed, his scepticism over the place of the unprivileged belligerents under the Geneva Conventions was bolstered by his parallel doubt over giving protections to “persons who did not conform to the laws and customs of war”.

#### *4. Three Solutions Suggested by the Working Party with Regard to the Third Paragraph of Article 3 of the Stockholm POW Draft*

In the Special Committee of Committee II, faced with the impasse of the debates surrounding the fate of the third paragraph of Article 3 of the Stockholm POW Draft, the chairperson of the Working Party proposed three possible options.<sup>187</sup> The first proposal was to replace it by the text of the first paragraph of Article 3A submitted by the Netherlands. That paragraph read that “[s]hould any doubt arise whether a person resisting the enemy belongs to any of the categories enumerated above, such person shall enjoy the

<sup>181</sup> *Final Record*, vol. II-A, at 433, Special Committee of Committee II, 7<sup>th</sup> Meeting, 19 May 1949 (Mr. Cohn, Denmark).

<sup>182</sup> *See ibid.*, at 433-434 (General Slavin, USSR and Mr. Falus, Hungary).

<sup>183</sup> *Id.*, at 433-434 (Mr. Gardner, UK). *See also ibid.* (General Devijver, Belgium; Mr. Stroehlin, Switzerland; and Mr. Wilhelm, ICRC); Committee II, 35<sup>th</sup> Meeting, 20 July 1949 (Mr. Gardner, UK) at 408.

<sup>184</sup> According to the ICRC, while some isolated cases might justify a ‘general clause of protection’ like the Martens clause, it was inadvisable to enumerate ‘irregular belligerents’ in the provision defining who would qualify for POW status; *id.*, at 433 (Mr. Wilhelm).

<sup>185</sup> *Id.*, at 433, Special Committee of Committee II, 7<sup>th</sup> Meeting, 19 May 1949 (Mr. Wilhelm, ICRC, opining that it was “uncertain which category of persons it was desired to cover”).

<sup>186</sup> *Ibid.*, (Mr. Wilhelm, ICRC).

<sup>187</sup> *Id.*, at 480, Special Committee of Committee II, 26<sup>th</sup> Meeting, 7 Jul. 1949.

protection of the present Convention until such time as their status has been determined by the competent authorities".<sup>188</sup> The special hallmark of the Dutch proposed text was to give the conditional and stopgap safeguards of the GCIII, with those safeguards applicable only where there is doubt about their status and only pending such status-determination. The second solution was to add the second paragraph of 'Article 3A' of the Netherlands' amendment,<sup>189</sup> whose tenor was aspirational and evocative of the Martens Clause.<sup>190</sup> The third option was to maintain the third paragraph of Article 3 of the Stockholm POW Draft. For the voting procedure, the Chairperson of the Working Party proposed that at first the delegates at Special Committee were invited to elect between the first solution on one hand, and the second or third solution on the other.<sup>191</sup> In the vote, the Special Committee adopted the first option.<sup>192</sup> The delegates then decided against inserting a separate clause based on the above second option or retaining the third paragraph of Article 3.<sup>193</sup> In the hindsight, the Working Party's proposal was anomalous. It looked poised to prearrange the Dutch amendment as the first pick. It clearly disfavoured the third option (retaining the third paragraph). Under this procedure, the third option was relegated to a contingency that availed itself only after the first proposal was ousted.

*G. The Adoption of the Text of Article 3 of the Stockholm POW Draft by Committee II*

At Special Committee of Committee II, the third paragraph of Article 3 of the Stockholm POW Draft was blotted out in favour of the Netherlands'

<sup>188</sup> *Final Record*, vol. III (Annexes), at 63, Annex No. 94 (the Dutch amendment to Arts. 3, 3A and 4 of 3 Jun. 1949).

<sup>189</sup> *Ibid.*

<sup>190</sup> This provided that "[e]ven in cases where the decision of the above-mentioned authorities would not allow these persons to benefit under the present Convention, they shall nevertheless remain under the safeguard and rule of the principles of international law as derived from the usages prevailing among civilized nations, of human rights and the demands of the public conscience."; *id.*, at 63, Annex No. 94. There was also an alternative option to add the text proposed by Denmark in its previous amendment: *Final Record*, vol. II-A, at 480, Special Committee of Committee II, 26<sup>th</sup> Meeting, 7 Jul. 1949.

