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RECENT DEVELOPMENTS IN INTERNATIONAL ORGANIZATIONS

IRAN AND IRAQ AND THE OBLIGATIONS TO RELEASE AND REPATRIATE PRISONERS OF WAR AFTER THE CLOSE OF HOSTILITIES

John Quigley*

In the past several years, the United Nations has assumed a more prominent role in resolving international and civil military conflicts. Recently, it played a significant part in arranging the current cease-fire in the eight-year war (1980-88) between Iran and Iraq. The United Nations is now encouraging Iran and Iraq to negotiate a permanent peace agreement, and to release and repatriate their prisoners of war (POWs).

Iran and Iraq still hold over 100,000 prisoners captured during the war.¹ Many of the prisoners have remained captive since early in the war. To date, each side has released only small numbers of sick and wounded prisoners.² The continued confinement of the majority of the prisoners raises important issues of humanitarian law and of human

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1. Lewis, *Red Cross Seeks to Interview All P.O.W.'s in the Gulf War*, N.Y. Times, Nov. 8, 1988, at A8 [hereinafter Lewis, *Red Cross Seeks*].

2. H.E. Wissam Zahawie, *Prisoners of War in the Iran-Iraq Conflict: Facts and Assessment 7-10* (May 29-30, 1989) (a presentation at the International Meeting of Experts of the International Progress Organization, Geneva, Switzerland) (available at the Washington College of Law Library, The American University); see also H. Klecatsky, *Preliminary Report on the Exchange of Prisoners of War Between Iran and Iraq as a Requirement of International Law and Human Rights ¶ 2* (May 29-30, 1989) (a report submitted to the International Meeting of Experts at the International Progress Organization, Geneva, Switzerland) (giving an overview of the number of prisoners exchanged through April 1989).

rights law. This note assesses the positions of Iran and Iraq concerning their obligation to release and repatriate their prisoners of war.

I. THE OBLIGATION TO RELEASE AND REPATRIATE

In the seventeenth and eighteenth centuries, an obligation developed in customary international law to release prisoners at the end of wars, rather than to execute or enslave them.³ The obligation to repatriate prisoners of war was included in The Convention Respecting the Laws and Customs of War on Land (Hague, 1907) which provided: "[A]fter the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible."⁴ The 1949 Geneva Convention Relative to the Treatment of Prisoners of War, usually referred to as the Third Geneva Convention, made a significant change in the law governing the repatriation of prisoners; it provided in article 118: "[P]risoners of war shall be released and repatriated without delay after the cessation of active hostilities."⁵ The Third Geneva Convention, thus, advanced the time at which prisoners must be released and repatriated from the conclusion of peace to the cessation of hostilities.⁶ The change was important because peace treaties are often concluded long after the cessation of hostilities. In the Middle East, for example, Israel concluded armistice agreements with Lebanon, Syria, Jordan, and Egypt in 1949,⁷ but to date, only one peace treaty has been concluded between Israel and Egypt.⁸ Nonetheless, even in the absence of peace agreements, prisoners have been exchanged from time to time between Israel and the Arab states.⁹

Both Iraq and Iran are parties to the Third Geneva Convention.¹⁰

3. C.S. DELESSERT, *RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE END OF ACTIVE HOSTILITIES: A STUDY OF ARTICLE 118, PARAGRAPH 1 OF THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR* 70 (1977).

4. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 20, 36 Stat. 2277, 2301, T.S. No. 539, at 30.

5. Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, art. 118, 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364, 3454, 75 U.N.T.S. 135, 224 [hereinafter Third Geneva Convention].

6. C.S. DELESSERT, *supra* note 3.

7. Egypt-Israel, General Armistice Agreement, Feb. 24, 1949, 42 U.N.T.S. 251; Israel-Lebanon, General Armistice Agreement, Mar. 23, 1949, 42 U.N.T.S. 287; Israel-Jordan, General Armistice Agreement, Apr. 3, 1949, 42 U.N.T.S. 303; Israel-Syria, General Armistice Agreement, July 20, 1949, 42 U.N.T.S. 327.

