

CHAPTER V

THE PUNISHMENT OF PRISONERS OF WAR

A. INTRODUCTORY

The probability that many prisoners of war will commit, or will be alleged to have committed, violations of the laws, rules, and regulations of the Detaining Power specifically governing their conduct, as well as its general criminal laws, has been demonstrated to be fairly high, as has the tendency of Detaining Powers to desire to punish them summarily.¹ Detailed international regulation of the punishment of prisoners of war for alleged misbehavior of any kind is therefore of major importance in the overall system of protections afforded to prisoners of war under international law.

In the drafting of convention provisions concerning prisoners of war there has been a steadily increasing conflict between the desire to provide the prisoners of war with the maximum possible protection against arbitrary and inhumane action on the part of the Detaining Power and its representatives and the need to permit the Detaining Power to retain the tools necessary to enable it to maintain order among the prisoners of war, to afford them protection from outsiders and from the unruly amongst them, and to ensure that they will constitute a minimum security problem.² As the humanitarian desire to protect prisoners of war has found greater and greater expression in succeeding agreements, the maintenance of discipline among and control over them has become more and more difficult for the Detaining Power intent on full compliance with the provisions of the Convention. While the 1907 Hague Regulations dealt with the subject of the punishment of prisoners of war in the single, very general, Article 8, the 1929 Convention included 23 articles (Articles 45-67) on the subject; and the 1949 Convention includes 27 such articles (Articles 82-108);³ and it must be borne in mind that in very large part the new articles are procedural in nature, successively imposing additional restrictions on the imposition of punishment on prisoners of war by the Detaining Power.

¹ See, e.g., *I.M.T.F.E.* 1028.

² *Hermes, Truce Tent* 234-35.

³ Among the 23 articles of the 1929 Convention there were three on the subject of escape; and among the 27 articles of the 1949 Convention there are four on that subject (Articles 91-94). These articles on escape are discussed in detail in Chapter VII (at pp. 403-407 *infra*), rather than in this chapter.

The use of force by the Detaining Power to maintain control over prisoners of war is, of course, still a reality and it is still legal under appropriate circumstances. While Article 42 of the Convention restricts the use of weapons by the Detaining Power against prisoners of war by designating such action as "an extreme measure, which shall always be preceded by warnings appropriate to the circumstances," it is certainly implicit in the provisions of that Article that force, including the use of firearms, may be used by the representatives of the Detaining Power when the circumstances leave no alternative if control is to be maintained by the latter.⁴ Attempts to escape are specifically recognized in that Article as one set of circumstances where the use of weapons by guards may become necessary. Such attempts by individuals, or even by small groups of prisoners of war, do not present a great threat to the security of the Detaining Power but, nevertheless, the guards may use weapons against the escaping prisoners of war if this use is necessary in order to frustrate their efforts.⁵ Attempted mass escapes do present such a threat and no Detaining Power can permit, or can be expected to permit, such an effort to succeed, no matter how much force may be necessary in order to prevent it.⁶ Similarly, mutinies by rebellious prisoners of war obviously cannot be tolerated by any Detaining Power. When such an event occurs, the Detaining Power's guards will uniformly be ordered to use truncheons, tear gas,⁷ concussion grenades, and other available anti-riot instruments, and, if these prove inadequate, shotguns, rifles, machine guns, and any other appropriate types of weapons.⁸ Moreover, while at-

⁴ A postaction determination as to whether the use of weapons was actually necessary is provided for through the medium of an inquiry conducted pursuant to Article 121. See notes I-379 *supra* and VII-47 *infra*.

⁵ Harvey, Control 135. Even the sometimes ultrahumanitarian ICRC recognizes and accepts this as the rule. Pictet, *Commentary* 247.

⁶ The action taken by the Australians to frustrate an attempted mass escape of Japanese prisoners of war at Cowra in August 1944 was completely legal even though more than 100 prisoners of war were killed in the ensuing *melée*. Concerning this episode, see Long, *The Final Campaigns* 623-24. The action taken on Hitler's orders after the mass escape of British prisoners of war from Stalag Luft III in March 1944, in which 50 recaptured officers were summarily executed by the Gestapo, was completely illegal, as it was not done as a necessary act to frustrate the escapes but as illegal punishment for having attempted to escape. Concerning this episode, see *The Stalag Luft III Case*.

⁷ The Korean experience mentioned in note 8 *infra* was undoubtedly one of the factors that motivated the United States, in its renunciation of the first use of riot-control agents, to except cases involving "rioting prisoners of war" and "escaping prisoners." Executive Order 11850, 8 April 1975, Renunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents, 3A *C.F.R.* 149 (1975 comp. 1976).