<sup>191</sup> *Ibid.* In contrast, the USSR endorsed the third option, proposing again that the new category of persons mentioned in the Danish amendment (civilian defenders during an invasion phase) be specifically spelled out in the third paragraph of Art. 3(1); *ibid.*

<sup>192</sup> *Ibid.* (by 9 votes to 1). The text was amended by the French proposal to delete the words "or by a competent military authority with officer's rank"; *ibid.*

<sup>193</sup> *Ibid.* (by 10 votes to 4). The Danish delegate requested the *Summary Record of the Meeting* to mention that no objection was raised against his proposal, according to which "Article 3 should not be interpreted in such a way as to deprive persons, not covered by the provisions [sic] of Article 3, of their human rights or of their right of self-defence against illegal acts"; *ibid.*, at 481.



amendment, which contained the substance of the second paragraph of Article 4 of the Stockholm text (relating to the determination of the status of doubtful captives).<sup>194</sup> The new third paragraph of Article 3, adopted by Special Committee of Committee II, read that “[s]hould any doubt arise whether persons resisting to the enemy belong to any of the categories enumerated above, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a military tribunal”. At Committee II, the ICRC representative<sup>195</sup> spotted the similarity between this amendment to the third paragraph of Article 3 and the second paragraph of Article 4 of the Stockholm Draft (now Article 5(2) GCIII).<sup>196</sup> Needless to say, the resemblance of those two paragraphs should not come as a surprise. The very purport of the Netherlands’ amendment submitted to Special Committee was to incorporate the substance of Article 4(2) into the third paragraph of Article 3 of the Stockholm POW Draft!<sup>197</sup>

When adopting the text of Article 3 as a whole,<sup>198</sup> Committee II confirmed the elimination of the revised third paragraph.<sup>199</sup> As summarised in the *Report of the Committee II* submitted to the Plenary Assembly,<sup>200</sup> the Netherlands’ amendment served as the last nails in the coffin of the ‘minimum protection clause’ of *generic nature*. Further, as a result of the Dutch proposal (Article 3A) as briefly discussed above, Article 4(2) of the Draft POW Convention (Article 5(2) GCIII) was transformed into a rule of tentative damage control. Under this provision, the parameters of the GCIV’s protection were circumscribed only to the captives whose legal status was doubtful, and this, only so long as their status was ascertained by a competent court.

<sup>194</sup> *Ibid.*

<sup>195</sup> *Id.*, at 388 (Mr. Wilhelm, ICRC).

<sup>196</sup> *Id.*, at 245, Committee II, 4<sup>th</sup> Meeting, 28 Apr. 1949. The second paragraph of Art. 4 of the Stockholm POW Draft read that “[s]hould any doubt arise whether one of the aforesaid persons belongs to any of the categories named in the said Article, the said person shall have the benefit of the present Convention until his or her status has been determined by a responsible authority”. *Final Record*, vol. I, at 74.

<sup>197</sup> Referring to the problem of this overlap, the USSR proposed the restoration of the third paragraph of Art. 3 of the Stockholm POW Draft. *Final Record*, vol. II-A, at 388, Committee II, 30<sup>th</sup> Meeting, 12 Jul. 1949 (General Slavin, USSR).

<sup>198</sup> *Ibid.*, at 388-389 (by 28 votes to nil, with 1 abstention; 12 Jul. 1949). See *Projet d’article adopté par la Commission II le 12 juillet 1949*, Conférence Diplomatique de Genève), CDG/PRIS.Art.3, 12 juillet 1949, CDG/PLEN.41, Pris, 20 Jul. 1949, at 1-2 (deposited at the Swiss Federal Archive).

<sup>199</sup> *Ibid.* (by 10 to 25). Both the first and the second paragraphs of Art. 3 were voted with no objection (31 votes to nil, with 1 abstention for the former; and 33 votes to nil, with 1 abstention for the latter): *ibid.*, at 388-389.

<sup>200</sup> *Final Record*, vol. II-A, at 559-615, *Report of Committee II to the Plenary Assembly of the Diplomatic Conference of Geneva* (23 Jul. 1949).

*H. Deliberations on Article 3 of the Draft POW Convention at the Plenary Assembly*