8. DEP'T ST. BULL., NO. 78, *A FRAMEWORK FOR PEACE IN THE MIDDLE EAST* 7 (1978), *reprinted in* 17 I.L.M. 1466 (1978).

9. H.E. Wissam Zahawie, *supra* note 2, at 12.

10. Third Geneva Convention, *supra* note 5. The Convention was ratified by Iraq on Feb. 14, 1956, 230 U.N.T.S. 433. Iran ratified on Feb. 20, 1957, 264 U.N.T.S. 335.

The war began in 1980 and continued until a cease-fire entered into effect on August 20, 1988.¹¹ The cease-fire left Iraq in occupation of small areas of Iranian territory.¹² Since the cease-fire, however, the two nations have not engaged in armed combat against each other.¹³ Iraq says that there is a "cessation of active hostilities" within the meaning of article 118 because both parties have observed a cease-fire since August 20, 1988.¹⁴ Iran, however, takes the position that there is no "cessation of active hostilities" because it considers the cease-fire to be unstable, due to some violations, and because Iraq holds some Iranian territory, which raises the possibility that the parties will resume fighting.¹⁵ Article 118 does not clearly define "cessation of active hostilities." It could mean simply that the parties are not currently shooting at each other. It probably includes within the definition, however, that hostilities are not expected to resume in the near future.¹⁶ The rationale for the obligation to release and repatriate prisoners at the cessation of hostilities is that there is no expectation that the prisoners will be used against the detaining party.¹⁷ If hostilities have ceased, but are likely to resume shortly, that rationale does not exist.¹⁸

II. SECURITY COUNCIL RESOLUTION 598

Iran and Iraq agreed to a cease-fire in United Nations Security Council Resolution 598 of July 20, 1987 (Resolution 598).¹⁹ Resolution 598 calls for a cease-fire, a withdrawal of forces from each other's territory, a return of prisoners, and negotiations to settle all outstanding issues.²⁰ Iraq expressed acceptance of Resolution 598 in a letter to the Secretary-General dated July 23, 1987,²¹ and Iran proceeded similarly on July 17, 1988.²² By Resolution 619 of August 9, 1988, the Security

11. *UN Conducts Peace Talks in Geneva*, *New York*, 25 U.N. CHRONICLE 20 (Dec. 1988) [hereinafter *UN Conducts*].

12. Lewis, *Gulf Talks Stall Over a Waterway*, *N.Y. Times*, Oct. 9, 1988, at A11 [hereinafter Lewis, *Gulf Talks*].

13. H.E. Wissam Zahawie, *supra* note 2, at 11.

14. *Id.* at 11-12.

15. *Id.* at 5-6.

16. C.S. DELESSERT, *supra* note 3, at 97-105.

17. J. DE PREUX, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 546-47 (J. Pictet ed. 1960).

18. *Id.*

19. S.C. Res. 598, U.N. Doc. S/RES/598 (1987).

20. *Id.*

21. *Letter Dated 14 August 1987 From the Charge d'Affaires A.I. of the Permanent Mission of Iraq to the United Nations Addressed to the Secretary-General*, Annex at 2, U.N. Doc. S/19045 (1987), reprinted in 26 I.L.M. 1485 (1987) [hereinafter *Letter of August 14, 1987*].

22. See *UN Conducts*, *supra* note 11, at 22 (stating that Iran's acceptance of Reso-

Council established the Iran-Iraq Military Observer Group (UNI-IMOG) and deployed it along the Iran-Iraq border.²³ The cease-fire went into effect August 20, 1988.²⁴

The agreement between Iran and Iraq to cease fire on the basis of Resolution 598 constitutes an expression of both nations' belief that hostilities between them terminated. Both parties undertook to negotiate a peace treaty. Those negotiations, however, have been held for only short periods and have made little progress.²⁵ Nonetheless, the parties have manifested no intention of resuming hostilities.²⁶ It would appear, therefore, that a "cessation of active hostilities" within the meaning of article 118 is present.

Through Resolution 598, however, the United Nations introduced an element of uncertainty into what would be an otherwise clear obligation to release and repatriate prisoners without delay. It did, to be sure, urge "that prisoners-of-war be released and repatriated without delay after the cessation of active hostilities in accordance with the Third Geneva Convention," but it put that call in paragraph three of Resolution 598.²⁷ In paragraph one, it demanded that, "as a first step towards a negotiated settlement, Iran and Iraq observe an immediate cease-fire, discontinue all military actions on land, at sea, and in the air, and withdraw all forces to the internationally recognized boundaries without delay."²⁸

Relying on this juxtaposition and on the words "as a first step," Iran took the position that a release of prisoners should be considered only as part of a package arrangement that would include Iraq's withdrawal from Iranian territory, and that the requirements of paragraph one must be fulfilled before those of paragraph three.²⁹ Iraq disputed Iran's

lution 598 paved the way for the cease-fire).

