One of the more significant, but inadequately recognized, developments in the field of the law of war which has occurred during the past half-century is that with respect to the institution of the Protecting Power. Surprisingly little has been written, especially in English, either on the general subject of the Protecting Power or on the specific subject of the Protecting Power and its relationship to the prisoner-of-war problem. This article will endeavor, to a necessarily limited extent, to fill that void, with the emphasis being placed on the gradual, but steady, expansion of the authority, responsibility, and functions of the Protecting Power in safeguarding the welfare of prisoners of war.

The term Protecting Power is comparatively simple of definition. It is a state which has accepted the responsibility of protecting the interests of another state in the territory of a third, with which, for some reason, such as war, the second state does not maintain diplomatic relations. Because the protection is most frequently rendered to nationals of the protected state found in the third state, the former is often referred to as the Power of Origin and the latter as the Power of Residence. For obvious reasons, in the case of prisoners of war the state by which they are held is known as the Detaining Power rather than as the Power of Residence. And while the term Power of Origin may be a misnomer in the case of certain prisoners of war, as, for example, those who were captured while serving in the armed forces of a state other than their own, it will be used herein for lack of a more appropriate term.

I. Historical

The earliest indication of what we now term the Protecting Power probably appeared in the Capitulations of the Ottoman Empire of the sixteenth century. Curiously enough, in those early days protection of non-nationals came about, not as a result of agreements reached with the Power of Residence by the Power of Origin, but as a result of agreements reached with the Power of Residence by the prospective Protecting Power itself, the latter having probably been primarily concerned with the resulting increase in its own prestige and influence in the territory in which it was acting and in the home territories of the protected...
persons. At that period the Protecting Power was, and in the three succeeding centuries it remained, completely a creature of custom and usage, with no conventional basis, definition, or functions. As a result, the extent of the activity of Protecting Powers varied in different countries and even, with respect to different Protecting Powers, within the same country. The passage of time resulted in the passing of the initiative for the designation of a Protecting Power in a particular case from the Protecting Power to the Power of Origin, where it more properly belonged. It also resulted in the concept of the Protecting Power as an international institution becoming more and more firmly intrenched in international law and practice. In its present form, however, the Protecting Power dates back less than one century—and its codified form is of even more recent vintage.

Most writers attribute the modern genesis of the Protecting Power to developments which occurred during the Franco-Prussian War (1870-1871). In that conflict, probably for the first time, all of the belligerents were represented by Protecting Powers in the territory of the enemy. England was charged with the protection of the French in Germany; and the United States, Switzerland, and Russia acted as Protecting Powers in France for the various German States. It may be said that the expansion of the functions of the Protecting Power during this conflict was, in large measure, due to two practices which originated during its course: that of expelling enemy consuls; and that of imposing stringent restrictions on enemy aliens. Unquestionably, each of these practices could and did contribute to the need for the enlargement of the functions of the Protecting Power.

The precedents established during the Franco-Prussian War were adhered to in most subsequent international conflicts, many of which had, however, their own peculiar aspects. Thus, in the Sino-Japanese War (1894-1895) each side requested the United States to act as its Protecting Power and so we find the same state acting as the Protecting Power for each belligerent within the territory of the other. Similarly, Germany acted as the Protecting Power for both belligerents in the Italo-Turkish War (1911-1912) and in the Sino-Soviet War (1929). Going to the other extreme, in the Greco-Turkish War (1897), Germany acted as the Protecting Power for Turkey in Greece, while three other nations, England, France, and Russia, acted jointly for Greece in Turkey; in the Spanish-American War (1898), England acted as the Protecting Power for Turkey in Greece, while three other nations, England, France, and Russia, acted jointly for Greece in Turkey; in the Spanish-American War (1898), England acted as the Protecting Power for Turkey in Greece, while three other nations, England, France, and Russia, acted jointly for Greece in Turkey; in the Spanish-American War (1898), England acted as the Protecting Power for Turkey in Greece, while three other nations, England, France, and Russia, acted jointly for Greece in Turkey; in the Spanish-American War (1898), England acted as the Protecting Power for Turkey in Greece, while three other nations, England, France, and Russia, acted jointly for Greece in Turkey; in the Spanish-American War (1898), England acted as the Protecting Power for Turkey in Greece, while three other nations, England, France, and Russia, acted jointly for Greece in Turkey; in the Spanish-American War (1898), England acted as the Protecting Power for Turkey in Greece, while three other nations, England, France, and Russia, acted jointly for Greece in Turkey; in the Spanish-American War (1898), England acted as the Protecting Power for Turkey in Greece, while three other nations, England, France, and Russia, acted jointly for Greece in Turkey; in the Spanish-American War (1898), England acted as the Protecting Power for Turkey in Greece, while three other nations, England, France, and Russia, acted jointly for Greece in Turkey; in the Spanish-American War (1898), England acted as the Protecting Power for Turkey in Greece, while three other nations, England, France, and Russia, acted jointly for Greece in Turkey;
almost disappeared, although at one time during World War II Spain was acting as the Protecting Power for Japan in the continental United States, while Sweden acted for her in Hawaii, and Switzerland in American Samoa.

The Boer War (1899-1902) may, perhaps, be considered to have been, at least to some extent, an exception to what was fast becoming a firmly established institution of international law. Early in that conflict the British requested the United States to represent their interests with the Boers. Apparently the consent of the Boers was not sought and they not only failed to designate a Protecting Power of their own, but, for all practical purposes, at first refused to recognize the right of the United States consular representatives to act on behalf of the British. Subsequently the Boers did agree to permit the United States consuls in their territory to perform certain specific and limited functions with respect to British prisoners of war, upon the understanding that United States consuls in England would have similar privileges with respect to Boer prisoners of war held there. Thus, to a limited degree, the institution of the Protecting Power was recognized even here.

The Russo-Japanese War (1904-1905) found the Protecting Powers once again exercising the full powers which it had become customary to allot to them. Perhaps as a result of the favorable experiences of the Sino-Japanese War, immediately upon the outbreak of hostilities Japan requested the United States to act on its behalf in Russia; while France was designated by Russia as its Protecting Power in Japan and Korea. And once again, but to an even greater extent than during the Spanish-American War, we find the representatives of the Protecting Powers concerning themselves with the welfare of prisoners of war.

Thus it can readily be seen that when World War I burst upon Europe, the designation of Protecting Powers by belligerents was a firmly established international custom, although the Protecting Power as an institution had yet to be the subject of international legislation. During the course of that conflict four definite items of progress occurred: first, it was during World War I that public opinion in the belligerent countries achieved an understanding of how a friendly neutral could represent, at times vigorously, an enemy belligerent and its nationals; second, the use of the Protecting Power as a means of safeguarding the welfare of prisoners of war, although at first somewhat restricted, was later greatly extended and received rather general acceptance; third, the practice was adopted that when a neutral which had been acting as a Protecting Power itself became embroiled in the conflict, a successor Protecting Power would be designated to fill the vacuum; and finally, the Protecting Power received legal recognition in a number of international agreements entered into by various of the belligerents during the course of the hostilities in which, to a surprising extent, its functions were spelled out with some degree of definiteness.
The precedents established during World War I were destined to bear fruit. A draft prisoner of war convention prepared in 1921 by the International Committee of the Red Cross (hereinafter referred to as the ICRC), while contemplating the use of Protecting Powers for certain limited purposes, would have assigned to the ICRC the responsibility for establishing mobile commissions composed of neutrals charged with assuring that the belligerents were complying with the convention. This proposal was probably due to two factors: first, the failure of the states which had acted as Protecting Powers during World War I adequately to report their activities; and second, the belief that the duties involved in the effective protection of the rights of prisoners of war would exceed the capacity of the diplomatic personnel of Protecting Powers. However, when the Diplomatic Conference convened in Geneva in 1929 and drafted the convention which subsequently received the ratification of the vast majority of states, the ICRC proposal was not adopted and, instead, the basic principle of the Protecting Power received general acceptance, the former Protecting Powers taking the position that all that was needed to assure their activities was that their role “be distinctly set out, and their task clearly defined.” The Prisoner of War Convention drafted at that Conference thus became the first international agreement negotiated in time of peace to give official recognition to the institution of the Protecting Power. However, it did not create a new international concept. It did not make the use of the Protecting Power by belligerents obligatory. It did not affect the relationships which had previously existed between the Power of Origin, the Protecting Power, and the Detaining Power. It did give the relationship a formal and agreed status which it had not previously had. It may well be considered that the provisions of the 1929 Convention relating to Protecting Powers constituted the most important advance contained in that convention over the provisions of the regulations relating to prisoners of war contained in the Annex to the Fourth Hague Convention of 1907. The lessons learned during World War I had not been forgotten.