⁸ It was necessary to use many of these weapons, resulting in the deaths of a number of prisoners of war (and of some guards) when, on order from their military authorities in North Korea, and in execution of previously conceived and

tempted escapes are the subject of special restrictions insofar as the punishment of prisoners of war is concerned,⁹ no such protections are afforded to prisoners of war who engage in rioting or mutiny and they are subject to the judicial prosecution and punishments hereinafter discussed.¹⁰

In drafting the articles of the Convention relating to the punishment of prisoners of war, the 1949 Diplomatic Conference deemed it appropriate to divide them into three major categories: (1) general provisions (Articles 82–88); (2) disciplinary sanctions (Articles 89–98);¹¹ and (3) judicial proceedings (Articles 99–108).¹² While this division into three categories is appropriate and helpful, and will be generally followed herein, it is believed that the allocation of subject matter to these categories in the Convention is not entirely what it should be. Accordingly, the discussion that follows will vary considerably from the numerical order contained in the Convention.

well-organized plans (Ball, POW Negotiations 64), at various times during 1951 and 1952 the prisoners of war held in prisoner-of-war camps in South Korea mutinied, murdered nonparticipating prisoners of war, refused to obey orders of the representatives of the Detaining Power, and temporarily took over control of some of the overcrowded camps. These events culminated in the mutiny in May 1952 of thousands of prisoners of war confined at the prisoner-of-war camp located on Koje-do Island. Concerning these episodes, see Hermes, *Truce Tent* 232–63; Vetter, *Mutiny, passim*; Harvey, *Control, passim*. For the present U.S. policy on riot control in prisoner-of-war camps, see U.S. Army FM 19-40, *Enemy Prisoners of War, Civilian Internees and Detained Persons*, paras. 3-71 to 3-78 (1967). For a discussion of the *Code of Conduct* and what the United States apparently expects of members of its armed forces who become prisoners of war, see Walzer, *Prisoners of War, passim*.

⁹ See pp. 403–407 *infra*.

¹⁰ Under Article 94(b), *Uniform Code*, the maximum punishment for mutiny is death. With respect to the special nature of prisoner-of-war mutinies, see 1947 GE Report 204–05. One author stated (in 1951) that severe penalties for prisoners of war are not justified and that “the question is simply and uniquely to subject them to a certain degree of supervision and to prevent them from committing any acts of aggression.” Paquin, *Le problème des sanctions disciplinaires* 52–53 (transl. mine). He obviously did not foresee the dogma that the Communists would adopt with respect to their personnel who became prisoners of war in Korea and Vietnam.

¹¹ By “disciplinary sanctions,” “disciplinary measures,” and “disciplinary punishment” (the words are used more or less interchangeably in the Convention), the draftsmen of the Convention meant punishment for minor offenses that could be imposed by the camp commander, or his appointee for the purpose, without the necessity of formal trial. The terms may be equated to the “commander’s punishment” or “captain’s punishment” (aboard ship) pursuant to which most military forces permit their commanders to impose a similar type of punishment on members of their commands. See, e.g., the power to impose “nonjudicial punishment” granted by Article 15, *Uniform Code*.

¹² This trichotomy originated in a recommendation of the 1947 Conference of Government Experts. 1947 GE Report 201.

B. PROVISIONS OF GENERAL APPLICABILITY

1. Laws, Regulations, and Orders Applicable

Article 8 of the 1907 Hague Regulations made prisoners of war "subject to the laws, regulations, and orders in force in the army of the State in whose power they are" and authorized that State to take appropriate measures in the event of "any act of insubordination."¹³ These provisions were carried over with only minor changes into Article 45 of the 1929 Convention.¹⁴ With considerable editorial, but little substantive, change, they became the basis for the first paragraph of Article 82 of the 1949 Convention.¹⁵

As we have seen, the actual Detaining Power, whether or not it was the Capturing Power, is primarily responsible for ensuring that prisoners of war receive the treatment specified in the Convention.¹⁶ Correlative with that responsibility is the principle of the first paragraph of Article 82 making the prisoners of war subject to the laws, regulations, and orders of the actual Detaining Power rather than to those of the Capturing Power. Thus, if a prisoner of war is captured by the armed forces of State A, but he is thereafter transferred to the custody of an ally, State B, he immediately becomes subject to the laws, regulations, and orders of State B.¹⁷ If he should subsequently be transferred to the custody of still another ally, State C, he would immediately cease to be subject to the laws, regulations, and orders of

¹³ Writing in 1942, Flory stated that in Anglo-American law "prisoners of war have received for several hundred years national treatment when accused of crimes cognizable by civil courts." Flory, *Prisoners of War* 93.