23. *Id.* at 20.

24. *Id.*

25. See generally Lewis, *Gulf Talks*, *supra* note 12 (describing the deadlock over Iraq's effort to improve its rights over Shatt al-Arab waterway, Iraq's only outlet to the sea); Lewis, *U.N. Acts to Spur Iran-Iraq Talks*, N.Y. Times, Jan. 17, 1989, at A19 (stating that three rounds of talks had provided little progress); *Iraq Called Willing to Soften Stand in Its Talks with Iran*, N.Y. Times, Jan. 22, 1989, at A4 (describing the United Nations promotion to resume talks).

26. H.E. Wissam Zahawie, *supra* note 2, at 11.

27. S.C. Res. 598 at 2, U.N. Doc. S/RES/598 (1987).

28. *Id.*

29. *Letter Dated 14 March 1989 from the Charge d'Affaires A.I. of the Permanent Mission of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General*, Annex at 2, U.N. Doc. S/20529 (1989); see also *Letter Dated 17 March 1989 from the Charge d'Affaires A.I. of the Permanent Mission of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General*, Annex at 2, U.N. Doc. S/20532 (1989) (reiterating that Iran considers withdrawal to internation-

construction of Resolution 598 and said that it did not subordinate the release and repatriation of prisoners to the prior resolution of other issues.³⁰ It said that the fact that the prisoner issue was treated in paragraph three did not make that issue "dependent upon the degree of progress accomplished at the talks."³¹ Iraq further stated that the obligation to release and repatriate prisoners is not contingent on other issues, in particular, on its withdrawal from Iranian territory, which it says can be effectuated only as part of an agreement between the two states for more comprehensive United Nations policing arrangements to ensure that the cease-fire will continue.³²

Iraq indicated to the International Committee of the Red Cross (I.C.R.C.) on October 4, 1988, that it was willing to begin "the process of a comprehensive exchange of prisoners."³³ President Saddam Hussein of Iraq reiterated to the United Nations on March 5, 1989, that Iraq is ready to release and repatriate prisoners immediately on a mutual basis.³⁴ Iraq charged that Iran's linking of the prisoner issue with the other issues converted "tens of thousands of Iraqi and Iranian prisoners into the pawns of political intrigues."³⁵

The fact that Iran holds more prisoners than Iraq may be a factor in Iran's reluctance to treat the prisoner issue separately. The I.C.R.C. estimates that Iran holds about 70,000 prisoners, while Iraq holds about 35,000.³⁶ The numbers, however, are disputed. The International Committee of the Red Cross was unable to convince the parties to notify it of the names of prisoners upon capture and, thus, does not have reliable figures. The I.C.R.C. has undertaken to register prisoners itself

ally recognized borders a prerequisite to the release of POWs).

30. *Letter of August 14, 1987, supra* note 21.

31. *Letter Dated 18 April 1989 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General*, Annex at 4, U.N. Doc. S/20597 (1989) [hereinafter *Letter of April 18, 1989*].

32. *See id.* (stating that the parties should repatriate POWs without awaiting resolution of political issues); H.E. Wissam Zahawie, *supra* note 2, at 11 (stating that delays in repatriation turn the POWs into political bargaining chips).

33. *Letter Dated 22 February 1989 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General*, Annex at 3, U.N. Doc. S/20478 (1989) [hereinafter *Letter of February 22, 1989*].

34. *Letter Dated 6 March 1989 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General*, Annex at 2, U.N. Doc. S/20506 (1989) [hereinafter *Letter of March 6, 1989*].

35. *Letter of April 18, 1989, supra* note 31; *see also* Lewis, *Red Cross Seeks, supra* note 1 (reporting that Iraq is ready for mutual release of prisoners, but that Iran is demanding that Iraq first withdraw forces from Iranian territory).