The advent of World War II provided, all too soon, an opportunity for the implementation and testing of this novel international legislation. Most of the belligerents were represented by Protecting Powers and, in general, these found the provisions of the 1929 Convention relating to their activities extremely helpful. True, the designation and functioning of Protecting Powers on behalf of prisoners of war had previously become an almost universally accepted custom in international law. But it is necessary to bear in mind that, despite this, in the U.S.S.R. and Japan, neither of which nations was a party to the 1929 Convention, there was either complete or substantial failure in the functioning of the Protecting Powers. In general, the fact that such a large number of countries were parties to the World War II hostilities had two distinct but related
results. In the first place, not only did the absence of strong neutrals present a problem in the selection of Protecting Powers, but it also meant that there was no large neutral world public opinion to be affected by violations of the convention, and the power of neutral public opinion in forcing compliance with a humanitarian convention cannot be overestimated. And in the second place, because of the small number of neutrals available to act as Protecting Powers, it frequently occurred that the same neutral was designated to act as the Protecting Power for two opposing belligerents.

Once again wartime lessons were not forgotten and on August 12, 1949, just four years after the final termination of World War II, a new Prisoner of War Convention was signed in which, as we shall see, the functions of the Protecting Power are identified and defined with even greater particularity than had been the case in the 1929 Convention. Since that time the hostilities in Korea have occurred. At the outbreak of those hostilities General Douglas MacArthur, as the commander of the United Nations Command, immediately announced that his forces would comply with the humanitarian principles of the 1949 Convention. In answer to a query made by the ICRC, the Foreign Minister of the so-called Democratic People’s Republic of Korea sent a message to the Secretary General of the United Nations stating that its forces were “strictly abiding by principles of Geneva Conventions in respect to Prisoners of War.” Unfortunately, the provisions of the convention relating to the Protecting Power were evidently not among the principles with which they were “strictly abiding” so that, despite all efforts expended in this regard, those provisions were never implemented.

From the foregoing brief historical survey it is apparent that prior to 1870 only the precursors of the modern Protecting Power existed, and not the latter itself; that during the period from 1870 to 1914 the concept of the Protecting Power began to take form, particularly with respect to its relationship to the problem of the prisoner of war; and that during the period subsequent to 1914 the form has become definite, the institution of the Protecting Power having become the subject of numerous bilateral and multilateral international agreements, culminating in the 1949 Geneva Conventions to which most of the nations of the world are parties. It now becomes appropriate to analyze the form and the character which the Protecting Power received during this evolutionary process.

II. The Modern Concept of the Protecting Power

A. Designation

As will have been noted, Article 86 of the 1929 Convention was, to say the least, somewhat vaguely worded:
The High Contracting Parties recognize that the regular application of the present Convention will find a guaranty in the possibility of collaboration of the protecting Powers charged with safeguarding the interests of belligerents . . . (Italics added.)

There is nothing mandatory here. There is no requirement here that a Protecting Power actually be designated or that, if designated, it be permitted to function as such by the Detaining Power. The comparable provision of the 1949 Convention reads quite differently. Article 8 of this latter convention provides:

The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. . . . (Italics added.)

It would appear that the designation of Protecting Powers has now become at least a moral obligation of the belligerent; and that, once designated, a Protecting Power has a duty not only to the Power of Origin, but also to the other parties to the conflict, to perform the functions which have been assigned to it by the 1949 Convention.

What are the qualifications required of a state before it may be designated as a Protecting Power? It must, first of all, be a state within the meaning of that term in international law. It must also, of course, be a neutral state—and it is advisable that it be one which can reasonably be expected to remain neutral, although this latter qualification has become more and more difficult to assure. And, finally, it must be a state which maintains diplomatic relations with both the requesting state (the Power of Origin) and the state in which it is being requested to operate (the Detaining Power).

How does a state actually become a Protecting Power? The belligerent state desiring the services of a Protecting Power requests a neutral state which has the qualifications listed above to act on its behalf. If the latter is willing to assume the functions of a Protecting Power, it so notifies the requesting state. It must then obtain from the Detaining Power permission to function as the Protecting Power for the requesting state vis-à-vis and within the territory of the Detaining Power. In other words, the actual designation of the Protecting Power is based upon the request of the Power of Origin and the consent of both the proposed Protecting Power and the Detaining Power.

As we have seen, it has frequently occurred in the past that more than one state has been designated as the Protecting Power for a belligerent, and there is nothing in the 1949 Convention, nor in general international law, to preclude this practice. However, the advantages of the other extreme—one and the same Protecting Power for both belligerents—are many. Even a small nation, when acting as the Protecting Power for both sides, is in a unique position to obtain a general observance of the law of war by each belligerent on the basis of
reciprocity. This was made quite apparent during World War II, when Switzerland acted as the Protecting Power for many of the belligerents on both sides of the conflict. Some of the advantages of this situation are summed up as follows:

For uniformity and simplicity of administration it is obviously desirable for the protected power to entrust its interests in another country to only one protecting power, and in instances involving the protection of belligerent interests there are advantages to all concerned if both belligerents entrust their interests in the other's territory to the same protecting power. . . . The experience of World War II indicates that a more uniform administration and a higher standard of treatment of enemy interests by both belligerents result from a reciprocal protection of the interests of those belligerents by the same protecting power throughout the territories under the control of each belligerent.29

The limited number of states which would be available and competent to act as Protecting Powers in any future world conflagration would, in all probability, almost automatically bring about this result, just as it did during World War II. The delegates at the Diplomatic Conference which drafted the 1949 Convention foresaw the possibility of numerous situations in which there would be no Protecting Power.30 They attempted to solve this problem by providing in Article 10 of the convention for the designation of “substitutes” for Protecting Powers.31 It must, however, be emphasized that the provisions of this article should not be considered as affecting the basic method of selecting either Protecting Power or successor Protecting Powers as long as the Power of Origin continues to exist. A successor Protecting Power, necessitated, perhaps, because the original Protecting Power has become a belligerent, is not a “substitute” for a Protecting Power within the meaning of Article 10, and its designation is governed by the same rules of international law as those which govern the designation of the original Protecting Power.32 It must also be emphasized that a state or organization designated under the provisions of Article 10 is not a Protecting Power as that term is used generally in international law and as it is used specifically elsewhere in the 1949 Convention, but is merely a state or organization performing some or many of the functions allocated to Protecting Powers by the convention.

B. Personnel

Article 8 of the 1949 Convention provides that

. . . the Protecting Powers may appoint, apart from their diplomatic and consular staff, delegates from amongst their own nationals or the nationals of other neutral
It is obvious that the convention has accorded to the Protecting Power two sources of personnel for the execution of its functions: its diplomatic and consular officers stationed within the territory of the Detaining Power; and others of its nationals and other neutral nationals specifically appointed for the purpose. We shall discuss each of these sources in turn.