¹⁴ The 1947 Conference of Government Experts referred to "the fundamental principle of Art. 45, which assimilates PW to nationals of the DP." 1947 GE Report 203.

¹⁵ For example, "the State in whose Power they are" became "the Detaining Power"; and the last part of Article 45, sometimes translated into English as "[t]he provisions of the present chapter, however, are reserved" [*e.g.*, 1 Friedman 505] (a rather meaningless phrase that was often made to end with the word "controlling") became "[h]owever, no proceedings or punishments contrary to the provisions of this Chapter shall be allowed" in Article 82 of the 1949 Convention.

¹⁶ See pp. 104-106 *supra*.

¹⁷ For a World War II application of this rule, see 3 *Bull. JAG* 465 (1944) where prisoners of war captured by the British and Canadians had been transferred to United States custody. During the hostilities in Vietnam, all prisoners of war captured by the armed forces of the United States were transferred to the custody of the armed forces of the Republic of Vietnam. They were then subject to the laws, regulations, and orders of that Republic, and not of the United States. (Because of the contingent responsibility of the United States as the Capturing Power, it maintained small detachments at each prisoner-of-war camp to observe the treatment received by the prisoners of war and to ensure compliance with the Convention. Levie, *Maltreatment in Vietnam* 339-40. However, this did not affect the applicability of South Vietnamese laws, etc.)

State *B* and become subject to those of State *C*, the new Detaining Power.¹⁸

One major problem may arise with respect to these provisions: what laws, regulations, and orders are applicable when the Detaining Power is not a State, but an international organization or group? Who was the actual Detaining Power in Korea, where the prisoners of war were stated to be in the custody of the United Nations Command? If there were, for example, an armed conflict involving the States composing NATO, or those composing the Warsaw Pact, could either of those groupings claim to be the Detaining Power, rather than its individual members?

In the unlikely event that the United Nations should itself ever directly recruit, train, maintain, and field an armed force, it would necessarily be the Detaining Power of any prisoners of war captured by such force. The United Nations is not a Party to the 1949 Convention and, most probably, is not eligible to become a Party.¹⁹ While it has, on occasion, agreed that its composite armed forces would comply with the principles of the Convention,²⁰ this would leave unanswered the question of the laws, regulations, and orders to be applied by those armed forces for the maintenance of order and the punishment of prisoner-of-war offenses.²¹ It appears to be a situation that the various draftsmen of the Convention either did not envision or, if they did, believed to be so remote a possibility that no provision covering it was deemed necessary.

¹⁸ The foregoing statements should not be construed as being applicable to an offense committed by the prisoner of war prior to his transfer to the custody of the new Detaining Power.

¹⁹ Although nowhere does the Convention provide that only States may be Parties, that appears to be implicit in many of its provisions. For example, the second paragraph of Article 2 and the first paragraph of Article 3 refer to the "territory" of a High Contracting Party; the term "Power" is used throughout the Convention in referring to the High Contracting Parties (Article 139 opens it to accession by any "Power"); and the first paragraph of Article 127 refers to the "respective countries" of the High Contracting Parties, etc. Simmonds, *Legal Problems* 182 is in agreement with the foregoing conclusion. Seyersted, *United Nations Forces* 352-53, argues that the United Nations could accede to the Convention even though it is not a State.

²⁰ Simmonds, *Legal Problems* 175-76; Seyersted, *United Nations Forces* 190-92. The Acting Secretary General of the United Nations has, on at least one occasion, formally advised the President of the ICRC to that effect. 2 *I.R.R.C.* 29 (1962), quoted in Simmonds, *Legal Problems* 183. For a specific United Nations directive to this effect, see e.g., Article 44, Regulations for the United Nations Emergency Force, ST/SGB/UNEF/1, 20 February 1957. (Article 40 of the UNFICYP Regulations is to the same effect.)

²¹ This question was raised by the ICRC with respect to the United Nations Command in Korea in 1951. 1 *ICRC, Conflit de Corée*, No. 220.