36. Lewis, *Red Cross Seeks, supra* note 1. The I.C.R.C., however, has registered only 50,182 Iraqi prisoners in Iran and 19,284 Iranian prisoners in Iraq. *Iraq Accepts a Swap Of Wounded P.O.W.'s*, N.Y. Times, Nov. 9, 1988, at A8 [hereinafter *Iraq Accepts*].

during visits to POW camps in the two countries, but has not gained access to all prisoners.³⁷

Iran considers that both sides hold an approximately equal number of prisoners because it includes Iranian civilians who allegedly went into Iraq during the war and are living in camps there.³⁸ Iran estimates the number of such persons at 60,000.³⁹ In August 1988, Iraq acknowledged to a United Nations visiting mission the presence in Iraq of 55,000 Iranian civilians, most of Iranian-Kurdish or Iranian-Arab descent. Iraq, however, contended that these Iranians went to Iraq voluntarily and were free to leave.⁴⁰ Iraq assigned them to residence camps, although some took employment outside these camps. The United Nations mission concluded that some Iranians had gone to Iraq voluntarily during the war, but that the majority of them had done so for political reasons in 1979, just prior to the war's commencement.⁴¹ The mission found, however, that Iraq had forcibly deported some of these civilians from areas of northwest Iran.⁴² Furthermore, the mission reported from conversations with Iranian-Kurdish civilians that although some desired to go to third countries, most wanted to return to Iran if they could be given guarantees against persecution.⁴³

III. THE UNILATERAL NATURE OF THE OBLIGATION

During the hostilities, Iran and Iraq released approximately equal numbers of wounded, sick, and elderly prisoners.⁴⁴ In so doing, they

37. INTERNATIONAL COMMITTEE OF THE RED CROSS, MEMORANDUM ON THE IMPLEMENTATION BY IRAQ OF THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR DURING THE PERIOD FROM 1985 TO JUNE 1988 4 (July 15, 1988). Iraq's position is that it withheld names of some prisoners in order to pressure Iran to disclose the names of Iraqi prisoners it held. *Id.* In November 1988, Iraq agreed to give the I.C.R.C. the names of all Iranian prisoners it held. *Id.*; see also *Letter of February 22, 1989, supra* note 33 (stating that Iran had rejected an I.C.R.C. initiative to register POWs).

38. *Report of the Mission Dispatched by the Secretary-General on the Situation of Prisoners of War in the Islamic Republic of Iran and Iraq*, Annex at 27-30, U.N. Doc. S/20147 (1988) [hereinafter *Report of the Mission*].

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. See generally ICRC Press Release No. 1495, Oct. 20, 1984 (announcing Iraq's release of 100 Iranian prisoners and civilian internees); ICRC Press Release No. 1496, Oct. 25, 1984 (reporting Iran's release of 72 wounded and sick Iraqi prisoners); ICRC Press Release No. 1535, Mar. 17, 1986 (informing of Iran's release of 76 disabled, sick, and elderly Iraqi prisoners); ICRC Press Release No. 1549, Oct. 2, 1987 (disclosing Iran's release of 101 disabled, sick, and elderly Iraqi prisoners); ICRC Press Release No. 1562, Feb. 17, 1988 (communicating Iran's release of 28 disabled, sick, and

complied, at least in part, with the obligation imposed by article 109 of the Third Geneva Convention to repatriate wounded and sick prisoners without waiting for the cessation of hostilities. After the August 20, 1988, cease-fire, the parties continued to repatriate small numbers of wounded and sick prisoners.⁴⁵ Finally, in November 1988, both nations agreed to repatriate all wounded and sick prisoners registered by the I.C.R.C. by December 31, 1988. This number of prisoners amounted to 411 Iranian prisoners held in Iraq, and 1,115 Iraqi prisoners held in Iran.⁴⁶

Both Iran and Iraq suspended the repatriation of prisoners. Both states halted the exchange of prisoners blaming each other for not releasing the correct number of prisoners set forth in the agreement.⁴⁷ Iran claimed that it had released fewer prisoners than agreed because some refused repatriation.⁴⁸ The I.C.R.C. had not been granted access to these prisoners, so it could not verify their wishes.⁴⁹ Even after the agreement failed, however, both sides continued unilateral releases of small numbers of sick and wounded prisoners from time to time.⁵⁰

Although Iraq is willing to negotiate a mutual release and repatriation, it is not willing to release and repatriate its Iranian prisoners uni-

elderly Iraqi prisoners); *Iraq Accepts*, *supra* note 36 (stating that each side has released 700 sick and wounded since the beginning of the war).

