

THE PARADOX IN THE TREATMENT OF PRISONERS OF WAR*

Abstract

Prisoners of War are combatants who for whatever reasons found themselves under the power and control of the adverse party. These persons are entitled to special protection under relevant Rules and Conventions not for the reason of falling into the hand of the adverse party but mainly because they are representatives of a foreign State. This paper examines the definition of prisoners of war, requirements for their interment, contrast between prisoners of war and ordinary prisoners and finally deliberates on the paradox of how prisoners of war are required to be treated. This paper finds that the provisions regarding the treatment of prisoners of war are laudable indeed but may not be attainable in practice in many States. This paper recommends that Protecting Powers should take their roles seriously in ensuring that prisoners of war are properly treated during periods of armed conflict. This paper also emphasizes the role of the ICRC and Civil Society Organisations in ensuring that Detaining Powers live up to the expectation required of them. Finally, this paper posits that since Prisoners of War are not criminals, they should be treated differently and better.

Keywords: Armed Conflict, Armed Group, Combatant, Detaining Power, Prisoner of War

1.0. Introduction

A prisoner of war is a person enlisted in an armed force of a State having the status of a combatant but has fallen into the powers of the adverse party when taking active part in hostility and is entitled to humane treatment and dignity under the Geneva Convention Relative to the Treatment of Prisoners of War, 1949¹. All of the Geneva Conventions contains provision on the treatment of Prisoners of War with specific conditions on how Prisoners of War are to be treated². They are not to be interned in close confinement except to safeguard their health³. They are to be put in liveable quarters⁴ according to their ranks, they are to be given appropriate

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¹Articles 3 & 4 of The Hague Regulations respecting the Laws and Customs of War on Land 1907; Geneva Convention Relative to the Treatment of Prisoners of War, 1949 (GCIII).

² Art. 14, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949 (GCI), Art 16 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 1949 (GCII), Art. 4 GCIII, and Art, 79-82 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949 (GCIV) which contains provisions with regard to the internment of Civilians in occupied territory.

³ Art.30 GC III.

⁴ Art. 25 GC III.

weather clothing⁵ and given materials to ensure better hygiene⁶. Prisoners are not to be subjected to dangerous or humiliating labour⁷. Their finances are to be carefully managed by the detaining power⁸. They are to be allowed to send and receive cards and correspondences⁹.

The contrast between how Prisoners of War are to be treated under the Geneva Conventions and how they were treated during the Second World War is glaring. Furthermore there is a serious disparity between how prisoners of war are to be treated and how prisoners/inmates are treated especially in developing countries using Nigeria as a case study. The Prison System in Nigeria is rife with overcrowding, lack of health facilities and a myriad of other problems. Asking a State like Nigeria to treat its Prisoners of War according to the standards provided for by the Geneva Conventions would seem to be asking for too much especially since prisoners do not even have acceptable good treatment. In fact the living conditions of members of the Armed Forces in Nigeria struggle to meet up to international standards. This is true especially with respect to the low ranking officers. That is one aspect relating to the conditions of prisoners of war. The other aspect which is the core of this paper is the elaborate conditions of treatment of Prisoners of war not being different from the conditions of normal combatants of the adverse party. Here we have two sets of States who will address the provisions of the conventions differently. The first set of States are those who by objection reality may not be able to comply with the provisions as these provisions are of standard higher than the ones obtainable in those States. The other sets of States objectively have no problems with complying with the provisions of the conventions but may not be willing to subject its combatants to the same treatment with those of the 'agents' (prisoner of war) of the enemy or adverse State as the case may be.

This paper first examines the concept of Prisoners of War under the Geneva Convention focusing on who a prisoner of war is and how they are required to be treated. This paper then evaluates the level of compliance with the Conventions by the States. A comparative analysis is made between the treatment of prisoners of war and the treatment of other combatants (not prisoners of war) using Nigeria as a case study. The paper rounds off the discussion by making certain recommendations geared towards ensuring that Prisoners of War are treated as provided for in the Third Geneva Convention with substantial improvement where possible.

⁵ Art. 27 GCIII.

⁶ Art. 29 GC III.

⁷ Art. 52 GC III.

⁸ Art. 18, 58-66 GC III.

⁹ Art. 71 GC III.

2.0 The Concept of Prisoners of War Under the Geneva Conventions and the Additional Protocols

The Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 gives an elaborate definition of who a prisoner of war is. It provides thus:

“Prisoners of war” are combatants who have fallen into the hands of the enemy, or specific non-combatants to whom the status of prisoner of war is granted by international humanitarian law.¹⁰

According to Article 4 of the Third Geneva Convention, Prisoners of War include: armed forces and volunteer militia belonging to either party to the armed conflict, other militia or volunteer corps not belonging to a party to the armed conflict, members of armed forces who belong to an authority not recognized by the detaining power, persons who accompany the armed forces without being members thereof such as the technical crew, members of crews of the forces who do not benefit from a more favourable treatment under GCIII and finally *levee en masse*.