In Korea the United Nations Command took the position that it was the Detaining Power.²² Nevertheless, no statement was ever made on its behalf concerning the applicability of the Convention.²³ Having no substantive or procedural criminal codes to govern the conduct and punishment of prisoners of war, the United Nations Command had no alternative but to draft and promulgate numerous such codes.²⁴ The propriety of such action is debatable, at the very least. It would appear that inasmuch as the United Nations Command was composed of national units made available by Member States and the Republic of Korea, the State whose armed forces captured prisoners of war was the Capturing Power as to them and that, unless and until it transferred them to custody of the armed forces of another Party to the Convention participating in the United Nations Command, it was the Detaining Power, and its laws, regulations, and orders were applicable.²⁵ *A fortiori*, this same conclusion must be reached with respect to prisoners of war captured by members of the armed forces of an international grouping such as NATO, the Warsaw Pact, etc.²⁶

The second paragraph of Article 82 places a specific limitation upon the Detaining Power with respect to any laws, regulations, or orders

²² *Ibid.*, No. 237.

²³ The statements concerning willingness or intention to comply with the "humanitarian principles" of the 1949 Convention, even though it was not then in effect, were made by the governments of the States that had contributed armed forces to the United Nations Command. See, e.g., *ibid.*, Nos. 12, 15, 20, 22, 23, etc.

²⁴ See 2 ICRC, *Confit de Corée*, No. 337. These included (1) Rules of Criminal Procedure for Military Commissions of the United Nations Command, 22 October 1950. (These Rules were to be applied only in trials for precapture offenses.); (2) Supplemental Rules of Criminal Procedure for Military Commissions of the United Nations Command, 6 October 1951. (These Rules were to be applied only in trials for postcapture offenses.); (3) Regulations Governing the Penal Confinement of Prisoners of War, 20 October 1951; (4) Non-Judicial Punishment of Prisoners of War, 19 October 1951; and (5) Articles Governing United Nations [sic] Prisoners of War, 23 October 1951. Reference to the promulgation of these Codes will be found in 1951 *Y.B.U.N.* 248. No trials were ever conducted under any of these Rules and Regulations.

²⁵ While Baxter, *Constitutional Forms* 336, states, with respect to the activities of the United Nations Command, that "it is necessary to ask what juridical person is responsible for the custody of prisoners of war" in Korea, unfortunately, he does not attempt to answer that question.

²⁶ Miller, *The Law of War* 279-80 suggests that the member States of military alliances "should determine, in advance of coalition warfare, the law of the detaining power to be applied in the event of war." He gives no legal basis for such a procedure and it would be directly contrary to the provisions of the first paragraph of Article 82 if subsequent developments indicated that the law agreed upon and applied was other than that of the actual Detaining Power. The European Defense Community contemplated uniform community regulations on military penal law and jurisdiction that would have been applicable to all personnel of intergovernmental forces (and, therefore, to all prisoners of war taken by those forces). Williams, *Intergovernmental Military Forces and World Public Order* 586-87.

promulgated by it to govern the conduct of prisoners of war. If such a law, regulation, or order makes punishable acts that are not punishable when committed by a member of the armed forces of the Detaining Power, the maximum punishment imposable may be of a disciplinary nature only.²⁷ The requirement of the second paragraph of Article 41 that “[r]egulations, orders, notices and publications of every kind relating to the conduct of prisoners of war” must be made available to them in a language that they understand, etc., may also be considered to some extent as a limitation on the disciplinary powers of the Detaining Power,²⁸ inasmuch as, if the Detaining Power fails to comply with this provision, it may not punish a prisoner of war for a violation of the directive, as to which there is, in effect, an irrebutable presumption that he had no knowledge.

2. Miscellaneous Rules

a. DECISION AS TO THE NATURE OF THE PROCEEDINGS

When a prisoner of war is alleged to have violated one of the laws, regulations, or orders of the Detaining Power governing his conduct, the first decision that the latter must make is as to the type of punishment warranted by the particular offending act. A similar decision must usually be made by someone in the military hierarchy in most armed forces before specific charges against a member of that armed force are referred for action.²⁹ Moreover, Article 83 admonishes that the competent authorities of the Detaining Power should exercise leniency in making this decision and also that they should, if possible, decide in favor of disciplinary, rather than judicial, measures.³⁰

b. DOUBLE JEOPARDY³¹

The Convention is clear and unambiguous on the question of double

²⁷ For a discussion of the permissible disciplinary punishments listed in the first paragraph of Article 89, see pp. 326–330 *infra*.

²⁸ Concerning the second paragraph of Article 41, see p. 167 *supra*.

²⁹ See, e.g., Article 30 (b), *Uniform Code*. In some armed forces, such as that of the United States, the level of the court to which the case is sent for adjudication will, in and of itself, determine the maximum punishment that may be imposed. See, e.g., *ibid.*, Articles 18–20.