45. See generally ICRC Press Release No. 1585, Sept. 12, 1988 (reporting Iran's release of 72 disabled, sick, and elderly Iraqi prisoners); ICRC Press Release No. 1588, Oct. 31, 1988 (announcing Iran's and Iraq's release of 50 disabled, sick, and elderly prisoners each).

46. See *Iraq Accepts*, *supra* note 36 (reporting Iraq's acceptance of Iran's proposal to exchange the sick and wounded prisoners the I.C.R.C. has registered); ICRC Press Release No. 1590, Nov. 11, 1988 (outlining details of the agreement to repatriate POWs).

47. *Letter Dated 29 November 1988 from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General*, Annex at 2, U.N. Doc. S/20304 (1988) [hereinafter *Letter of November 29, 1988*]; see also *Letter Dated 15 December 1988 from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General*, Annex at 2, U.N. Doc. S/20335 (1988) (reiterating concern for Iraq's failure to repatriate all the prisoners the agreement contemplated); H.E. Wissam Zahawie, *supra* note 2, at 7-8 (discussing Iraq's reasons for releasing fewer prisoners than agreed).

48. H.E. Wissam Zahawie, *supra* note 2, at 7-8; see also *Letter of November 29, 1988*, *supra* note 47 (stating that some Iraqi POWs sought asylum in Iran when offered repatriation).

49. *Teheran Suspends P.O.W. Trade With Baghdad*, N.Y. Times, Nov. 28, 1988, at A14.

50. See ICRC Press Release No. 1600, Jan. 24, 1989 (disclosing Iraq's release of 255 wounded, sick, or elderly Iranian prisoners); ICRC Press Release No. 1602, Feb. 23, 1989 (announcing Iran's release of 233 wounded, sick, or elderly Iraqi prisoners); ICRC Press Release No. 1604, Apr. 10, 1989 (reporting Iran's release of 66 wounded, sick, or elderly Iraqi prisoners).

laterally.⁵¹ State practice prior to the Third Geneva Convention had been for release and repatriation as a *quid pro quo* for release and repatriation by the other party.⁵² Article 118 of the Third Geneva Convention, however, required prisoner release and repatriation upon the cessation of hostilities,⁵³ rather than upon the conclusion of a peace treaty. In so doing, article 118 made clear a postulate not identified in the Hague Convention, namely, the obligation to release and repatriate is not dependent on a corresponding release and repatriation by the other party.⁵⁴

Article 118 requires a party to release its prisoners, even though the other party shows no willingness to reciprocate. This rule may seem harsh. A party in Iraq's situation may well consider that it is more likely to gain the release of its nationals held by the other party and, thereby, achieve a goal of article 118, if it retains the prisoners it has taken to pressure the other party to negotiate a mutual release. In such a situation, Iraq could claim that Iran is in material breach of its article 118 obligation, though given the unilateral character of the obligation, Iraq is also breaching. It is not open to Iraq to refuse performance on the basis of a material breach by Iran because material breach is not a ground for nonperformance of an obligation of a humanitarian character.⁵⁵

The unilateral character of the obligation is more clear if one deems human rights law relevant to the situation of a prisoner. States have increasingly found human rights law applicable, in addition to humanitarian law, in various aspects of belligerency.⁵⁶ Under human rights law, every person has a right not to be arbitrarily detained,⁵⁷ and once hostilities have ended, arguably, no lawful justification for detention exists.

51. See *Letter of February 22, 1989, supra* note 33 (stating that Iraq is willing to participate in exchanges of prisoners); *Letter of March 6, 1989, supra* note 34 (reiterating Iraq's willingness to exchange all POWs).

52. C.S. DELESSERT, *supra* note 3, at 70.

53. Third Geneva Convention, *supra* note 5.

54. See *supra* notes 4-6 and accompanying text (discussing the provisions of the two treaties).

55. Vienna Convention on the Law of Treaties, May 22, 1969, art. 60, para. 5, U.N. Doc. A/CONF. 39/27 (1969), *reprinted in* 63 AM. J. INT'L L. 875 (1969), and in 8 I.L.M. 679 (1969).