Article 41 (3) of API¹¹ provides for the safeguard of enemy *hors de combat*. Persons *hors de combat* are combatants who are not able to continue with combat for whatever reason and are consequently captured by the adverse party and become prisoners of war. A person is *hors de combat* if: (a) they are in the power of an adverse Party; (b) they clearly express an intention to surrender; or (c) they have been rendered unconscious or are otherwise incapacitated by wounds or sickness, and therefore are incapable of defending themselves provided in any of these cases they abstain from any hostile act and do not attempt to escape¹².

Additional Protocol I also provides for the safeguard of enemy *hors de combat*¹³ to the effect that when persons entitled to protection as Prisoners of war have fallen into the power of an adverse party under unusual conditions which prevent evacuation as provided for in Part III, Section I of GC III, they shall be released and all feasible precaution shall be taken to ensure their safety. It is noteworthy that the adverse party carries enormous responsibility for the safety of persons *hors de combat*.

GC III specifically provides that:

¹⁰ Art. 4 Geneva Convention III Relating to the Treatment of Prisoners of War, 1949.

¹¹ Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977.

¹² Article 41 (1 & 2) AP I.

¹³ Article 41 (3) of API.

Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger. Only those prisoners of war who, owing to wounds or sickness, would run greater risks by being evacuated than by remaining where they are, may be temporarily kept back in a danger zone. Prisoners of war shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone.¹⁴

In carrying out the provisions of GC III in respect of evacuation of those *hors de combat* under the power of the adverse Party, the adverse Party is enjoined to treat those *hors de combat* humanely and in conditions similar to those for the forces of the detaining power¹⁵. To do a similar thing may not necessarily mean to do the same thing. The variation in treatment between the sick and wounded of the detaining Power and those *hors de combat* from the adverse Party may show a disparity in treatment and handling which may whip up sentiment of treatment that does not meet the threshold of humane treatment in the minds of those *hors de combat* of the adverse Party. The expression of ‘similar treatment’¹⁶ added to humane treatment may not be necessary and if and when the GC III is due for review, that word “similar” should be expunged from the provisions of this instrument.

3.0 Requirements for Treatment of Prisoners of War (POW)

The Third Geneva Conventions contains extensive provisions on the definition, treatment and repatriation of Prisoners of War. The Convention is divided into six parts. The Convention sets out with Part I containing General Provisions, Part II contains General provisions on the treatment of Prisoners of War. Part III contain provisions on Captivity and Regulations concerning the internment of Prisoners of War, Part IV makes stipulations regarding the end of captivity and the conduct of the Detaining Powers at the end of internment. Part V provides for the creation of Information Bureau and Relief Societies for Prisoners of War. Finally, Part VI makes stipulations on the execution of the Convention. This section will take a look at some of the requirements on how POWs should be treated and practical application of these provisions in periods of Armed Conflicts.

3.1. Respect for the Convention

¹⁴ Article 19 GC III.

¹⁵ Article 20 GC III.

¹⁶ Ibid.

The very first Article of the Third Geneva Convention provides that Parties to the Convention should ensure respect for the Convention in all circumstances. This sets the pace for all the other stipulations in the Convention. Despite the unique circumstances of war, States are to ensure that they respect the provisions of this Convention with regards to treatment of prisoners of war. The struggle for the revolution in Cuba between the guerillas and the Batistas gives a worthy example for emulation on how Prisoners of War should be treated. In the late 1950's, concerned citizens in Cuba took up arms using guerrilla¹⁷ warfare as a result of the state sponsored terrorism. The Batista's army reign of terror came to a grinding halt as a result of the resistance of the guerillas¹⁸.

When hundreds of these terrorists surrendered, Raul Castro one of the leaders of the Guerrilla Forces addressed the surrendered forces as follows:

We hope that you will stay with us and fight against the master who so ill-used you. If you decide to refuse this invitation – and I am not going to repeat it – you will be delivered to the custody of the Cuban Red Cross tomorrow. Once you are under Batista's orders again, we hope that you will not take arms against us. But, if you do, remember this:

*We took you this time. We can take you again. And when we do, we will not frighten or torture or kill you ... If you are captured a second time or even a third ... we will again return you exactly as we are doing now.*¹⁹

Although, Cuba is a party to the four Geneva Conventions of 1949 and the first two Additional Protocols of 1977, the Guerrilla forces as an independent Armed Group respected the tenets of the Convention despite the act of the state forces in acting contrary to the Geneva Convention they would later accede to²⁰.

3.2 Extent of the Application of the Convention

The Third Geneva Conventions applies to both international and non- international armed conflicts. Common Article 2 to the Conventions of 1949 provides that in addition to the provisions which shall be implemented in peacetime, the Geneva Conventions shall apply to all types of Armed Conflict between two or more States even if the state of war is not recognized by

¹⁷ A member of a small independent group taking part in irregular fighting, typically against larger regular forces. Google English Dictionary, Oxford Languages. Available at: <https://languages.oup.com/google-dictionary-en/>. Accessed on 17/10/2020 at 15:40pm.