At the Plenary, where the entire text of the POW Convention was presented, the whole text of Article 3 of the Draft POW Convention was adopted resoundingly.<sup>201</sup> Still, what little discussion there was of this provision at the Plenary were instrumental in speculating one of the most vocal negotiators' thinking of the coverage of the GCIV.<sup>202</sup> It was the same Danish delegate that undeterredly revisited the issue of the right of a civilian population to defend against an aggressor in a combat zone of their state.<sup>203</sup> By proposing such a new class of the POW candidacy, the Danish delegate indicated a rather radical view. It asserted that '[t]he categories named in Article 3 [of the Stockholm POW Draft] cannot be regarded as exhaustive, and [that] it should not be inferred that other persons would not also have the right to be treated as prisoners of war'.<sup>204</sup> His suggestion that Article 3 of the Stockholm POW Draft provided an open-ended list of the POW candidates is hard to sustain. It is unclear whether, more than a quarter-century before the landmark decision of the ICJ in *Nicaragua*,<sup>205</sup> the Danish delegate contemplated the two-fold theses that there existed a parallel customary rule governing the same subject matter, and that this admitted of broader classes of persons eligible for the POW rights. A safer inference is that the Danish delegate laid out such an interpretation precisely because of his scepticism over the comprehensive coverage of the Civilians Draft and over its aid to 'civilian' defenders against aggressors on their homeland battlefield.<sup>206</sup>

*I. 'Battlefield Unprivileged Belligerents' Discussed in the Context of Article 4 of the Stockholm POW Draft (Article 5 GCIII) at the Plenary*

At Plenary, the question whether the GCIV could serve as a gap-filler for battlefield unprivileged belligerents resurfaced in relation to Article 4 of the Stockholm POW Draft (Article 5 GCIII). This provision contemplated a tribunal assigned to determine the status of captives of doubtful nature. At the 13<sup>th</sup> plenary meeting, when submitting an amendment to Article 4(2) of

<sup>201</sup> *Final Record*, vol. II-B, at 342, 20<sup>th</sup> Plenary Meeting, 29 Jul. 1949 (by 33 votes *nem. con.* with 3 abstentions).

<sup>202</sup> *Id.*, at 267-269, 13<sup>th</sup> Plenary Meeting, 26 Jul. 1949.

<sup>203</sup> *Id.*, at 268 (Mr. Cohn, Denmark),

<sup>204</sup> *Ibid.*

<sup>205</sup> ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, ICJ Reports 1986, at 14, para. 176 (recognising the customary law equivalent of the treaty-based rule on the right of self-defence laid down in Art. 51 of the UN Charter).

<sup>206</sup> Callen, *supra* note 1, at 1055-60.

the Draft POW Convention,<sup>207</sup> the Netherlands delegate provided the following observation that went beyond the bounds of the GCIII and ventured into the terrain of the GCIV:

That persons who do not fall under Article 3 [now Article 4, GCIII] are automatically protected by other Conventions is certainly untrue. The Civilians Convention, for instance, deals only with civilians under certain circumstances; such as civilians in an occupied country or civilians who are *living* in a belligerent country, but *it certainly does not protect civilians who are in the battlefield, taking up arms against the adverse party. These people, if they do not belong to Article 3, and if they fall into the hands of the adverse party, might be shot* and that is a decision which we do not want to leave in the hands of one man.<sup>208</sup>

The tenor of the Dutch representative's statement confirms his working assumption: the applicability of the GCIV only to civilians *living* in the territory of a party to the conflict or finding themselves in occupied territory, to the exclusion of unprivileged belligerents trapped in a combat zone. Two crucial corollaries can be drawn from this premise: (1) denying the GCIV the role of the 'safety-net' for persons excluded from the ambit of the GCIII; and (2) possible recognition of the third distinct category of persons outside the combatants-civilians binary, to which battlefield unprivileged belligerents (whether captured in their home territory or in enemy territory) would appertain. Admittedly, the Dutch delegate's thinking of the GCIV, which transpired in the context of the Draft POW Convention, was more or less consistent with the ICRC's Tokyo Civilians Draft (1934) and Draft submitted to the CGE (1947), and even with the *Report of Committee III to the Plenary*.<sup>209</sup> Yet, the residential requirement appended to situation (i) made the Dutch view more restrictive than what may have been implied by most of the precursory texts. The civilians falling into hands of the adversary in the combat zone not only of their own state, but also of that adversary where they did *not abode*,<sup>210</sup> would be debarred from benefiting from the GCIV.

<sup>207</sup> The main differences from the Stockholm Draft lay in the determination of their status by a 'military tribunal' rather than by a non-judicial authority to avoid arbitrary decisions by a local commander.

<sup>208</sup> *Final Record*, vol. II-B, at 271, emphasis added (Captain Mouton, Netherlands). *See also id.*, at 270-271 (arguing that if the military commander of the spot determined that a captive did not appertain to any of the classes of persons mentioned in Art. 3, "he will be considered to be a franc tireur and be put against the wall and shot on the spot").

<sup>209</sup> *Final Record*, vol. II-A, at 821.

<sup>210</sup> Such non-resident foreign nationals of a belligerent party might find themselves in the territory of their adversary after crossing the border into that territory by whatever modality.