56. See, e.g., Quigley, *The Relation Between Human Rights Law and the Law of Belligerent Occupation: Does an Occupied Population Have a Right to Freedom of Assembly and Expression?* 12 B.C. INT'L & COMP. L. REV. 1, 2-13 (1989) (discussing the universality of human rights law during wartime).

57. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(e) (1987).

IV. THE WISHES OF THE PRISONER

One issue that potentially obstructs a repatriation of the prisoners held by Iran and Iraq is that some prisoners may not desire repatriation.⁵⁸ Both Iran and Iraq have apparently urged the prisoners they hold that the other side was at fault and that justice was on their side. Iran has reportedly put psychological pressure on its Iraqi prisoners to change their views.⁵⁹

The I.C.R.C. has expressed concern over the Iranian authorities' indoctrination of Iraqi prisoners. In a 1983 memorandum to all signatories of the Third Geneva Convention, the I.C.R.C. stated that Iraqi prisoners had been "subjected to ideological and political pressure, contrary to the Convention."⁶⁰ It stated further, that Iran had subjected its Iraqi prisoners to "forced participation in demonstrations decrying the Iraqi Government."⁶¹ In another memorandum to the signatories in 1984, the I.C.R.C. said that it had complained to the government of Iran of "intimidation" used against Iraqi prisoners in a "re-education" process, "with the aim of turning the prisoners against their own government."⁶²

In Iran, according to a 1988 United Nations report, Iraqi prisoners were in some instances segregated, depending on whether Iran considered them Iraqi loyalists or believers in Iran's approach to Islam.⁶³ Iranian authorities have provided what they term "spiritual guidance" to Iraqi prisoners.⁶⁴ United Nations investigators who visited POW camps in both Iran and Iraq at the time of the cease-fire in 1988 reported that at each POW camp they visited in Iran, about half the prisoners conducted "fanatical, hysterical and sometimes violent demonstrations," during which they chanted slogans against President Saddam Hussein of Iraq, against the United States and the U.S.S.R., and in favor of the

58. See ICRC Press Release No. 1602, Feb. 23, 1989 (stating that of 233 wounded, sick, or elderly prisoners Iran released between February 21, 1989, and February 23, 1989, 27 refused repatriation and remained in Iran); ICRC Press Release No. 1604, Apr. 10, 1989 (reporting that of 70 wounded, sick, or elderly prisoners Iran released on April 10, 1989, four refused repatriation and remained in Iran). Some Iraqi prisoners in POW camps in Iran expressed to the United Nations investigators a concern about Iraqi government reprisals against their relatives, should they refuse repatriation. *Report of the Mission, supra* note 38, at 14. *But see* ICRC Press Release No. 1600, Jan. 24, 1989 (commenting that of the 255 wounded, sick, or elderly prisoners Iraq released on January 23, and 24, 1989, none refused repatriation).

59. *Report of the Mission, supra* note 38, at 13-14.

60. ICRC Press Release No. 1462, May 11, 1983, at 2.

61. *Id.*

62. ICRC Press Release No. 1480, Feb. 15, 1984, at 2.

63. *Report of the Mission, supra* note 38, at 11.

64. *Id.* at 12.

Ayatollah Khomeini.⁶⁵ I.C.R.C. visitors reported similar demonstrations.⁶⁶ The United Nations investigators said that some Iraqi prisoners considered the "spiritual guidance" to be brainwashing and that it put them under great mental pressure.⁶⁷

Iranian prisoners in POW camps in Iraq also do not appear to be uniform in their loyalties. The United Nations investigators reported that some were loyal to the government of Iran, others to the previous government of Iran, and the rest to the Mojahedin-e Khalq,⁶⁸ an Iranian dissident movement that transferred its base of operations to Iraq and some of whose members enlisted in Iraq's army to fight against Iran. Many Iranian prisoners in POW camps in Iraq complained to the investigators that spies among the prisoners reported to camp commanders on the prisoners' political views.⁶⁹ Although most prisoners expressed a desire to return to Iran, some asked the investigators whether they would be forced to return to Iran against their will.⁷⁰ The prisoners were concerned that the government of Iran might take reprisals against them after their return because not all of them remained loyal to Iran.⁷¹ Consequently, they asked whether there would be any guarantees to protect them against such reprisals.⁷²

Article 118 does not condition a belligerent's obligation to release and repatriate a prisoner on the willingness of the prisoner to be released and repatriated.⁷³ This matter was raised at the Geneva Conference discussion leading to the Third Geneva Convention, but delegates expressed the fear that the detaining state might manipulate the prisoners to keep them from expressing a true desire to be repatriated.⁷⁴ Article 118 does not specifically address the wishes of the prisoner.⁷⁵ By contrast, article 109, which requires release and repatriation of seriously sick and wounded prisoners even during hostilities, expressly states: "[N]o sick or injured prisoner of war who is eligible for repatriation . . . may be repatriated against his will during hostilities."⁷⁶

65. *Id.* at 13.