¹⁸ Mateo Pimentel, Guirella Warfare in Cuba, CounterPunch February 11, 2015. Available at: <https://www.counterpunch.org/2015/02/11/guerrilla-warfare-in-cuba/>. Accessed on 17/10/2020 at 15:55pm.

¹⁹ Marco Sassoli and others, How does Law Protect in War? Cuba, Status of Captured "Guerillas", Online Casebook, International Committee of the Red Cross, 2021. Available at: <https://casebook.icrc.org/case-study/cuba-status-captured-guerrillas>. Accessed on 17/10/2020 at 15:47pm.

²⁰ It should be noted that as at 1950, the Cuba had not acceded to the Geneva Conventions.

one of them while Article 3 of the Geneva Conventions of 1949 extends the application of the Conventions to conflicts not of an international character. It goes on to make minimum provisions that are to be complied with in periods of Internal Armed conflicts.

It provides that:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: members of armed forces who have laid down their arms and others who have been placed hors de combat shall be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.²¹

Certain acts are prohibited against the above persons. The prohibited acts include:

- a. Violence to life and person*
- b. Taking of hostages*
- c. Outrages upon personal dignity*
- d. Passing of sentences or carrying out of judgement without prior judgement pronounced by a properly constituted court of law²².*

It should be noted that the term Prisoner of War refers strictly to persons who surrendered, who were captured or placed *hors de combat* during an Armed Conflict of International character. While Prisoners of War are immune from prosecution for taking direct part in hostilities, those detained for participation in hostilities during Internal Armed Conflicts are not immune from criminal prosecution under the applicable domestic laws for having done so.

It is provided that the Convention shall apply to the persons referred to in Article 4 from the time they are captured by the enemy adversary until their final release and repatriation²³. Article 5 also makes a very important provision thus:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Art. 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Until such a time when question of doubtful status of such a person is awaiting the determination of a competent tribunal and enjoying the protection of the Convention, his doubtful status shall in

²¹ Common Article 3 (1) to the Geneva Conventions, 1949.

²² Ibid.

²³ Art. 5 GC III of 1949.

the meantime fall under the status of a civilian. In case of doubt whether a person is a civilian, that person shall be considered a civilian²⁴.

In *Public Prosecutor v. Oie Hee Koi (And Associated Appeals)*²⁵, the status of some captured Chinese Malay soldiers²⁶ was to be determined by the trial court. The court found that the captured soldiers were not entitled to protection under the Geneva Conventions and were all sentenced to death. All the accused appealed against their convictions and their appeals were dismissed by the Federal Court of Malaysia save in two cases namely that of Oie Hee Koi (Appeal No. 16 of 1967) and that of Ooi Wan Yui (Appeal No. 17 of 1967) in both of which the appeals were allowed on the ground that the accused were prisoners of war within the meaning of the Geneva Conventions Act, 1962 of the Federation of Malaya (herein referred to as “the Act of 1962”) and as such were entitled to protection under the Geneva Convention relative to the treatment of prisoners of war²⁷.

On appeal, all the convictions were quashed on the basis that there had been a mis-trial. It was held that the circumstances of the case required for all the accused persons to be presumed to be under the protection of the Geneva Conventions is as provided for in Art. 5 of GC III and, therefore, the accused persons should have had the protection of the Geneva Conventions until their status was determined by a competent tribunal²⁸.

3.3. Responsibility for the Treatment of Prisoners of War

Prisoners of War are said to be in the power of the enemy and not in the power of the individuals or military units who have captured them²⁹. This means that the Detaining Power (enemy state) has responsibility for the treatment of Prisoners of War. This prevents authorities from turning a

²⁴ Art. 50 (1) AP I.

²⁵ 1 All E.R.419 [1968].

²⁶They were captured during the Indonesian confrontation campaign. All but two were dropped in Malaysia by parachute as members of an armed force of paratroopers under the command of Indonesian Air Force officers. The main party was dropped in Johore wearing camouflage uniform. Each man carried a fire-arm, ammunition, two hand grenades, food rations and other military equipment. Of the main party thirty-four out of forty-eight were Indonesian soldiers and fourteen Chinese Malays which included twelve of the accused. One was dropped from a different plane similarly equipped. The remaining two accused landed later by sea and were captured and tried. One of these likewise claimed the protection of the Geneva Convention.

²⁷ See Schedule. 3 to the Geneva Conventions Act, 1962, of the Federation of Malaya.

²⁸ Marco Sassoli and others, How does Law Protect in War? Malaysia, Public Prosecutor v. Oie Hee koi Online Casebook, International Committee of the Red Cross, 2021. Available at: <https://casebook.icrc.org/case-study/malaysia-public-prosecutor-v-oie-hee-koi>. Accessed on 18/10/2020 at 19:12pm.

²⁹ Article 12 GC III.

blind eye to the actions of their soldiers and officers who actually assume the adverse State's power and are directly responsible for the treatment of prisoners of war.