³⁰ The second paragraph of Article 87 carries this a step further by directing that, in the ultimate imposition of punishment, serious consideration should be given to “the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will.” (The relevance of such consideration to the case of a prisoner of war charged with rape, the murder of a fellow prisoner of war, etc., is a little difficult to discern. For a discussion of this problem, see p. 337–338 *infra*.)

³¹ Although Article 86 is captioned “*non bis in idem*” (usually translated “no one shall be twice tried for the same offense”), it is a second *punishment* that is actually prohibited by that Article, rather than a second *trial*. (The article headings were added by the Swiss Political Department and are not actually a part of the Convention. 1 *Final Record* 369, 375.) For this reason, the imposition of even

jeopardy.³² Article 86 states flatly that “[n]o prisoner of war may be punished more than once for the same act, or on the same charge.”³³

3. Limitations on Punishment

There are a number of provisions that were included in the Convention in order to ensure that the punishment imposed upon prisoners of war would, in no manner, exceed that imposed upon members of the armed forces of the Detaining Power under similar circumstances; and that certain types of punishment would not be inflicted upon prisoners of war even if they were permissible in the case of members of the armed forces of the Detaining Power.³⁴ Thus, the first paragraph of Article 87 provides that the only punishments that may be adjudged against a prisoner of war shall be those that could be adjudged against a member of the armed forces of the Detaining Power who has committed the same act; and the first paragraph of Article 88 provides that the prisoner of war undergoing such punishment shall not be subjected to more severe treatment than would be imposed upon a member of the armed forces of the Detaining Power of comparable rank.³⁵ Obviously, these provisions establish a national standard both as to the extent of the punishment that may be adjudged against a prisoner of war and as to the conditions under which he may be compelled to undergo it. However, the Convention also contains provisions with respect to punishment that may, in the case of some Detaining Powers, establish a higher-than-national standard. Thus, the third paragraph of Article 87 prohibits all types of collective pun-

disciplinary punishment would preclude a subsequent judicial proceeding and punishment. During World War II the Germans, on occasion, demonstrated a feeling of frustration because an act considered by higher authority to be serious (relations between a prisoner of war and a German woman) had already been dealt with by the local commander as a disciplinary matter, thus precluding judicial prosecution. *German Regulations* No. 20, para. 240. *But see* note 32 *infra*.

³² Article 52, third paragraph, of the 1929 Convention was just as clear and unambiguous—but this did not prevent the Germans from trying prisoners of war twice for the same offense during World War II. *See, e.g.*, the incident that occurred in Oflag 64 in late 1944 and early 1945. *American Prisoners of War* 36.

³³ At the 1949 Diplomatic Conference the United Kingdom sought to add to this article a prohibition against the increasing on appeal of the punishment imposed below (3 *Final Record*, Annex 147), a practice permitted by a number of civil-law countries. It was unsuccessful. 2A *Final Record* 501.

³⁴ Provisions similar to those about to be discussed were previously to be found in Article 46 of the 1929 Convention.

³⁵ For a discussion of the provisions specifying a similar type of protection, as well as others, for women prisoners of war, *see* p. 179 *supra*. Concerning retained personnel, *see* pp. 73–74 *supra*.

ishment,³⁶ corporal punishment,³⁷ imprisonment in premises without daylight, and, generally, any form of torture or cruelty.³⁸ The last paragraph of Article 87 prohibits the Detaining Power from depriving a prisoner of war of his rank, and from preventing him from wearing his insignia of rank or nationality as an incident to any punishment imposed.³⁹ And the last paragraph of Article 88 provides that once a prisoner of war has completed his punishment he "may not be treated differently from other prisoners of war."⁴⁰

One definite problem exists with respect to the interpretation to be given the last sentence of the second paragraph of Article 87. That sentence states that the "courts or authorities"⁴¹ of the Detaining Power "shall be at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused [found guilty?], and shall therefore not be bound to apply the minimum penalty prescribed." It would appear that this provision constitutes an attempt to modify by international treaty the domestic criminal law of Detaining Powers.⁴² Thus, if such law provided that the penalty for a particular offense was "not less than three years confinement at hard labor," the court finding a prisoner of war guilty of that offense would, presumably, under this provision of the Convention, have the authority to

³⁶ Although collective or mass punishments were likewise prohibited by the last paragraph of Article 46 of the 1929 Convention, they were, unfortunately, not infrequent during World War II. See, e.g., *I.M.T.F.E.* 1089-90; *American Prisoners of War 16*. In Korea the Chinese similarly disregarded this prohibition. *U.K. Treatment 32*. It seems likely that it will be disregarded by many Detaining Powers in any future international armed conflict. Miller, *The Law of War* 248, 260, 262, etc.