The normal and natural source of personnel for the execution of the functions of the Protecting Power is, of course, the diplomatic and consular personnel already assigned to and stationed in the territory of the Detaining Power. These officials, working under the ambassador, are experienced, they are known to the local officials, and, perhaps most important, they are already present within the area of operations. It is, of course, true that they already have their usual functions to perform; but many of these functions disappear or are seriously curtailed upon the advent of war (commercial, immigration, tourists, etc.). While any large-scale war of lengthy duration will undoubtedly make it necessary for the Protecting Power to supplement its regular diplomatic and consular staff within the territory of the Detaining Power, there will be numerous instances in which the Protecting Power will be able to perform its functions with only its normal complement of officials, at least for some considerable period of time and until the number of prisoners of war held by the Detaining Power makes a build-up of personnel essential. Of course, the term “diplomatic and consular staff” includes not only those officials of the Protecting Power who were already stationed within the territory of the Detaining Power at the time of the designation of the Protecting Power, but also any of its other diplomatic and consular personnel who may be sent to replace or supplement them.

With the heavy commitments which Switzerland had during World War II, it would obviously have been impossible for it to have made even a pretense of performing its far-flung responsibilities as a Protecting Power without a considerable increase in its staffs in the territories of the many Detaining Powers where it had consented to function. To accomplish this purpose the Swiss Government recruited in Switzerland and sent to its various affected embassies and legations “camp inspectors,” who had the function of periodically visiting prisoner-of-war camps and work areas to assure that there was compliance by the Detaining Power with the provisions of the 1929 Convention. This is typical of the second source of personnel the use of which is authorized by Article 8 of the 1949 Convention—the non-career national who is selected by the government of the Protecting Power solely for the purpose of assisting it in performing its functions. He may also be the national of another neutral, but
normally the Protecting Power would resort to this type of selection only when it has exhausted its own manpower potential. Of course, a major source of non-career personnel is to be found among the nationals of the Protecting Power and of other neutral Powers who are residing within the territory of the Detaining Power when the use of additional personnel becomes necessary. The Protecting Power may sometimes find it more convenient, when it has exhausted the list of its own nationals residing in the territory of the Detaining Power, to use neutral nationals falling within this category before resorting to the policy of recruiting its own nationals in its own territory and sending them to the territory of the Detaining Power.

It will have been noted that these non-career, or auxiliary, personnel are subject to the approval of the Detaining Power. This has occasioned considerable discussion, both at and since the Diplomatic Conference. No objection can be perceived to this procedure. The diplomatic and consular personnel of the Protecting Power stationed within the territory of the Detaining Power must have the normal approval of the state to which they are accredited (agrément, exequatur), required for all such personnel, and any one of them may, at any time, be declared persona non grata by that state, the Detaining Power. The writer finds himself in complete accord with the statement that

... it appeared to be incompatible with international usage that the occasional, auxiliary and temporary staff recruited by the Protecting Power should enjoy a more favorable status than the usual diplomatic or consular staff.\textsuperscript{35}

The fear has been expressed that a Detaining Power might arbitrarily refuse to approve any of the auxiliary personnel nominated by the Protecting Power and thereby make it impossible for the latter properly to perform its functions. But a Detaining Power so minded could also, and with equal ease, arbitrarily decline to grant the necessary agrément or exequatur to replacement or supplementary diplomatic or consular personnel of the Protecting Power. Either of these acts would constitute a violation of the spirit, if not the letter, of the convention. Until the contrary is affirmatively established, it must be assumed that states parties to the convention will carry out their obligations in good faith.

The restriction which we have just been discussing is logical from another standpoint. The individuals concerned will, in the performance of their functions, be required to do considerable traveling within a country at war. Any country at war must institute controls on the right to enter into and to travel within its territory. To tell it that it must accept anyone selected by the Protecting Power, even though it has good reason not to trust the particular individual, is to close one's eyes to the facts of life. And for this same reason, the Detaining Power must retain the right to declare members of the staff of the Protecting
Power *persona non grata*, whether the individual concerned has diplomatic, consular, or auxiliary status.

It has been stated that the representatives of the Protecting Power engaged in performing its functions in the territory of the Detaining Power have a triple responsibility: to their own government; to the government of the Power of Origin; and to the government of the Detaining Power.\(^{36}\) If this is another way of saying that these individuals must be completely neutral and unbiased, it is correct. It would, however, be less controversial to state, as did William Jennings Bryan, that they are “representatives of a neutral power whose attitude toward the parties to the conflict is one of impartial amity.”\(^ {37}\)

C. Functions

Unfortunately, with only a very few exceptions, the drafters of the 1949 Convention apparently found it necessary to avoid any attempt to specify in detail the functions of the Protecting Power. Most frequently these functions are expressed either in the form of duties of the Detaining Power or rights of the prisoners of war. Where a precedent had previously been established, it is set forth in appropriate detail. Where no precedent had previously been established, the problem is normally left to *ad hoc* decision. It was probably anticipated that such problems would be solved by the Protecting Power through the exercise by it of the basic power guaranteed to it, that of surveillance to insure that there is, at all times, full compliance with the provisions of the convention. Should the Protecting Power ascertain that there is a default in the performance of some particular provision, it is apparently assumed that it will find a means of procuring a correction of the situation, even though such means is not specified.\(^ {38}\)

Nevertheless, the convention does contain repeated references to the Protecting Power and a function may usually be implied in a particular instance merely from such a reference. It is difficult, indeed, to categorize these varied references to the Protecting Power. Extremely broad categories are required, and even then not every function will fall within them. Several not wholly successful efforts have been made to list these references on a functional basis.\(^ {39}\) For the purposes of this discussion they will be considered under three general categories: powers and duties; liaison functions; and miscellaneous functions (the functions listed in each category do not purport to be all-inclusive).

(1) Powers and Duties:

The basic and overriding power granted to the Protecting Power by the 1949 Convention is, of course, that contained in Article 8, the very first sentence of which states that the convention...
...shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict.

This provision has been termed, and rightly so, "the keystone of the conventions."\(^{40}\)

Strangely enough, the only extended debate on this extremely crucial article which took place at the Diplomatic Conference concerned the selection of the proper word to characterize the activities of the Protecting Power, and that debate occurred primarily as a result of difficulties of translation. The delegates at the Diplomatic Conference were agreed that the Protecting Power could not give orders or directives to the Detaining Power. The idea which it was desired to convey was that the authority of the Protecting Power would entitle it to verify whether the convention was being properly applied and, if necessary, to suggest measures on behalf of prisoners of war.\(^{41}\) In the draft text the words "under the supervision of the Protecting Power" were used in the English version and the words "sous le contrôle des Puissances protectrices" in the French. This was acceptable to the French-speaking delegates but was opposed by those who were English-speaking. It eventually became apparent that the two groups were actually in agreement and that the seeming dispute had arisen because the word "contrôle" in French is much weaker than either "control" or "supervision" in English. The English-speaking delegations were given a choice of a number of words to be used as a counterpart for the French word "contrôle" and unanimous agreement was ultimately reached on the word "scrutiny."\(^{42}\)

The importance of Article 8 may, perhaps, be found to lie in the very generality of its phrasing. The fact that the entire convention is to be "applied with the cooperation" of the Protecting Power undoubtedly empowers the latter to make suggestions to the Detaining Power with a view to the improvement of the lot of the prisoner of war even with respect to areas in which no specific reference is made to the Protecting Power. Thus, a Protecting Power might suggest to, and seek to obtain the agreement of, the Detaining Power that certain specified types of offenses committed by prisoners of war be punished by disciplinary rather than judicial measures, even though Article 83 contains no reference to the Protecting Power. Similarly, the fact that the convention is to be applied "under the scrutiny" of the Protecting Power undoubtedly empowers it to investigate and to request reports from the Detaining Power in unspecified areas. Thus, a Protecting Power might seek from the Detaining Power a complete report as to the reasons for delays in the delivery or dispatching of mail or for the prohibition of correspondence, even though Article 76, dealing with these subjects, contains no mention of the Protecting Power; again, it might seek a report from the Detaining Power as to the action taken with respect to a complaint made by a prisoner of war, through the Protecting Power, regarding
the conditions of his captivity, even though Article 78, which authorizes such complaints, does not specifically provide for such a report.