The detaining power has the power to detain prisoners of war under its authority with full responsibility to carry out the attendant responsibilities of a detaining power. These responsibilities are wide and complex including general protection of prisoners of war³⁰, internment of prisoners³¹, quarters, food and clothing of prisoners³², hygiene and medication for prisoners³³, religious, intellectual and physical activities for prisoners of war³⁴, labour of prisoners³⁵, discipline and prosecution of prisoners of war³⁶ and termination of captivity of prisoners of war, repatriation and taking care of death of prisoners of war with all the attendant procedures³⁷. The above shows that taking prisoners of war and keeping them by the detaining powers in compliance with the provisions of GC III is in itself an added responsibility to the burden of war. That is why it is commendable on the part of GC III and its drafters by providing for transfers of prisoners of war to other protecting powers when it appears that the burden imposed by the Third Geneva Convention is too heavy for the detaining power to carry³⁸.

Article 12 of GC III further provides that a detaining power may transfer their responsibility for the care of the Prisoners of War to a transferee state provided that the detaining power has satisfied itself of the ability of the transferee state to apply the Convention. If the transferee power fails to do so, the original enemy power can still be held liable. Paragraph 5 of the Agreement for the Transfer of Detainees between The Canadian Forces and The Ministry of Defence of the Islamic Republic of Afghanistan provides that:

*The Afghan authorities will accept (as Accepting Power) detainees who have been detained by the Canadian Forces (the Transferring Power) and will be responsible for maintaining and safeguarding detainees, and for ensuring the protections provided in GC III, to all such detainees whose custody has been transferred to them.*³⁹

³⁰ Articles 12-16 GC III.

³¹ Articles 21-24 GC III.

³² Articles 25- 28 GC III.

³³Articles 29-32 GC III.

³⁴ Articles 34- 38 GC III.

³⁵Articles 49-57 GC III.

³⁶Articles 39-42; 82-108 GC III.

³⁷Articles 109-121 GC III.

³⁸ Articles 12 GC III.

³⁹ Marco Sassoli and others, How Does Law Protect in War? Vol III, Cases and Materials December 2005, Third Edition, 'Arrangement for the Transfer of detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan', 18 at p. 2306.

3.4 Humane Treatment of Prisoners of War

Prisoners of war must always be humanely treated⁴⁰. Any unlawful act or omission causing death or seriously endangering the health of a prisoner of war is prohibited, and constitutes a serious breach of the Geneva Convention. This means that no prisoner of war may be subjected to torture, such as physical mutilation, or to medical or scientific experimentation of any kind that is not in the prisoner's best interests. Similarly, prisoners of war are protected against reprisals for acts of their government (i.e. killing hostages in retaliation), as well as any other act of violence, intimidation, or public humiliation or insult.

The obligation to treat prisoners of war humanely was already recognized in the Lieber Code, the Brussels Declaration and the Oxford Manual and was codified in the Hague Regulations⁴¹. The requirement of humane treatment for civilians and persons *hors de combat* is set forth in common Article 3 of the Geneva Conventions, as well as in specific provisions of all four Conventions. This requirement is recognized as a fundamental guarantee by both Additional Protocols I and II. The requirement of humane treatment is set forth in numerous military manuals. It has been reaffirmed in national and international case-law⁴².

3.5 Captivity of prisoners of war

The Geneva Convention relative to the treatment of prisoners of war contains provisions on the Captivity and Internment of Prisoners of War⁴³. It covers subjects from their questioning, to safeguarding of their property, evacuation in times of emergency, restrictions on their liberty of movement, places and conditions of internment, security of Prisoners of War, quarters, food, clothing and medical attention. These articles further provide for the retention of medical personnel and chaplains to assist prisoners of war. The Prisoners of War are to be free to carry out intellectual, physical activities, the type of Labour they can engage in are also subject to regulation and their financial resources are to be properly managed.

In addition to the foregoing, prisoners of war, subject to certain restrictions, are to be allowed to maintain contact with the external world. Articles 95-108 contain guidelines on penal and

⁴⁰ See GC III Article 13.

⁴¹ Lieber Code, Article 76; Brussels Declaration, Article 23; Oxford Manual; Article 63, Hague Regulations, Article 4.

⁴² Available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule87#Fn_71A8635_00001. Accessed on 18/10/2020 at 19:38pm.

⁴³ See GC III Articles 17-108.

disciplinary sanctions. GC III makes provisions on the restriction on liberty of movement of Prisoners of War. It provides thus:

*The Detaining Power may, subject prisoners of war to internment may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter...prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary.*⁴⁴

The same article goes on to provide that prisoners of war may not be subject to close confinement except on health grounds. Prisoners of war may also be released on parole or promise especially in cases where such release may contribute to the improvement of their state of health. Article 22 goes on to provide that Prisoners of war may only be interned in premises located on land and affording every guarantee of hygiene and healthfulness. According to Article 23, the security of prisoners of war must be guaranteed. Articles 25 to 32 provide generally on the quarters, food and clothing of prisoners of war. It requires that the quality of quarters of Prisoners of war should be commensurate to the quarters of the forces of the Detaining Power who are billeted in the same area. The said conditions of quarters shall make allowance for the habits and customs of the prisoners and shall in no case be prejudicial to their health⁴⁵. The above provisions on quarters shall also apply in particular to their dormitories as regards both total space and minimum cubic space, and the general installations, beddings and blankets⁴⁶. The dormitories of prisoners of war shall entirely be protected from dampness and adequately heated and lighted especially between dusk and light out and all precautions must be taken against the danger of fire. Above all, separate dormitories must be provided for women prisoners of war as well as men prisoners of war⁴⁷.