³⁷ Article 33, Standard Minimum Rules, specifically prohibits the use of handcuffs, chains, irons, and straitjackets as punishments. (See also *U.S. Army Regs.* 633-50, para. 99d.) Such a provision might well have been included in the third paragraph of Article 87 instead of relying on the general term "corporal punishment" as a catchall.

³⁸ The use of torture would, of course, constitute a grave breach of the Convention even without this provision. See pp. 357-358 *infra*. The cited provisions of Article 87 are the obvious source of Article 31, Standard Minimum Rules.

³⁹ See p. 170 *supra*.

⁴⁰ Article 92, third paragraph, specifies that despite this provision unsuccessful escapees may, except for certain enumerated restrictions, be subjected to "special surveillance."

⁴¹ "Courts" refers to the courts of the Detaining Power, either civilian or military, having jurisdiction over prisoner-of-war offenses under the Detaining Power's domestic law (see Article 84, first paragraph); and "authorities" refers to the military authorities having the power to impose disciplinary punishment (see Article 96, second paragraph).

⁴² This was seemingly understood by the 1949 Diplomatic Conference inasmuch as the British representative "pointed out that certain difficulties might arise in United Kingdom courts, which would be unable to apply penalties less severe than the minimum penalty prescribed for a given offense." 2A *Final Record* 304-05 & 310.

sentence him to only one year of confinement, perhaps not at hard labor. While this could cause internal legal problems in a number of countries, the likelihood of its actual occurrence seems rather remote.⁴³

C. PROVISIONS APPLICABLE TO DISCIPLINARY SANCTIONS

As we have already seen, the Convention is here concerned with minor offenses such as breaches of discipline, rather than major offenses such as crimes.⁴⁴ Always bearing in mind the provisions of general applicability, which are, of course, applicable to disciplinary sanctions as well as to judicial prosecutions, let us now review the provisions of the Convention peculiar to disciplinary matters.

1. Who May Impose Disciplinary Sanctions

As in the case of most armed forces, disciplinary measures will normally be imposed by the military commander—in this case, the prisoner-of-war camp commander. The second paragraph of Article 96 gives him this power, at the same time indicating that this grant is without prejudice to the competence of superior military authorities who may, of course, supplant the camp commander in this area of prisoner-of-war management. The prisoner-of-war camp commander may delegate his disciplinary powers to one of his officers.⁴⁵ The third paragraph of Article 96 prohibits the delegation of disciplinary powers over prisoners of war to another prisoner of war.⁴⁶ It would appear that this limitation not only prohibits such a delegation of authority by any representative of the Detaining Power, but also prohibits the assumption of disciplinary powers by the senior prisoner of war in the camp or by the prisoners' representative under the law of the Power of Origin.⁴⁷ Nor may there be a delegation of disciplinary powers to, or assumption of such powers by, civilian contractors to whom prisoners of war have been furnished as a labor force.⁴⁸

2. Procedure

The important Article 96 opens with the admonition that “[a]cts which constitute offences against discipline shall be investigated immediately.” Certainly, that admonition does not mean that the military

⁴³ See Paquin, *Le problème des sanctions disciplinaires* 54.

⁴⁴ See note 11 *supra*.

⁴⁵ During World War II *German Regulations* No. 10, para. 3 authorized only camp commanders and work-detail leaders of officer rank to exercise disciplinary powers over prisoners of war.

⁴⁶ Apparently, the United States did permit this practice during World War II, at least with respect to the Italian Service Units. Lewis & Mewha 186.

⁴⁷ JAGW 1965/1325, 22 September 1965. See also *British Manual*, para. 159 n.2, stating that courts-martial of the Power of Origin may not convene in a prisoner-of-war camp. See also p. 336 *infra*, concerning prisoner-of-war “kangaroo” courts.

⁴⁸ Anon., *Employment in Germany* 323. See *German Regulations* No. 27, para. 386.

authorities of the Detaining Power may not completely disregard a breach of discipline by a prisoner of war if they choose to do so. In other words, it does not purport to require that every breach of discipline be investigated and punished. What it undoubtedly seeks to ensure is that disciplinary proceedings with respect to minor offenses will not be delayed, perhaps until the prisoner of war concerned is no longer able to produce supporting testimony, or, perhaps, has himself forgotten the exact details of the incident out of which arose the proposal to punish.