Perhaps on only a slightly lower level of importance than Article 8 is Article 126 which empowers the representatives of the Protecting Power to visit all places where prisoners of war may be, themselves selecting the places they will visit and determining the frequency of the visits; to have access to all premises where prisoners are confined; to go to the place of departure, passage, and arrival of prisoners who are being transferred; and to interview prisoners and prisoners' representatives without witnesses. The significant nature of these provisions is so patent as to make any discussion superfluous.

Other powers and duties of the Protecting Power are, indeed, varied. For example, it is directed to lend its good offices to assist in settling disputes with respect to the application and interpretation of the convention (Article 11); it is authorized to inspect the financial records of individual prisoners of war (Article 65); it may, in the interests of the prisoners, permit the Detaining Power to reduce below the specified minimum the number of communications which may be sent out each month by each prisoner (Article 71); it may, in the interests of the prisoners, propose a limit on the number of packages which a prisoner may receive (Article 72); it may itself take over the transport of capture cards, mail, packages, and legal documents, should military operations prevent the Detaining Power from fulfilling its obligations in this respect (Article 75); it has an unrestricted right to receive complaints from individual prisoners and from prisoners' representatives (Article 78); it has the right to inspect the record of disciplinary punishments (Article 96); and it has the duty to find counsel for a prisoner against whom judicial proceedings have been instituted, and the right to attend the trial (Article 105).

(2) Liaison Functions:

In its liaison capacity the Protecting Power is actually little more than a conduit. It serves merely as the means of relaying necessary communications between the Detaining Power and the Power of Origin. Protecting Powers are, not infrequently, the sole means readily available for the transmittal of messages between the two belligerents. And, of course, while a great many liaison functions are specifically set forth in the 1949 Convention, this is one area in which the Protecting Power may safely operate, even where the particular liaison mission which it undertakes is not among those enumerated in the convention.

The Detaining Power is required to give to the Protecting Power for relay to the Power of Origin the geographical location of all prisoner-of-war camps so that the prisoners will not, as has happened, accidentally become the target of their own compatriots (Article 23). The reasons for any limitations placed by
the Detaining Power on the amount of funds made available to a prisoner of war from advances of pay must be conveyed to the Protecting Power, presumably for transmittal to the Power of Origin (Article 60). The Detaining Power must advise the Protecting Power, for relay to the Power of Origin, of the rate of daily working pay which it has fixed (Article 62). Transmittals of payments by prisoners of war to their own country are made by notification from the Detaining Power to the Power of Origin through the medium of the Protecting Power (Article 63). Notifications with respect to the status of the accounts of prisoners of war (Article 65) and of prisoners whose captivity has, for some reason, such as escape, death, or other means, terminated (Article 66), are also sent by the Detaining Power to the Power of Origin through the medium of the Protecting Power. Claims of prisoners for injury or disease arising out of assigned work are similarly transmitted (Article 68). Information with respect to the measures taken by the Detaining Power to enable prisoners to communicate with the exterior must be transmitted to the Power of Origin through the Protecting Power (Article 69). And the Protecting Power must be informed, presumably for the information of the Power of Origin, as well as for its own, of all offenses punishable by death under the laws of the Detaining Power (Article 100).

In several instances the convention provides for the exchange of information between the belligerents without specifying how this is to be accomplished. Unquestionably, these are areas in which, as noted above, the Protecting Power would feel qualified to intervene, even though it has no specific mandate. For example, Article 21 provides for an exchange of information between belligerents as to their respective laws and regulations on the subject of parole, and Article 43 provides for an exchange of information with respect to military titles and ranks, but neither of these articles states how the exchange is to be made. The Protecting Powers are available and competent to perform this liaison function; and it may be assumed that either the Detaining Powers would request their services for this purpose or the Protecting Powers would, themselves, offer their services for the transmittal of the required information.

(3) Miscellaneous Functions:

There are a number of references to the Protecting Power in the 1949 Convention which cannot rightly be designated as powers or duties but which are likewise not precisely liaison functions. For lack of a more descriptive term, and because, for the most part, they bear little or no relationship to each other, they are here considered as miscellaneous functions.

Thus, Article 12 provides that if a Detaining Power, to whom prisoners of war have been transferred by the original Detaining Power, fails to carry out the
provisions of the convention, the original Detaining Power will, upon being notified to that effect by the Protecting Power, either take measures to correct the situation or request the return of the prisoners concerned. And Article 58 indicates, without specifically so providing, that some time after the outbreak of hostilities the Detaining Power and the Protecting Power will enter into an arrangement relating to the possession of money by prisoners of war.

Again, Article 79 requires the Detaining Power to inform the Protecting Power of its reasons therefor whenever it refuses to approve a duly elected prisoners' representative; and Article 81 requires the Detaining Power to inform the Protecting Power of its reasons for dismissing a prisoners' representative. In neither of these articles is there any indication of the action it is contemplated that the Protecting Power will take when the required information is given to it. While the information might, in the exercise of the Protecting Power's liaison function and as a matter of routine, be passed to the Power of Origin, this action alone would have little significance. Under its right to scrutinize the application of the convention, the Protecting Power would probably, in an appropriate case, take issue with the Detaining Power's action with respect to the non-approval or the dismissal of a prisoners' representative.

Further, Article 121 provides that the Detaining Power shall investigate and make a full report to the Protecting Power of every death or serious injury of a prisoner of war caused or suspected to have been caused by a sentry, another prisoner of war, or any other person, or where the cause of death is unknown; and that if guilt is indicated, the Detaining Power will prosecute the responsible persons. Certainly it is to be expected that the Protecting Power will forward the report of the incident to the Power of Origin; but it is equally certain that the Protecting Power would, on its own initiative, make démarches to the Detaining Power, if it felt that the investigation had been inadequate or that a prosecution indicated by the investigation had not taken place.44

It is believed that the foregoing short presentation of only a few types of provisions adequately establishes that the Protecting Power has certain functions which cannot exactly be fitted into either the category of powers or duties or the category of liaison functions, and that these miscellaneous functions can probably become whatever the particular Protecting Power desires them to be.

(4) Limitations:

Each of the four conventions drafted at the 1949 Diplomatic Conference contains an article similar to Article 8 of the Prisoner of War Convention.45 However, in the Third and Fourth Conventions (Prisoner of War and Civilian Conventions, respectively) the Protecting Powers are merely admonished to "take account of the imperative necessities of security of the State wherein they
carry out their duties,” while in the First and Second (Wounded and Sick of Armed Forces in the Field—the “Red Cross Convention”—and Wounded, Sick and Shipwrecked at Sea, respectively), not only are they so admonished, but they are told in an oblique fashion that their activities may be restricted “as an exceptional and temporary measure when this is rendered necessary by imperative military necessities.” The importance of the distinction drawn between the two pairs of conventions was fully appreciated at the time of the drafting of the conventions and was the occasion for some spirited debate. While on its face the solution reached by the convention is plainly a victory for those who sought to exclude the possibility of any shackles being placed on the Protecting Power in the performance of its functions with respect to prisoners of war, it remains to be seen whether this result was actually attained.