The paradox here is that these conditions provided for prisoners of war seem to be too good to be implementable especially for most developing States who are still finding it very difficult to provide accommodations that are not even furnished for members of either armed forces or their Police Force in peace time not to talk of providing super furnished accommodations for enemy soldiers captured during hostilities or during an armed conflict. Most developing countries, including Nigeria priding itself as one of the best Armies in Africa, do not have the capacity to

⁴⁴ GC III Article 21.

⁴⁵ GC III Article 25.

⁴⁶ Ibid.

⁴⁷ Ibid.

cater for the accommodation needs of their armed forces. The question begging for answer here is how can a State provide what it does not have or cannot afford even with the utmost willingness to obey and implement the provisions of the Geneva Convention in relation to prisoners of war?

The Convention provides that the food provided for the Prisoners of war must be balanced and not such as would lead to malnutrition⁴⁸. It further provides that the daily food ration for prisoners of war shall be sufficient in quantity, quality and variety to keep them in good health and prevent loss of weight or the development of nutritional deficiencies. It further provides that account shall not only be taken of the habitual diet of the prisoners but also the way such meals are prepared and for that, the prisoners shall as far as possible be allowed or employed in the kitchen⁴⁹. These provisions are wonderful as they bring to bear the fullness of life even as a prisoner of war.

It is submitted that these conditions are good enough to encourage a lazy combatant to willingly surrender to the enemy and be captured as a prisoner of war knowing the wonderful treatment waiting for such a prisoner while his colleagues who are not prisoners are slogging it out in a hot battle. It is submitted that this responsibility of providing habitual diet for prisoners of war, notwithstanding its well-intended purpose, may in most cases be difficult to implement. For example, Cameroon and Chad are neighbouring States and if a conflict occurs between them in which case Cameroonians are known to love eating unripe plantain which grows and are freely cultivated in Cameroon being a country in the tropics while Chadians are known to love eating millet which also grows and widely cultivated in Chad being a country which is located in the savannah region. If there is conflict between Cameroon and Chad and some Cameroonians are captured as prisoners of war in Chad, Chad should feed the Cameroonians with unripe plantain whether plantain is readily available in Chad or not. This may be difficult for most States to implement. Unless a State may need to embark on importation of special diet just to feed those usually referred to as enemy soldiers and especially when the war is still in progress.

Most States may find this provision a bit cumbersome and as such tinker with its implementation. Apart from the elaborate provisions on food for the prisoners of war, special mention was made of water. This is because if nothing else can be provided for prisoners of war, definitely it will not be water. It was provided that sufficient drinking water shall be supplied to

⁴⁸ See GC III Article 26.

⁴⁹ Ibid.

prisoners of war and that the use of tobacco shall be permitted⁵⁰. Clothing of prisoners of war must be supplied in sufficient quantities and the climate of the place where the Prisoners of war are interned must be taken into consideration. It is provided that even underwear and footwear shall be supplied to them in sufficient quantities by the detaining power. These clothing items shall be subject to regular replacement and repairs by the detaining authority and if a prisoner of war works, he shall be given appropriate clothing in line with the nature which the work demands⁵¹.

Prisoners of war are to be provided with furnished baths and showers and every other thing incidental to maintaining proper hygiene⁵². Medical attention and medical inspections shall be held at least once a month⁵³. Prisoners of war who work as medical personnel should receive the same treatment as corresponding medical personnel retained by the Detaining Power although they continue to be Prisoners of war.

Articles 49 to 57 provide for Labour of POWs. These articles provide generally that only Prisoners of War who are physically fit may be required to carry out any form of labour. Prisoners of war can only carry out work that fall into the following categories:

- i. Agriculture
- ii. Production or extraction of raw materials, manufacturing industries (with the exception of metallurgical, machinery and chemical industries), public works and building operations which have no military character or purpose.
- iii. Transport and handling of stores not of military character
- iv. Commercial business, arts and crafts
- v. Domestic service
- vi. Public utility services that have no military purpose

Prisoners of war are not to be subjected to dangerous or humiliating labour which is of an unhealthy and dangerous nature unless the prisoners volunteer to engage in such labour. The removal of mines or other similar devices shall be considered as dangerous labour⁵⁴. The duration of the daily labour of Prisoners of war including the time of the journey to and from, must also not be excessive and must not exceed that permitted for the civilians who are nationals

⁵⁰ Ibid.