One remaining question is if one can deduce from the Dutch delegate's assumption, which placed all battlefield unprivileged belligerents outside the ambit of the GCIV, the conclusion that even non-armed civilians who got captured in a combat zone would also be excluded. On closer scrutiny, one should pay closer heed to the Dutch delegate's remark that 'The Civilians Convention ...does not protect civilians who are in the battlefield, *taking up arms against the adverse party*'. The italicised words suggest that in the Dutch delegate's opinion, such armed participation in hostilities might have been regarded as an *additional* condition before a detaining power could deny captives the civilian status. On this reading, it can be argued that the Dutch delegate did not necessarily endorse the preclusion of unarmed civilians caught on a battlefield, insofar as they were resident in a belligerent country.

Be that as it may, at the same Plenary, the Dutch delegate's narrower understanding of the Civilians Convention quoted above prodded the Soviet delegate's robust counter-proposal:

With regard to the ... point ...that any person not protected by the provisions of Article 3 (that is to say, any person not recognized as a prisoner of war), should be shot...I do not know of any law to this effect, and I do not know of anybody who would wish to devise a clause of that kind. That argument...is not valid. *If a person is not recognized as a prisoner of war under the terms of Article 3, such a person would then be a civilian and would enjoy the full protection afforded by the Civilians Convention.*<sup>211</sup>

In view of such robust opposition to the Dutch statement<sup>212</sup> any suggestion that the delegates at the Diplomatic Conference tacitly acknowledged the restrictive ambit of the GCIV proposed by the Dutch delegate is flawed.<sup>213</sup> The USSR's above statement evinced his foresight that the Geneva Conventions were built on the combatant-civilian dualist premise, allowing for no third category of persons.<sup>214</sup> Hence, akin to the subsequent comprehensive approach of the Additional Protocol I to defining the concept

<sup>211</sup> *Final Record*, vol. II-B, at 271, 13<sup>th</sup> Plenary Meeting, 26 Jul. 1949, (emphasis added) (Mr. Morosov, USSR).

<sup>212</sup> As noted by Hersch Lauterpacht, "in the atmosphere of international conferences an unpalatable proposal or interpretation is not always expressly rejected...[but] [f]requently they are merely ignored by others; at times the delegates are not sufficiently acquainted with the intricacies of the situation to grasp and to reply to the implications of a subtle declaration". Lauterpacht, *supra* n 13, at 582.

<sup>213</sup> Callen, *supra* note 1, at 1061-62.

<sup>214</sup> *Compare Final Record*, vol. II-A, at 621-622, Committee III, 2<sup>nd</sup> Meeting, 26 Apr. 1949 (Luxembourg proposal).

of ‘civilians’,<sup>215</sup> the Soviet delegate’s approach seemed to furnish ‘water-tight’ safeguards admitting of no lacunae. His approach encompassed all the unprivileged belligerents falling into an adversary’s hands in a combat zone. Still, when the Plenary adopted the Netherlands’ amendment to Article 4 of the Stockholm POW Draft as modified by the Danish proposal, no consideration was given to the Soviet proposal.<sup>216</sup>

*J. Overall Assessment of the Inferences Drawn from the Travaux  
Préparatoires of the GCIII –the GCIV as the Safety-net for All Falling  
Outside the GCIII?*

The foregoing investigations into the *travaux* of the GCIII show that the majority of both the ‘abolitionists’ and some of the ‘retentionists’ in relation to the third paragraph of Article 3 of the Stockholm POW Draft were united in considering the GCIV’s scope short of comprehensiveness. They seemed to rule out civilians trapped on their homeland battlefield from the compass of Part III of the GCIV. On one hand, most delegates that voted to abolish this paragraph were motivated by the tenet that extending the protection of the GCIV to civilians caught in a combat zone would risk blurring the distinction between combatants and civilians. On the other hand, the underlying assumption of some staunch ‘retentionists’ such as the Danish delegation seemed to be that it was this ‘minimum protection clause’, not the GCIV, that should serve to fill any lacunae. As discussed above, he even strove hard to introduce a supplementary safeguard, unsuccessfully proposing an additional POW candidate. As a corollary, it can be inferred that for Danish and most other delegates the ambit of the GCIV was not regarded as extensive enough to encompass homeland battlefield unprivileged belligerents.

Nevertheless, a closer inspection of the draft records of the Diplomatic Conference reveals that the idea of the GCIV as the ‘gap-filler’ was supported by two most influential delegations: the USSR and the US. On one hand, the records of both Committees II and III amply show the USSR’s consistent and express endorsement.<sup>217</sup> On the other hand, the US

<sup>215</sup> See Art. 50(1) of the 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts. Compare Part IV, Art. 2 of the 1934 First Draft Convention adopted in Monaco (Sanitary Cities and Localities).