66. Lewis, *Red Cross Seeks*, *supra* note 1.

67. *Report of the Mission*, *supra* note 38, at 11.

68. *Id.* at 24.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. See Third Geneva Convention, *supra* note 5, art. 118 (making no mention of the wishes of the prisoners).

74. J. DE PREUX, *supra* note 17, at 542; see also C.S. DELESSERT, *supra* note 3, at 68-69 (discussing the debate during the Conference).

75. Third Geneva Convention, *supra* note 5, art. 118.

76. *Id.* art. 109; see also J. DE PREUX, *supra* note 17, at 542-43 (discussing article

State practice since 1949 has shown that the wishes of the prisoner are considered.⁷⁷ In the Iran-Iraq War, in particular, the I.C.R.C., which has facilitated the releases to date, has questioned prisoners with no witnesses present to determine their wishes.⁷⁸ As indicated, those rejecting repatriation have been permitted to remain in the territory of the detaining state.⁷⁹

A strong argument may be made on the basis of human rights law that a prisoner's desire should be considered. Under human rights law, a person enjoys a right to emigrate⁸⁰ and a right to seek asylum.⁸¹ Forced repatriation would violate these rights. While it could be asserted that the person must first return and then exercise the right to emigrate or to seek asylum, forced repatriation would seem to violate both rights.

The Third Geneva Convention is silent on the question of guarantees that a returning prisoner will not be treated harshly if his government is concerned over disloyalty he may have manifested during captivity. This matter requires attention in the Iran-Iraq context. The parties should give clear guarantees that they will not victimize either those prisoners who return, or the families of those prisoners who choose to remain. Guarantees will be difficult to effectuate because such victimization can be subtle and can occur well into the future.

109 of the Convention).

77. See G.A. Res. 610, art. 2, 7 U.N. GAOR Supp. (No. 20) at 3, U.N. Doc. A/2361 (1953) (prohibiting use of force against POWs to block or compel their return to their native land); see also J. DE PREUX, *supra* note 17, at 544-45 (discussing the United Nations' refusal to adopt North Korea's suggestion that POWs be repatriated without regard to their wishes).

78. See ICRC Press Release No. 1496, Oct. 25, 1984 (stating that the I.C.R.C. privately interviewed Iraqi prisoners prior to repatriation); ICRC Press Release No. 1535, Mar. 17, 1986 (announcing the repatriation of Iraqi POWs after private interviews were conducted to determine their wishes). *But see* Lewis, *Red Cross Seeks*, *supra* note 1 (noting I.C.R.C. complaints that it was not granted access to all prisoners to determine their wishes).

79. See *supra* notes 66-67 and accompanying text (describing the refusal of some Iraqi POWs to return to Iraq).

80. See generally H. HANNUM, *THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE* (1987) (explaining a person's right to leave his or her country).

81. See Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (implementing measures designed to foster international cooperation in the granting of asylum to refugees); see also Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (extending the protection afforded under the Convention Relating to the Status of Refugees to individuals who achieved refugee status after January 1, 1951).

V. THE OBLIGATIONS OF OTHER STATES PARTIES TO THE CONVENTION

The likelihood that Iran and Iraq will soon release and repatriate all of their prisoners is not great because Iran links the prisoner issue to other issues that are not likely to be resolved soon and Iraq is not willing to release prisoners unilaterally.⁸² This unfortunate situation makes the obligation in article 1 of the Third Geneva Convention important.⁸³ Article 1 states that "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."⁸⁴ Although the scope of that obligation is not clear, other party states, including most of the world community,⁸⁵ are required to encourage Iran and Iraq to release and repatriate their prisoners.

The Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) makes the obligation to release and repatriate prisoners more precise.⁸⁶ Article 89 of Protocol I states that in "situations of serious violations of the Conventions . . . the High Contracting Parties undertake to act, jointly or individually."⁸⁷ Furthermore, article 85(4) of Protocol I defines "unjustifiable delay in the repatriation of prisoners of war" as a "grave breach," thereby making it clear that failure to repatriate is a "serious violation" within the meaning of article 89.⁸⁸ To be sure, Protocol I is not universally ratified.⁸⁹ Nevertheless, it shows that many of the states parties recognize a mutual obligation to ensure respect for the Convention. The I.C.R.C., as indicated, sends information about its work on the issue to the states parties to the Convention to encourage them to take an interest in the matter.⁹⁰

82. See H.E. Wissam Zahawie, *supra* note 2, at 6, 9 (explaining how Iran's demand for Iraq's withdrawal from Iranian territory prior to repatriation of POWs violates Resolution 598 and the Third Geneva Convention).

83. Third Geneva Convention, *supra* note 5, art. 1.

84. *Id.*

85. TREATIES IN FORCE 360 (Jan. 1, 1989). As of January 1, 1989, 167 states were parties to the Third Geneva Convention. The only states not parties were Bhutan, Maldives, Nauru, and Burma. *Id.*

86. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* December 12, 1977, U.N. Doc. A/32/144, Annex I and II (1977), *reprinted in* 16 I.L.M. 1391 (1977).

87. *Id.* art. 89.

88. *Id.* art. 85(4).

89. 269 INT'L REV. RED CROSS 163 (Mar./Apr. 1989). As of February 8, 1989, eighty countries had ratified the Protocol. *Id.*

90. See *supra* notes 59-61 and accompanying text (discussing the I.C.R.C.'s appeal to all states parties to the Third Geneva Convention to enforce the provisions of that Convention).

United Nations Security Resolution 598 encouraged Iran and Iraq to release and repatriate their prisoners, but since the 1988 cease-fire went into effect, other states have not given significant attention to the situation of the Iranian and Iraqi prisoners. A unified position by the industrialized countries might well influence the parties, as might a concerted effort by the other powerful Islamic states.

One possible way for states parties to pressure Iran and Iraq would be to seek an advisory opinion of the International Court of Justice⁹¹ on the question of the unilateral nature of the obligation to release and repatriate, on the question of how to accommodate the wishes of the prisoner with respect to repatriation, and on the question of guarantees to prevent reprisals against returning prisoners or against the families of prisoners who refuse repatriation. The court might also be asked to clarify the relevance of human rights law to the issue of release and repatriation. Member states of the United Nations could ask either the Security Council or the General Assembly to request an advisory opinion.⁹² An advisory opinion would presumably stress the obligation of both parties to release and repatriate their prisoners.

Political pressure must also be exerted more forcefully through the United Nations to encourage Iran and Iraq on the prisoner issue. The United Nations, however, is a creature of its member states. The actions of the United Nations will be limited if the member states do not treat the prisoner issue with all due seriousness. At present, unfortunately, the member states are not making this issue a matter of priority.

Since its adoption of Resolution 598 in 1987, the Security Council has not devoted much of its attention to Iran and Iraq. Although the Security Council played an important role in bringing the hostilities to an end, it should not view its job as complete. The Security Council might play a vital role in exerting pressure on Iraq and Iran to release their prisoners.

CONCLUSION

Negotiations between Iran and Iraq for a general settlement are at a standstill, and no separate negotiations on the prisoner issue are contemplated. Neither party is inclined to release and repatriate prisoners unilaterally. The prospect thus exists that more than 100,000 prisoners

91. See U.N. CHARTER art. 92 (stipulating that the International Court of Justice is the primary judicial body of the United Nations).

92. *Id.* art. 96, para. 1.

could remain in POW camps for an extended period.⁹³ If the humanitarian goal of the Third Geneva Convention is to be attained, all states parties should take their article 1 obligation seriously to ensure respect for the Convention by other states parties.

93. See Brooks, *Stalemated Iran-Iraq Peace Negotiations Leave Thousands of POWs Languishing*, Wall St. J., June 23, 1989, at A10 (explaining that repatriation of prisoners has halted because Iran hopes to use Iraqi POWs as leverage for the reacquisition of border territory lost to Iraq during the war).