Assuming that the Detaining Power desires to impose the “exceptional and temporary” restrictions on visits of the Protecting Power which are authorized in Article 126 of the 1949 Convention, or the right to the even more extensive restrictions on the activities of the Protecting Power which is asserted by some states to exist, whether or not specified in the convention, how and by whom is the decision to be made as to whether “imperative military necessities” do, in fact, exist? There is one school of thought which takes the position that it would be illogical to permit the determination to be made by the Detaining Power itself, as it would be judging its own case, and which insists that only the Protecting Power can validly make such a determination. While, from a strictly humanitarian point of view, there is much to be said in favor of this position, it cannot, as a practical matter, be justified. If, for example, the Detaining Power deems it essential to keep representatives of the Protecting Power temporarily out of an area, lest military movements noted therein inadvertently lead to the disclosure of important impending military actions, there would be little logic in compelling it to advise the Protecting Power what and why it was so doing in order to permit the latter to determine whether imperative military necessities actually existed and whether the restriction was really justified. This is unquestionably a matter which will, in the course of events and through reciprocal actions of the belligerents, adjust itself inasmuch as time and experience will very quickly result in an informal mutual appreciation as to where the line is to be drawn.

D. Relationship to the ICRC

The multifold operations of the ICRC are obviously not within the scope of this article. However, inasmuch as the functions of the Protecting Power and those of the ICRC often overlap insofar as prisoners of war are concerned, it appears appropriate to mention, at least briefly, some of the overlapping areas.
The basic safeguard to the activities of the ICRC is contained in Article 9 of the 1949 Convention, which specifies:

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of prisoners of war and for their relief.

Despite a substantially similar provision in Article 88 of the 1929 Convention, the ICRC found, during World War II, that it was, at times, necessary to overcome the feeling of some belligerents that it was attempting to duplicate the functions of the Protecting Powers. Apparently it succeeded in convincing them that such was not the case. 51

It has already been pointed out that Article 10 of the 1949 Convention contains provisions for the designation of “substitutes” for Protecting Powers under certain circumstances. The third paragraph of Article 10 provides that, failing such a “substitute,” the Detaining Power shall request or accept the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.

It must be emphasized that when the ICRC is thus called upon to serve, it does so as a humanitarian organization and not as a Protecting Power which, by definition, it cannot be, inasmuch as it is not a state. 52

In a number of areas the convention places the ICRC on the same plane as the Protecting Power. As we have seen, Article 126 is of major importance in its grant of authority to the Protecting Power to go wherever prisoners of war are located. 53 That article also specifies that “The delegates of the International Committee of the Red Cross shall enjoy the same prerogatives.” A similar parallel is to be found in Article 56 dealing with the locations of, and visits to, labor detachments. And it is not surprising that we find the ICRC referred to along with the Protecting Power in Articles 72 and 75, for these two articles are among those relating to individual and collective relief shipments, a subject of particular interest to the ICRC and one with respect to which it has developed an unchallengeable expertise as a result of experience gained in innumerable conflicts. Most Protecting Powers would probably be more than willing to permit the ICRC to pre-empt the handling of this difficult and complicated function.

Articles 79 and 81 authorize the prisoners’ representatives to communicate with the ICRC as well as the Protecting Power. Here, however, it is believed
that the purpose of each such authorization to communicate is fundamentally different. The creation of the position of prisoners' representative was first suggested during the Franco-Prussian War (1870–1871) and became a reality during World War I. The function for which it was originally created was to receive and distribute relief packages. However, over the course of time, the functions of the prisoners' representatives have been greatly expanded, and during World War II it was not unusual to find them involved in practically all of the problems of a prisoner-of-war camp. Thus, they were frequently used by the prisoners as the channel for the transmittal of complaints both to the Detaining Power and to the Protecting Power. The drafters of the 1949 Convention were fully aware of this development, and it appears that the steps which they took were intended to insure that the privileges accorded to the prisoners' representative would permit him to communicate with the delegates of the ICRC on problems relating to relief shipments and with the Protecting Power on this subject as well as on the myriad of other problems into which the prisoners' representative is now projected.

It is probably safe to state that, while the allocation of functions by the 1949 Convention between the Protecting Power and the ICRC is not always as clearly stated as it might have been, the fundamental differences between the two and between their methods of operation are such that conflicts between them would be extremely rare.

III. Conclusion

The past century has seen tremendous advances made in the concept of the Protecting Power as an instrument of international law, both in the role which it is called upon to play and in the prestige which it enjoys and which goes far in assisting it to perform the numerous functions which have now been assigned to it. It appears unquestionable that:

The presence of the Protecting Powers today remains the sole means of putting a brake on the excesses of Detaining Powers, the sole element of moderation and of morality in the treatment of enemy persons, their belongings, and their interests: this was noted and affirmed many times at Geneva.

The results of the 1949 Diplomatic Conference reveal clearly that the nations of the world were generally prepared to accept a solid basis for the activities of the Protecting Power. It was conceded a mission of close observation of the application of the provisions of the Prisoner of War Convention drafted at that Conference, a mission which necessarily incorporates within it a right to call to the attention of the Detaining Power any failure of performance which it finds and to report any such failure of performance to the Power of Origin; a sizeable
expansion was made in its functions and, correlative-ly, in its power and authority; provision was made for substitutes for Protecting Powers in order to insure that prisoners of war would at all times benefit from the exercise of the functions of the Protecting Power, thus correcting the situation which had arisen all too frequently during World War II; and the use of the institution of the Protecting Power was extended not only to the Red Cross Convention (Wounded and Sick of Armed Forces in the Field), but also to the convention which adapts the Red Cross Convention to maritime warfare (Wounded, Sick and Shipwrecked at Sea), and to the completely new Civilian Convention. These few examples alone demonstrate the great distance which has been traversed since 1907, when the prisoner-of-war provisions of the Regulations Respecting the Laws and Customs of War on Land were drafted at The Hague and contained no reference whatsoever to the Protecting Power.

In many respects the provisions of the 1949 Geneva Conventions relating to the Protecting Power represent compromises. Positions reached solely in order to bring about agreement between opposing viewpoints can rarely be considered perfect and the present case is no exception. However, these provisions unquestionably represent a great step forward in the evolution of international law and would undoubtedly be viewed with amazement by those who drafted the first Red Cross Convention in 1864 or even by those who acted on behalf of the Protecting Powers as recently as in 1914, at the beginning of World War I.59

The Protecting Power is now a generally accepted institution of international law. It is the subject of international agreements to which most of the states of the world are parties. There are clear indications that it has been weighed in the balance and not been found wanting, with the result that it has been, and in the future will continue to be, requested to assume numerous new functions on behalf of states at war.

Notes

1. A fairly complete contemporary bibliography of published items would consist of the following: [Franklin, Protection of Foreign Interests (1946); Janner, La Puissance Protectrice en Droit International (1948; originally published in German); Sievert, The Geneva Conventions of 1949: The Question of Scrutiny (1953; originally published in French); and De la Pradelle, "Le Controle de l'Application des Conventions Humanitaires en cas de Conflit armé," in 2 Annuaire Français de Droit International 343 (1956). The subject is, of course, dealt with, but in a more limited fashion, in the various general treatises and articles on the 1949 Geneva Conventions such as De la Pradelle, La Conference Diplomatique et les Nouvelles Conventions de Genève du 12 août 1949 (1951); Yingling and Ginnane, "The Geneva Conventions of 1949," in 46 AJIL 393 (1952); Kunz, "The Geneva Conventions of August 12, 1949," in Law and Politics in the World Community 279 (Lipsky, 1953); and Pictet, Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War (hereinafter referred to as Commentary) (1960). Modern texts on international law do little more than paraphrase the provisions of the Geneva Conventions. See, for example, 2 Oppenheim (Lauterpacht), International Law 374-376 and 386 (7th ed., 1952), and Stone, Legal Controls of International Conflict 655, 658, 661, and 666 (1954). Many slightly older texts do not even include the term "Protecting Power" in their indices. See, for example, 2 Oppenheim (McNair), International Law (4th ed., 1926), and

2. A state is frequently called upon to represent certain specified interests of another state in the territory of a third, even though normal, peaceful relations exist between the two latter. Thus, in 1955 the United States was, in varying degrees, representing some 25 states in some 80 other states (United States Foreign Service Manual, Vol. 2, Consular Affairs, paras. 923.31-923.32, July 13, 1955). This peacetime practice unquestionably played an important part in the historical development of the present-day wartime concept of the Protecting Power. The Protecting Power, which is the subject of this article, must not be confused with the protecting state exercising powers over a protectorate.