The fourth paragraph of Article 96 establishes the method by which a determination is made as to whether disciplinary punishment is warranted and should be imposed. The accused prisoner of war must be advised of the charge being made against him; he must be given an opportunity to defend himself, including an opportunity to explain his conduct and to call witnesses in his behalf; and, if necessary, he must be provided with a qualified interpreter. Both the accused prisoner of war and the prisoners' representative must be advised of the decision. Moreover, the last paragraph of Article 96 contains a new provision under which the camp commander is required to maintain a record of all disciplinary punishments imposed, and this record must be open to inspection by the representatives of the Protecting Power. This is a modest attempt to prevent the military authorities of the Detaining Power from imposing punishment secretly and without any justification.⁴⁹

3. Prehearing Confinement

One entire article, plus a portion of another, is devoted to the subject of prehearing confinement.⁵⁰ The first paragraph of Article 95 establishes the applicability of the national standard: a prisoner of war may not be subjected to prehearing confinement unless a member of the armed forces of the Detaining Power would be so subjected if charged with a similar offense. This paragraph concludes with an exception to the national standard: "[unless] it is essential in the interests of camp order and discipline." It would seem that this exception opens the door to improprieties on the part of the military authorities of the Detaining Power. Any conduct truly making confinement "essential in the interests of camp order and discipline" would

⁴⁹ One author has written that this provision "constitutes one of the most remarkable advances realized in the new Convention." Paquin, *Le problème des sanctions disciplinaires* 58 (transl. mine). While it will unquestionably be of value, that statement would appear to exaggerate its importance considerably.

⁵⁰ The logic of this emphasis on the subject becomes obvious when it is considered that while the maximum duration of confinement that may be imposed in a disciplinary proceeding is 30 days (*see pp. 327-328 infra*), without this protection there would assuredly be many instances in which the prisoner of war was kept in pre-hearing confinement for a period in excess of that maximum.

certainly be of such magnitude that similar conduct on the part of a member of the armed forces of the Detaining Power would result in the offender's being subjected to prehearing confinement (or, more probably, being charged with an offense calling for judicial prosecution, rather than disciplinary punishment). Accordingly, there was no need for the exception, and it merely constitutes an excuse for violations of the preconfinement provision of the Convention.⁵¹

The second paragraph of Article 95 mandates the reduction of prehearing confinement of prisoners of war to a minimum and sets an outer limit of 14 days for such confinement. The first paragraph of Article 90 directs that the period spent in prehearing confinement be deducted from the punishment ultimately imposed in the disciplinary proceedings. Including the 14-day limit was an improvement over the relevant provision of the 1929 Convention, as was the requirement that the time spent in prehearing confinement be deducted from the punishment imposed.⁵²

Finally, the third paragraph of Article 95 prescribes the conditions under which such prehearing confinement is to be served. Inasmuch as the same rules apply to both prehearing confinement and confinement served pursuant to the decision reached after the disciplinary hearing, the subject will be discussed immediately below in connection with authorized disciplinary punishments.

4. Authorized Disciplinary Punishments

The first paragraph of Article 89 specifies the four types of punishment that may be imposed upon prisoners of war in disciplinary proceedings. These four types of punishment are exclusive; no other types of punishment may be imposed as a result of disciplinary proceedings, even if the laws of the Detaining Power permit the imposition of additional types (or more severe punishment for these types) upon members of its armed forces (*see below*).

a. FINES

It may seem strange that the Convention should provide for a monetary sanction against prisoners of war, but reflection will indicate the logic of such a sanction. As we have seen, there are a number of provisions ensuring prisoners of war an income,⁵³ albeit a very small one,

⁵¹ During the discussion at the 1949 Diplomatic Conference the French representative stated that he "saw no objection to modifying the last part of the first paragraph [of Article 85, later renumbered Article 95] because of the wide interpretation it made possible." 2A *Final Record* 493. Presumably, he was referring to the clause complained of in the text. No further reference to the matter could be located in the Conference discussions.

⁵² The third paragraph of Article 47 of the 1929 Convention provided for such a deduction—but only if it was granted to members of the armed forces of the Detaining Power. The deduction is no longer dependent upon that contingency.

⁵³ *See pp. 194–206 supra.*

primarily in order to enable them to make purchases at the camp canteen.⁵⁴ Accordingly, cutting off that income, or any part of it, is a meaningful sanction. However, paragraph (1) of Article 89, in authorizing a fine as disciplinary punishment, limits the amount thereof to 50 percent of the combined advances in pay and working pay that would accrue to the prisoner of war during a 30-day period.⁵⁵

b. DISCONTINUANCE OF PRIVILEGES IN EXCESS OF THOSE SPECIFIED IN THE CONVENTION.