⁵¹ See GC III Article 27.

⁵² See GC III Article 29.

⁵³ See GC III Article 30 and 31.

⁵⁴ See GC III Article 52.

of the detaining power in the same locality⁵⁵. Prisoners of war are not slaves who work for their owners without payment of wages except for free food in exchange. Prisoners of war are to be paid a fair working rate of wages for their work directly by the detaining authority. The rate of payment to Prisoners of war shall be fixed but at no time be less than one-fourth of one Swiss franc⁵⁶ for a full working day⁵⁷. Prisoners of war are allowed to send and receive correspondences and cards⁵⁸.

Articles 82- 108 provide for Penal and Disciplinary Sanctions pertaining to Prisoners of war. The applicable law with respect to the discipline and punishment of Prisoners of war shall be the same laws, regulations and orders in force in the armed forces of the Detaining Power. Prisoners of war are required to be treated the same way as armed forces of the Detaining Party are treated with regard to their discipline. The Detaining Power is enjoined to exercise utmost leniency in deciding cases involving Prisoners of war. Prisoners of war are entitled to essential safeguards and have a right to defend themselves in any charge instituted against them. Article 107 provides that before any sentence can be enforced against a Prisoners of war, the Protecting Power must be notified in summary form of such sentence.

All things that have a beginning will definitely have an end. The status of prisoners of war usually also do come to an end. Articles 109-121 of GC III provide for the termination of captivity and repatriation of prisoners of war. Any prisoner of war who dies in captivity must be honorably buried by the Detaining Power in individual marked graves except in tenuous circumstances. This is necessary as a means of honour to the dead and also to provide for situation of re-burial or situation of evacuation of the remains of the dead in future by relations of the dead whose traditional beliefs or practice dictate that the remains of such dead persons be buried in a particular place or in a particular manner at a particular place.

4. Prisoners of War Distinguished From Prisoners (A Study of the Treatment of Prisoners Using Nigeria as a Case Study)

While a Prisoner of war is a person (combatant or non-combatant) who has fallen into the power of the enemy, a Prisoner (otherwise known as an inmate) is a person who having been convicted

⁵⁵ See GC III Article 53.

⁵⁶ This is equal to 27 cents at current market rates. This is ₦102.54. Available at <https://usd.currencyrate.today/ngn/0.27>. Accessed on 19/10/2020 at 12:43pm.

⁵⁷ See GC III Article 62.

⁵⁸ See GC III Article 71.

of a crime in a competent court of law is sentenced to serve a term of imprisonment in a correctional facility. A prisoner may also be generally defined as a person deprived of his liberty against his own will without having been sentenced to prison by any court of competent jurisdiction. This category of prisoners is referred to as unlawful detention prisoners.

The Nigerian Prison system now called the Nigerian Correctional Services is a reflection of what is obtainable in the West African sub-region as a whole although the Nigerian situation seems to be worse off. There are certain problems with the Nigerian Correctional Service which draws a sharp contrast with how Prisoners of War are expected to be treated in situations of armed conflicts. A few problems with the Nigerian Correctional Service include:

- a. In various respects, life in Nigerian correctional homes in general is overly regimented to the extent that there is strict control in virtually all activities of the inmates. This often leaves the prisoners in a mentally brutalized manner with broken body and spirit, which destroys the individuals. In this regard, it is apparent that the correctional homes system in Nigeria is faced with the problem of destroying the individual members of the community, which negates the essence of imprisonment, amounting to human development wastage in the national calculus. It is evident that various correctional homes in Nigeria are saddled with the problem of turning out maladjusted releases.⁵⁹
- b. Contact with the prison institution in Nigeria makes the less hardened individuals to be more hardened in criminal activities upon release, with more tendencies than not, to relapse to criminal activities, which generates high frequency of recidivism⁶⁰.
- c. The Nigerian prison environment with regard to amenities and conditions of living quarters have been characterized as “uncheerful”⁶¹ by the first Premier of the Western Region Obafemi Awolowo, “dehumanizing”⁶² by Wole Soyinka an eminent Nigerian Poet and writer, and “a hell” by Abubakar Rimi after his life experience as a political prisoner in Nigeria at the termination of the second republic. This lack of social amenities accounts for the culture of fragility⁶³ and explosive social violence that is recurrent and

⁵⁹ Emeka E. Obioha, “Challenges and Reforms in the Nigerian Prisons System”, *Journal of Social Sciences* vol. 27(2), pp. 95-109, May 2011, at p. 97.

⁶⁰ Ibid.

⁶¹ Awolowo, O. (1985). *Adventure in Power: My March through Prison*. Ibadan: Macmillan Publishers. Azu, J. C. (2019, August 20). Major implications of Nigeria’s new Correctional Act. Daily Trust. Retrieved from <https://www.dailytrust.com.ng/major-implications-of-nigerias-newcorrectional-act.html> accessed 15th June, 2021.

⁶² Soyinka, W. (1972). *The Man Died: Prison Notes*. London: Penguin Books.