3. Isolated instances of this practice had occurred earlier. Thus, for example, we find that in the thirteenth century the Venetian Resident in Constantinople was charged with the protection of Armenians and Jews.

4. Franklin, op. cit. 7. It is doubtful that the concept of the Protecting Power as it first appeared in the Turkish Capitulations had any more direct progenitor.

5. Franklin, op. cit. 29 and 39; Ergölu, La Représentation Internationale en vue de Protéger les Intérêts des Belligérants 10-12 (unpublished thesis 1949) graciously furnished to the writer by the Dean of the Faculty of Law of the Université de Neuchâtel; detailed information concerning the designation of Protecting Powers in most of the conflicts mentioned herein may be found in this excellent study at pp. 10-29.

6. Ergölu, op. cit. 23-24; Franklin, op. cit. 78-79. The latter states that on one occasion when an American Vice Consul was inspecting a prisoner-of-war camp he was permitted to sample the meal which was then being given to the Japanese prisoners of war. In view of all these precedents, it is particularly difficult to comprehend why the 1899 and the 1907 Hague Conferences, both of which were sponsored by the Tsar of Russia, while codifying many customary rules concerning the treatment of prisoners of war, continued the silence of previous international conventions with respect to the institution of the Protecting Power.

7. It is well known that the Protecting Power, as it was intended to be understood after 1929, would have been the Swiss. This position that Germany had no right to designate the Protecting Power is supported by the absence of any record of such designation. The Protecting Power, as it was actually carried out, has been attributed to a combination of three older institutions of international law: extra-territoriality; the employment of foreigners as diplomatic and consular agents; and the use of personal good offices. Franklin, op. cit. 7.


9. Ergölu, op. cit. 22; Franklin, op. cit. 27-28. For example, Art. VIII of the Final Act of the Conference of Copenhagen of Nov. 2, 1917 (photostatic copy on file in The Army Library, Washington, D.C.), to which Austria-Hungary, Germany, Rumania, and Russia were the belligerent parties, dealt with "Arrangements concerning the Admission of the Delegates of the Protecting Power . . . on the Basis of Reciprocity"; Art. XI of the Agreement between the British and Turkish Governments respecting Prisoners of War and Civilians, executed at Bern on Dec. 28, 1917 (111 Brit. and For. State Papers 557-568), dealt with the subject of visits to prisoners-of-war camps by "representatives of the Protecting Powers"; and the Agreement between the United States of America and Germany Concerning Prisoners of War, Sanitary Personnel, and Civilians, executed at Bern on Nov. 11, 1918 (13 A.J.I.L. Supp. 1 (1919); Foreign Relations of the United States, 1918, Supp. 2. p. 103), contains references to the Protecting Power in no less than 25 separate paragraphs.


11. Ergölu, op. cit. 29.

12. Ergölu, op. cit. 27-28. For example, Art. VIII of the Final Act of the Conference of Copenhagen of Nov. 2, 1917 (photostatic copy on file in The Army Library, Washington, D.C.), to which Austria-Hungary, Germany, Rumania, and Russia were the belligerent parties, dealt with "Arrangements concerning the Admission of the Delegates of the Protecting Power . . . on the Basis of Reciprocity"; Art. XI of the Agreement between the British and Turkish Governments respecting Prisoners of War and Civilians, executed at Bern on Dec. 28, 1917 (111 Brit. and For. State Papers 557-568), dealt with the subject of visits to prisoners-of-war camps by "representatives of the Protecting Powers"; and the Agreement between the United States of America and Germany Concerning Prisoners of War, Sanitary Personnel, and Civilians, executed at Bern on Nov. 11, 1918 (13 A.J.I.L. Supp. 1 (1919); Foreign Relations of the United States, 1918, Supp. 2. p. 103), contains references to the Protecting Power in no less than 25 separate paragraphs.


14. Siordet, op. cit. 12. Twenty years and one World War later, we again find them urging that the Protecting Power be given the benefit of "well-defined and precise provisions." Final Record of the Diplomatic Conference of Geneva of 1949 (hereinafter referred to as Final Record), Vol. II B, p. 19.
15. The 1929 Geneva Convention Relative to the Treatment of Prisoners of War (hereinafter referred to as the 1929 Convention), 47 Stat. 2021; Treaty Series, No. 846; 27 A.J.I.L. Supp. 59 (1933). It is interesting to note that the companion convention drafted at the same Diplomatic Conference, The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field (better known as the 1929 Geneva Red Cross Convention), 47 Stat. 2074; Treaty Series, No. 847; 27 A.J.I.L. Supp. 43 (1933), a direct descendant of the 1864 and 1906 Geneva Red Cross Conventions, continued to contain no reference to Protecting Powers, a situation which was only remedied 20 years later, after World War II.

16. Art. 86 of the 1929 Convention reads as follows:

"The High Contracting Parties recognize that the regular application of the present Convention will find a guaranty in the possibility of collaboration of the Protecting Powers charged with safeguarding the interests of belligerents; in this respect, the protecting Powers may, besides their diplomatic personnel, appoint delegates from among their own nationals or from among the nationals of other neutral Powers. These delegates must be subject to the approval of the belligerent near which they exercise their mission."

"Representatives of the protecting Power or its accepted delegates shall be permitted to go any place, without exception, where prisoners of war are interned. They shall have access to all places occupied by prisoners and may interview them, as a general rule without witnesses, personally or through interpreters."

"Belligerents shall so far as possible facilitate the task of representatives or accepted delegates of the protecting Power. The military authorities shall be informed of their visit."

"Belligerents may come to an agreement to allow persons of the same nationality as the prisoners to be permitted to take part in inspection trips."

In addition, the Protecting Powers were specifically given such functions as: receiving complaints from prisoners of war (Art. 42); conferring with the representatives ("agents") of prisoners of war (Arts. 43 and 44); and assuring that prisoners of war who were subjected to judicial prosecutions were adequately protected (Arts. 60, 62, 65, and 66). Evidence that the drafters of the convention were attempting merely to formalize and perpetuate an existing status, and not to create a new one, is found in the use in relation to the exercise of its functions by the Protecting Power of such terms as "mediation" (Art. 31) and "good offices" (Art. 87).


18. The U.S.S.R. took the position that, as it was a party to the Fourth Hague Convention of 1907, the Annex to which, it asserted, covered "all the main questions of the regime of captivity" (but not, as has previously been pointed out in note 8 above, the question of the designation or functions of the Protecting Powers), there was no need for it to consider an Italian proposal to apply reciprocally the provisions of the 1929 Convention (Report of the International Committee of the Red Cross on its Activities during the Second World War (hereinafter referred to as ICR.C Report), Vol. I, p. 412). While Japan stated its intention to "apply this Convention mutatis mutandis, to all prisoners of war" (ibid. 443), the Protecting Powers were never permitted to function in a manner even remotely resembling their manner of functioning in the territories of most of the other belligerents. As a result of the foregoing, and of the disappearance of many Powers of Origin during the course of hostilities, the ICRC estimates that during World War II approximately 70% of all prisoners of war were deprived of the services of a Protecting Power. De la Pradelle, op. cit. 224. Thus, Germany denied the status of states to Poland, Yugoslavia, France and Belgium (after the 1940 armistice), Free France, and Italy (after Mussolini's overthrow in 1943), and refused to permit the intervention of Protecting Powers on behalf of their captured personnel. Pictet, "La Croix-Rouge et les Conventions de Genève," in 76 Hague Academy Recueil des Cours 5, 87 (1950, I).