<sup>216</sup> By 24 votes to 15, with 5 abstentions. *Final Record*, vol. II-B, at 270, 13<sup>th</sup> Plenary Meeting, 26 Jul. 1949 (with the phrase ‘military tribunals’ changed to the wording ‘competent tribunals’). The entire text of Art. 4 was approved by 32 votes to nil, with 10 abstentions: *id.*, at 272.

<sup>217</sup> For Committee II, see, e.g., *id.*, at 271 13<sup>th</sup> Plenary Meeting, 26 Jul. 1949, (emphasis added) (Mr. Morosov, USSR).

admonition that the GCIV should fill the lacunae of the personal categories of the GCIII seemed more spasmodic than firmly convinced. Their thinking can be inferred from the US proposal in relation to the first sub-paragraph of Article 3(2) of the Stockholm POW Draft (Article 4B(1) GCIII). This sub-paragraph, as seen above, secured the POW rights for the ex-members of regular armed forces of the occupied state. At Special Committee of Committee II, the US proposed this first sub-paragraph to be expunged on the ground that such persons ‘ought to be covered by the Civilians Conventions [sic], and not by the Prisoners of War Convention’.<sup>218</sup> One author concludes that the US must have excluded ‘battlefield unprivileged belligerents’ from the parameters of the GCIV. In his reasoning, to eschew the duplication, the US delegation would have proposed the elimination *also* of the third paragraph of Article 3 of the Stockholm POW Draft, had they believed that *all* types of unprivileged belligerents were already covered by the GCIV.<sup>219</sup> Yet, as a matter of fact, another US delegate in the same meeting *did* make a proposal to that effect.<sup>220</sup> Accordingly, after such closer scrutiny, the hypothesis that the US delegates treated the GCIV as the safety-net for all persons falling outside the ambit of GCIII is not ruled out.

### CONCLUSION

The draft provisions of the Geneva Conventions have undergone several phases of metamorphoses and reconstitutions. It has turned out that Committee II’s lengthy debates on the Stockholm POW Draft (especially, on the wretched third paragraph of Article 3) at the 1949 Diplomatic Conference supply more fertile ground than the *travaux* of the GCIV for exploring drafters’ underlying thought on unprivileged belligerents (or the civilians overall) trapped in their homeland combat zones. The preceding analyses suggest that *most* delegates grasped the ‘minimum protection clause’ contained in that paragraph as the sole gap-filler for the persons that would fall outside the bounds of the GCIII. In the light of the polemics over whether or not to eliminate that clause, it can be assumed that most negotiators were then convinced of (or resigned to) the idea that the protective scheme of the GCIV (or its Part III) was not so comprehensive as some hoped it to be. Indeed, the inference drawn from the draft records corroborates the hypothesis that the majority of the negotiators of the

<sup>218</sup> *Final Record, vol. II-A*, at 431, Special Committee of Committee II, 7<sup>th</sup> meeting, 19 May 1949 (General Parker, US). See also the statement of General Dillon, US. *Id.*

<sup>219</sup> Callen, *supra* note 1, at 1057-58.

<sup>220</sup> *Final Record, vol. II-A*, at 431, Special Committee of Committee II, 7<sup>th</sup> meeting, 19 May 1949 (General Parker, US).

Geneva Conventions set the parameters of Part III of the GCIV confined to the protected persons held in occupied territory or in enemy territory.<sup>221</sup>

Nevertheless, such outcomes borne out by historical interpretation are no obstacle to the present-day interpreters' almost instinctive impulse to venture a teleological interpretation that can promote more expansive scope of guarantees of the GCIV. At least with respect to Section I of Part III, *Pictet's Commentary to the GCIV* (1958), with remarkable acuity only nine years after the Geneva Diplomatic Conference, felt able to reconceive most of the provisions in that section (Articles 27 and 31-34 GCIV) as expressive of 'universal human rights'.<sup>222</sup>

<sup>221</sup> Needless to say, the material scope of their protections of the GCIV could be curbed by the derogation clause under Art. 5 of the GCIV.

<sup>222</sup> *Pictet's Commentary to the GCIV* at 200-201 (regarding Art. 27 as 'the basis on which the entire provisions of the GCIV is built), and 228 and 231 (considering Arts. 33 and 34 of the GCIV to recognise the rights of 'absolute' nature, and the scope of application of those provisions as wide as that envisaged by Art. 4 of the GCIV).