⁶³The prison culture is one that is predicated on high tendencies of riots, rebellion and civil disturbances.

descriptive of Nigerian prison community over the years. Physical infrastructure and housing facility could better be described as uncivilized. The rooms and cells are not good for human habitation, while the beddings are in most cases absent as many prison inmates in Nigeria sleep on bare floor.

- d. Furthermore, in spite of the heinous cry by human rights organisations, most Correctional homes in Nigeria are overcrowded beyond the designed population⁶⁴. An example is the Ikoyi Correctional Home in Lagos Nigeria where a power surge was said to have killed five inmates and put another seven inmates in the hospital. The root cause of this incidence was overcrowding. The prison facility which was constructed in 1955 to hold 800 inmates now holds 3,113 inmates with 2, 680 inmates awaiting trial⁶⁵.
- e. Deplorable health conditions. There are no standard hospitals, drugs and qualified medical personnel to take care of the sick inmates⁶⁶. Even when there is a need to take a sick inmate out of the prison yard for treatment in a hospital, there are no motor vehicles made available for that. The close quarters in which inmates are kept gives a field day to all sorts of skin diseases and epidemics to breakout.
- f. Corruption. Guards frequently demand that inmates pay bribes for such “privileges” as visiting the hospital, receiving visitors, contacting their families and, in some cases, being allowed outside their cells at all. Prisoners with money may be even allowed mobile phones, whereas those without funds can be left languishing in their cells. One inmate said: “If you don’t have money, if you come to prison, you will suffer. They collect money from you. It is not right.”⁶⁷

It is evident from the above that prisoners in Nigeria are subject to conditions that fall far short of the conditions provided by the Geneva Convention for the Treatment of Prisoners of War. Even in developed countries where Prison Systems are much more developed and saner for the inmates, they are not without their own problems. It is, therefore, a great paradox that prisoners of war are required to be treated so favourably in a situation of armed conflict. This, therefore,

⁶⁴ Ifionu O 1987. Hell on Earth: Our Prisons and Dreaded Chambers. African Concord, volume 147, June 1987 pages 14-21; Obioha E.E. 1995, Prison Culture in Nigeria; A Study of Life within Agodi Prison Community, Ibadan. M.Sc. Dissertation, Unpublished. Ibadan: Department of Sociology, University of Ibadan.

⁶⁵ The Nation, Prison Tragedy, December 17, 2019. Available at: <https://thenationonlineng.net/prison-tragedy/>. Accessed on 16/06/2021 at 16:02pm.

⁶⁶ Ishaka P, Akpovwa P 1986. Not a Prisoner Heaven. Newswatch, volume 4 December 29, 1986, at page 26; Igbeare F. 1987. Prison Stories: Inmates Experience. African Concord, volume 147, June, 1987 at page 8.

⁶⁷ Supra at footnote 19. See page 5.

raises the concern of how realistic the provisions are. In the next segment of this paper, a closer look shall be taken on this paradox and the way forward.

5. The Paradox in the Treatment of Prisoners of War

Prisoners of War are entitled to almost delicate treatment under the Geneva Conventions and their Additional Protocols. The reality of how prisoners are treated in many countries falls far below the standard set by the Geneva Conventions. The truth is that during periods of hostility, emotions run high and when soldiers are captured, the last thing the Detaining Power wants to do is to take care of these prisoners and almost coddle them. The default reaction would be to make captured soldiers pay for damage that their fellow soldiers and State has wrought upon the territory of the Detaining Power.

One provision that stands out here is the restriction on the kind of labour that POWs can be subjected to. Even though they are not to carry out dangerous work, they are also not to carry out work (as harmless as it seems) which may be of military character⁶⁸. This is rather unrealistic as during periods of war, work that would be available would almost always be work of military character.

Another surprising requirement is that Prisoners of war are to be paid for the work they do. Prisoners generally do not get paid for work they do. This would be placing undue financial burden on the Detaining Power. This is asides from the responsibility of housing, feeding and clothing the Prisoners of war which must be of similar quality to what is enjoyed by armed forces of the Detaining Power.

It is, therefore, paradoxical that Prisoners of War are required to be treated better than mere criminals because according to the Convention, no persons who take part in armed conflict may be tried for taking direct part in hostilities. This means that as long as a combatant or other person qualified to be categorized as a Prisoner of war respects the provisions of the Convention and their Additional Protocols, they are to be the responsibility of the Detaining Power.

If, however, a Prisoner of war is suspected of having committed war crimes or commits a crime during internment, he is to be tried for such offences and such trials are to be done in a court of competent jurisdiction with all procedural guarantees with access to counsel of his or her choice. An accused shall be tried in his own presence⁶⁹. An accused cannot be tried without him been

⁶⁸ Articles 49- 57, Geneva Convention III Relating to the Treatment of Prisoners of War, 1949.