19. The 1949 Geneva Convention Relative to the Treatment of Prisoners of War (hereinafter referred to as the 1949 Convention), 6 U.S. Treaties 3316; 75 U.N. Treaty Series 135 (I: 972); 47 A.J.I.L. Supp. 119 (1953). There were signed, on the same day, three other conventions in which, for the first time in other than a prisoner-of-war convention, references were made to Protecting Powers: Art. 8 and others of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (the successor to the 1929 Red Cross Convention mentioned in note 15 above), 6 U.S. Treaties 3114; 75 U.N. Treaty Series 31 (I: 970); Art. 8 and others of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S. Treaties 3217; 75 U.N. Treaty Series 85 (I: 971); and Art. 9 and others of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S. Treaties 3516; 75 U.N. Treaty Series 287 (I: 973); 50 A.J.I.L. Supp. 724 (1956). This latter convention will undoubtedly prove of major importance in extending the functions of the Protecting Power in any future international conflict.

20. References to the Protecting Power are contained in 36 of its 132 substantive articles (4, 8, 10, 11, 12, 23, 56, 58, 60, 62, 63, 65, 66, 68, 69, 71, 72, 73, 75, 77, 78, 79, 81, 96, 98, 100, 101, 104, 105, 107, 108, 120, 121, 122, 126, and 128) as well as in two of its Annexes The basic charter for the Protecting Power is contained in Art. 8, which reads:
"The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

"The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

"The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties."


22. The U.N. Command permitted the ICRC to perform its usual functions with respect to the Communist prisoners of war held by the UNC. Pictet, Commentary 546. As we shall see many of these functions parallel, or may be substituted for, those of a Protecting Power. Unfortunately, all efforts of the ICRC to act as a neutral were rejected by the Communists. Treatment of British Prisoners of War in Korea 33-34 (British Ministry of Defence, 1955).

23. Up to the end of 1959 there had been 77 ratifications of, and accessions to, these conventions. International Committee of the Red Cross, Annual Report, 1959, at p. 45 (1959). These include all of the more important Powers except Canada and the Republic of China. The use of the institution of the Protecting Power has since been resorted to in the Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague on May 14, 1954 (249 U.N. Treaty Series 215 (I: 3511)), where it is adopted as a means of overseeing the protection of immovable objects—which is, actually, merely a variation of the protection furnished historically by the Protecting Power, a very large part of its energies having once been directed towards the protection of the embassy buildings and diplomatic archives of the Protected Power.

24. As was aptly stated by one author: "What happened was that an existing usage was taken, and transformed into a regulation. It was the organ which created the function." Siordet, op. cit. 3.

25. It must at all times be borne in mind that the Protecting Power is not a general agent of the Power of Origin. In his book, The Present Law of War and Neutrality (1954), Castén defines the over-all relationship between these two Powers as follows (at p. 92):

"The protecting Power does not act in its own name but rather as a kind of caretaker or intermediary. Nevertheless, it acts independently in so far as the State whose interests it protects cannot demand, but only request, it to perform certain services, and the protecting Power itself decides the way in which it discharges its mission. Nor may a belligerent give instructions to those organs of the protecting Power which carry out this mission. Instead, requests to the protecting Power have to be made through diplomatic channels. The protecting Power may refuse to act when compliance with a request would be contrary to its own interests or infringe the lawful right of the enemy State."

26. Siordet states that the designation of a Protecting Power is no longer optional but is now "quasi obligatoire" ("De l'Application et du Contrôle des Conventions de Genève de 1949," in 1956 Revue Internationale de la Croix-Rouge 464, 468); that it is now put in the "imperative form" (The Geneva Conventions of 1949: The Question of Scrutiny 36); and that in performing its mission the Protecting Power is no longer the special representative of one of the parties, but is "the representative of all the Contracting Parties to the Convention." (Ibid.)

27. This is the step which the United States apparently failed to take when it was requested to perform the functions of the Protecting Power for Great Britain during the Boer War. See discussion above.

28. The 1949 Convention contains no provisions with respect to the qualifications of a Protecting Power, the method of designation, etc., leaving these problems for settlement under general international law. Heckenroth, Les Puissances Protectrices et les Conventions de Genève 62 and 224 (unpublished thesis, Université d'Aix-Marseille, 1951). This solution will work until one belligerent arbitrarily elects to deny its consent to every neutral nominated by its enemy. In the light of the adamant refusal of the U.S.S.R. to permit any type of inspection to take place on its territory during peacetime, it seems unlikely that such activity would be permitted at all, even though the U.S.S.R. participated actively in the drafting of the 1949 Geneva Conventions and has ratified them, at least all of its satellites, without any reservations as to Art. 8.

29. Franklin, op. cit. 164-165. A similar conclusion is reached in Pictet, Commentary 95-96, wherein this statement appears:

"It became more and more common for these neutral Powers to find themselves responsible for representing the respective interests of two opposing Parties at one and the same time. This gave them additional authority, and incidentally altered their role; for once a Power represented the interests of two opposing belligerents, it became not so much the special representative of each of them, as the common agent of both,
or a kind of umpire. This enabled it to bring directly into play that powerful instrument, the argument of 
reciprocity, to obtain the improvements desired."

In 1945 Switzerland alone represented 34 belligerents, and in many cases it represented opposing 
belligerents in the territory of each other. Eroglu, op. cit. 144-148.

30. For some of these possible situations see Siordet, op. cit. 49-53; and Heckenroth, op. cit. 229-236.
31. The French Delegation strongly urged that a provision be included in the 1949 Convention setting 
up an international body to perform the functions of Protecting Powers in the absence of the latter (Final 
Record, Vol. II B, p. 27; ibid., Vol. III, pp. 30-31). The substance of this proposal was included in Resolution 
2 adopted by the Diplomatic Conference (ibid., Vol. I, p. 361), but, as far as the writer has been able to ascertain, 
no steps have been taken, or are contemplated, to implement the resolution. The U.S.S.R., opposed both the 
original French proposal and the adoption of the resolution, stating as to the latter that it "sees no need to 
consider this question or to create such a body, since the problem of the Protecting Powers has been satisfactorily 
solved by the Conventions established in the present Conference." Declaration made by the Delegation of 
the U.S.S.R. at the time of the signing of the conventions. ibid., Vol. I, n. 201.

32. Pictet, Commentary 117-118. All of the Communist countries (and Portugal) made reservations to 
Art. 10 to the effect that they would not recognize as legal "requests by the Detaining Power to a neutral State 
or to a humanitarian organization, to undertake the functions performed by a Protecting Power, unless the 
consent of the Government of the country of which the prisoners of war are nationals is obtained." While 
there is a not unnatural tendency to view with suspicion this position taken almost uniquely by the U.S.S.R., 
and its satellites (see, for example, Brockhaus, "Sowjetunion und Genfer Kriegsgefangenen-Konvention von 
1949," 2 Ost-Europa Recht 286, 291 (1956)), it appears to have a valid basis. If there is an existing Power of 
Origin, not only is its consent to the designation of a Protecting Power to act on its behalf essential, but it has 
the right to make the selection itself in the first place! And the statements made at the Diplomatic Conference 
by Soviet representatives Morozov (Final Record, Vol. II B, pp. 29 and 351) and Solzhenin (ibid., p. 347) make 
it clear that they merely desired to limit specifically the right of the Detaining Power to select a substitute for 
the Protecting Power to those cases where there is no existing Power of Origin—a limitation as to which 
there is no reasonable dispute. It is to be hoped that by overruling the Soviet thesis the Diplomatic 
Conference did not establish the proposition that a Detaining Power may, on its own, select and designate a 
substitute for a Protecting Power even though there is a Power of Origin in being.