⁶⁹ See Article 63 of Rome Statute of the International Criminal Court, 2002 (otherwise known as the ICC Statute).

present as one cannot shave a man's head in his absence. The trial of prisoners of war can only take place either in the territory of the detaining Power or in the territory of the State of the prisoner of war or in another State as shall be agreed by the States involved. If for whatever reasons, these States are not ready or not willing to prosecute the accused, then he may be released to the International Criminal Court for appropriate trial. The International Criminal Court (ICC) is a permanent institution with the powers to exercise its jurisdiction over persons for the most serious crimes of international concern and those powers shall be complementary to national criminal jurisdictions⁷⁰. Trial of the accused by the ICC is done with full complement of the rights of the accused. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of the ICC Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

- a. To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
- b. To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
- c. To be tried without undue delay;
- d. To be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
- e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;
- f. To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;

⁷⁰ See Article 1 of Rome Statute of the International Criminal Court, 2002.

- g. Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
- h. To make an unsworn oral or written statement in his or her defence; and
- i. Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal⁷¹.

In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence, evidence in the Prosecutor's possession or control which he or she believes, shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the court shall decide⁷².

These guarantees make justice delivery more efficient, better, and satisfactory without any rancour at the International level where political, religious and other considerations are not part of the decision process.

6. A Case for the Humane Treatment of Prisoners of War

Having examined the practicability of the standard to which of Prisoners of War (POWs) are required to be treated, it is important to stress that the provisions remain relevant and extremely important to International Humanitarian Law. To state otherwise would be to say that prisoners of war are not entitled to any special protection and are to be treated shabbily and inhumanely.

The Conventions envisage a situation where reprisals are taken out on prisoners of war and sought to prevent this by criminalising any maltreatment of POWs. Extensive provisions are made to cover every aspect of the life of a POW while in detention so that there is no lacuna in the law.

POWs are members of the armed forces (and other categories of persons who are qualified to be so called) who have fallen into the hands of the adverse party. They are persons who are on the battlefield to defend their country in many different ways and are entitled to be treated with utmost care and respect.

⁷¹ Article 67 (1) ICC Statute.

⁷² Article 67 (2) ICC Statute.

Despite these provision, Prisoners of War are still being tortured and treated degradingly. This has to stop. The United Nations as well as the International Committee of the Red Cross have a huge role to play in enforcing the tenets of the Third Geneva Convention. A collaboration between both organisations will result in better treatment for POW. The ICRC through its mechanisms such as the International Fact Finding Commission and its National Societies can monitor how prisoners of war are treated while the UN may pass resolutions condemning degrading treatment of POWs and directing compliance with the Conventions. Civil Societies may also lend a helping hand by investigating violations of the Third Geneva Conventions and Reporting to the ICRC. They could also provide relief supplies for Prisoners of War.

The ICC also has a role to play by passing heavy sentences on persons who mistreat or maltreat prisoners of war such that the sentences serve as deterrence to others.

7. Conclusion And Recommendations

It is apparent that the Conventions and their Additional Protocols ensure that Prisoners of War are treated with utmost care and respect for their fundamental rights. Special attention is also paid to their ranks and this would determine how well they would be treated. The Conventions, however, guarantee that a Prisoner of War of the lowest rank is treated respectfully and this is very laudable. This favourable treatment however, creates two problems. First, with the appeal of such favorable treatment, soldiers might not put in their best at the warfront knowing that if they are captured, they will be safe from the perils of war. Beyond their safety, they will be living comfortably the only constraints being that they would be in captivity. Secondly, the requirement for treating prisoners of war is so high that it creates a paradox with how ordinary prisoners are treated in most of their respective countries. The high point and the paradox here is that any combatant of any rank of either of the parties can at any time during armed conflict become a prisoner of war. This uncertainty enforces the urge of all states to accept a high standard of protection for prisoners of war. The import of this being that in the event of war, the Detaining Power will have no option but a standing responsibility to treat Prisoners of War according to the standard required under the Geneva Conventions.

Another paradox this creates is that the idea of a detaining power which sometimes doubles as the enemy state treating captured enemy soldiers in any favorable way is rather unlikely. This is

because the natural disposition to Prisoners of War is unfavourable and, therefore, there might be need for intervention and assistance of third parties to ensure that they are treated right.

To this end, there should be collaboration between the International Committee of the Red Cross (ICRC) and the United Nations Organisation (UNO) as third parties with respect to ensuring that the provisions of the conventions are strictly adhered to when it comes to the treatment of prisoners of war.

It is further recommended that:

Protecting Powers should ensure that they take their roles seriously. Committees of Inquiry should be set up and these protecting powers and other organizations should be granted unrestricted access to the detained Prisoners of war as frequent as possible.

Civil Societies and Non-Governmental Organisations should be allowed access to provide support to Prisoners of War and help in taking their complaints before the relevant authorities.

In their activities they are to act with utmost confidentiality.

The United Nations should be more active in monitoring the activities of States in the implementation of the Conventions in relation to the treatment of prisoners of war. This can better be achieved if the United Nations cooperate with the International Committee of the Red Cross (ICRC) that has the structure and experience in the treatment of prisoners of war in different parts of the world.