33. Neither the 1929 Convention nor the working (Stockholm) draft used at the Diplomatic Conference 
includes the term "consular" in specifying the authorized representatives of the Protecting Power. The 
authorization for the Protecting Power to use this category of personnel as representatives was proposed by 
Australia and was unanimously approved. Final Record, Vol. II B, p. 58.
34. Janner, op. cit. 52.
35. Siordet, op. cit. 27. A provision of the working (Stockholm) draft used at the Diplomatic Conference 
would have required the Detaining Power to give "serious grounds" for any refusal to approve the nomination 
of a non-career individual by the Protecting Power. Final Record, Vol. I, p. 73. This proposal was equally 
lacking in logic, since a state need give no reasons for refusing to agree to the assignment to a post in its territory 
of a member of the diplomatic or consular service of the Protecting Power or for declaring such an individual 
persona non grata. The provision was deleted at Geneva. ibid., Vol. II B, pp. 58 and 110.
36. De la Pradelle, "Le Contrôle de l'application des Conventions Humanitaires en cas de Conflit armé," 
in 2 Annuaire Français de Droit International 343, 344 (1956).
37. Letter of Instructions of Secretary of State William Jennings Bryan, dated Aug. 17, 1914 (9 A.J.I.L. 
Affairs, pass. 924.1 and 931.
38. "It is not the function of the Protecting Power to command or to overrule; it is its function to observe, 
to comment, to make representations, and to send reports to the outside world. If we are faced with an 
uncharismatic belligerent, the presence of the Protecting Power and the ability of the Protecting Power to 
examine what is going on and to observe is the only preventive measure which we have." Statement of 
Quentin-Baxter, representative of New Zealand, at the 1949 Diplomatic Conference, Final Record, Vol. II 
B, p. 344.
39. Thus, Heckenroth, op. cit. 135, and Janner, op. cit. 52, have each listed seven separate categories of 
functions of the Protecting Power, but the lists coincide with respect to only four functions! Still a third 
functional listing appears in Pictet, Commentary 98-99.
40. Yingling and Giannini loc. cit. 397. In the British Army Manual of Military Law (Part III, The Law 
of War on Land, 1958) 92, the Protecting Power is termed "the principal organ, apart from the Contracting 
Parties themselves, for ensuring the observance of the Convention." Part III of the Manual was largely the 
work of the late Sir Hersch Lauterpacht.
42. Ibid.; Siordet, op. cit. 24-25.
43. The right of visitation granted by Art. 126 is reiterated in Arts. 56 (labor detachments), 98 (prisoners undergoing disciplinary punishment), and 108 (prisoners undergoing judicial punishment).
44. Pictet, Commentary 571.
45. See note 19 above.
46. A similar restriction is contained in Art. 126 of the 1949 Convention with respect to visits to places where prisoners of war may be. This is the only area in which the 1949 Convention specifically permits the activities of the Protecting Power to be restricted by the Detaining Power. While it is, of course, a very important one, it is not believed that a Detaining Power could really justify the imposition of such a restriction except in very rare cases, such as prohibiting visits to extremely forward collecting points during the actual course of an attack.
47. The proponents of the distinction between the two pairs of conventions argued that it was "obvious and reasonable that the activities of a Protecting Power in sea warfare and on the field of battle must be restricted," in that case, to the Prisoner of War and Civilian Conventions. "The vital force which animates those rules and gives them effect is the presence of the Protecting Power." Final Record, Vol. II B, p. 344. The pessimism which may be apparent in the text is occasioned by the fact that the U.S.S.R. took the position that, even without such a restrictive limitation in the convention, it would exist in fact. Ibid. 345.
48. Pictet, Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field (1952). Even there it is admitted that "this is precisely what it [the Protecting Power] would, in such a case, be debared from doing. It will only be possible to show after the event whether or not the restriction was justified." In Pictet, Commentary, published 8 years later, a much more realistic approach is taken (at p. 611):
"If they are to justify the prohibition of visits, military necessities must be imperative. Whether they are or not is a matter for the Detaining Power alone to decide and the right of supervision of the Protecting Power is restricted by this exercise of sovereignty. Such a decision must not be lightly taken, however, and any prohibition of visits must be an exceptional measure."
49. In Pictet, Commentary, loc. cit., the following remedial procedure is suggested:
"The Protecting Powers and the International Committee will have the right to bring the temporary nature of the prohibition to the notice of the Detaining Power and, after a certain length of time, to request it to raise all restrictions. Moreover, the Protecting Power will be able to check afterwards whether the prohibition of visits has been used by the Detaining Power to violate the Convention. In any case, it is not in the interests of the Detaining Power to misuse this reservation, because it would very soon be suspected of deliberately violating the Convention by evading supervision by qualified witnesses."
50. As stated in the ICRC Report, Vol. I, p. 39:
"Despite partial overlapping, the functions of the Protecting Power are fundamentally dissimilar in kind and extent [from those of the ICRC]. The Protecting Power is the mandatory of one or both belligerents, with competency to protect the rights and interests of the States from which it derives authority. The Committee is concerned exclusively with humanitarian tasks; its functions are not limited to those which are guaranteed by law, but embrace such enterprises in the interests of humanity as appear essential, or which are justified through a request made by a belligerent."
51. Ibid.
52. In Pictet, Commentary 119, the following statement appears:
"The Convention in this case [paragraph 3 of Article 10] no longer uses the words 'undertake the functions performed by a Protecting Power,' but speaks only of 'humanitarian functions.' The distinction is logical. There is no longer any question of a real substitute, and a humanitarian organization cannot be expected to fulfill all the functions incumbent on a Protecting Power by virtue of the Conventions." See also Final Record, Vol. II B, pp. 61 and 63.
53. See above.
54. ICRC Report, Vol. I, pp. 342-343. At that time a prisoners' representative was known as a "man of confidence." In the 1929 Convention they were called "agents."
55. See, for example, Art. 78, wherein specific provision is now contained permitting individual complaints to be transmitted to the Protecting Power either directly, as had been provided in Art. 42 of the 1929 Convention, or through the medium of the prisoners' representative. Although Art. 42 of the 1929 Convention, the predecessor of Art. 78 of the 1949 Convention, made no mention of the ICRC as an authorized recipient of complaints from prisoners of war, the ICRC took the position that "it is, according to the spirit of the [1929] Convention, undoubtedly meant to be placed, in this respect, on the same footing as the Protecting Power." ICRC Report, Vol. I, p. 341. This conclusion is subject to dispute and, in view of the fact that Art. 78 of the 1949 Convention again omits all reference to the ICRC, it would, in interpreting that article, now be even more difficult to accept the ICRC position. Certainly, if such had been the intention
of the drafters, they could easily have attained their objective by merely including the ICRC in the article, along with the Protecting Power, as they did in a number of other articles. Their failure to do so in the light of the announced ICRC position strongly militates against the ICRC interpretation.

56. Castènè, op. cit. 95; Pictet, Le Droit International et l'Activité du Comité International de la Croix-Rouge en temps de Guerre 25 (1943). It is more probable that, as in World War II, it will be the Detaining Power which will object where activities of the ICRC appear to duplicate those being performed by the Protecting Power. That the ICRC does not consider the Protecting Power to be a rival, but rather another means of making the life of a prisoner of war a little less miserable, is apparent from the communication sent by its President early in the Korean conflict in which he said: "The International Committee views, in the activities of the 'Protecting Powers,' a forceful instrument for insuring full implementation of the Geneva Conventions and an always desirable corollary to the activities which the Committee itself undertakes." Le Comité International de la Croix-Rouge et le Conflit de Corée: Recueil de Documents, Vol. I, p. 32.

57. Heckenroth, op. cit. 229.
58. Ibid. 222.
59. In Pictet, Wounded and Sick Commentary 101-102, the following statement appears: "As it stands, Article 8 is not perfect, far from it. But we have to consider the huge advance which it represents in international humanitarian law. We have to realize that, to achieve this much, the diplomats assembled in Geneva had to cope with divergent opinions; they had to reconcile the claims of the sovereignty of their respective countries with the claims of humanity; and they had to harmonize two opposed conceptions of the role of the Protecting Power, viewed by some as their agent (of whom one demands the maximum), by others as the agent of the enemy (to whom one accords the minimum)."