While it is not a situation that prevails widely, there are occasions when a Detaining Power grants to prisoners of war privileges not required by the Convention.⁵⁶ However rare this may be, it was appropriate to include the authority to withdraw such a privilege as one of the potential disciplinary punishments. Absent such a right to withdraw a gratuitous privilege from a particular prisoner of war for misconduct, few Detaining Powers would ever find it possible to grant such privileges.⁵⁷

c. FATIGUE DUTIES

This punishment consists of extra-duty chores (beyond regular work hours and beyond normal duty-roster assignments), such as policing of the prisoner-of-war camp grounds, kitchen police, etc.⁵⁸ The imposition of such extra fatigue duty as disciplinary punishment is limited to 2 hours per day; and Article 90 limits the overall duration to 30 days.

d. CONFINEMENT

The draftsmen of the Convention considered that no explanation was necessary concerning this type of disciplinary punishment. However, they did consider it necessary to include a mass of provisions placing limitations on the nature and conditions of the confinement; either indirectly (Articles 90, 87, and 89), or directly (Articles 97 and 98). Thus the first paragraph of Article 90 restricts the duration

⁵⁴ Concerning camp canteens, see pp. 143-145 *supra*.

⁵⁵ The ICRC has computed this maximum fine to be 7.25 Swiss francs. Pictet *Commentary* 437. For sample conversions to other monetary systems, see note II-431.

⁵⁶ For an example of a grant to prisoners of war beyond the requirement of the 1929 Convention during World War II, see note II-427 *supra*.

⁵⁷ Some will argue that any privilege granted by a Detaining Power beyond the requirements of the Convention may be withdrawn by the Detaining Power at any time and without any need to justify its action. While there is considerable merit to this argument when the Detaining Power is withdrawing the privilege completely (even though it may, under some circumstances, resemble collective punishment), its status as punishment becomes obvious when the privilege is withdrawn from only one prisoner of war while the others retain it.

⁵⁸ The second paragraph of Article 89 makes this type of disciplinary punishment inapplicable to officers.

of any single punishment to 30 days; and this restriction would, of course, apply to confinement imposed as disciplinary punishment. The third paragraph of Article 87 prohibits "imprisonment" in premises without daylight; and this, too, would apply to confinement imposed as disciplinary punishment. The last paragraph of Article 89 bans generally any disciplinary punishment that is inhuman, brutal, or dangerous to the health of the prisoners of war; and this, too, would apply to confinement imposed as disciplinary punishment.⁵⁹ And Articles 97 and 98 contain detailed and specific rules concerning the conditions under which confinement imposed upon prisoners of war as disciplinary punishment is to be served. Thus, prisoners of war undergoing disciplinary punishment may not be confined in a penitentiary type of establishment (Article 97, first paragraph); the establishment in which they are confined must meet the sanitary requirements of Article 25⁶⁰ and the confined prisoners of war must be able to maintain their personal cleanliness as required by Article 29⁶¹ (Article 97, second paragraph); they must be permitted to attend the daily medical inspection,⁶² to receive any appropriate medical treatment and, if necessary, to be removed to a medical facility (Article 98, fourth paragraph); they must be allowed at least two hours of exercise daily in the open air (Article 98, third paragraph); they must continue to be accorded the benefits of the Convention including the rights granted by Article 78 to make complaints with respect to the conditions of their confinement⁶³ and by Article 126 to confer privately with the representatives of the Protecting Power⁶⁴ (Article 98, first paragraph); they must be granted the right to read and write and to send and receive correspondence⁶⁵ (Article 98, last paragraph); officer prisoners of war may not be confined in the same quarters as noncommissioned officers or enlisted men (Article 97, third paragraph); and no prisoner of war may be deprived of the prerogatives attached to his rank (Article 98, second paragraph).

There are still other rules governing the performance of disciplinary punishment. As has been noted immediately above, no such punishment may exceed a duration of 30 days. The second paragraph of

⁵⁹ Actually, the cited portions of the third paragraphs of Articles 87 and 89 apply only to confinement and, possibly, but rarely, to fatigue duties.

⁶⁰ See pp. 124-125 *supra*.

⁶¹ See pp. 132-133 *supra*.

⁶² See pp. 133-134 *supra*.

⁶³ See pp. 285-301 *supra*.

⁶⁴ See pp. 281 and 283 *supra*.

⁶⁵ The last paragraph of Article 98 authorizes the temporary detention, until the termination of the confinement, of parcels and of remittances of money. Concerning the implementation of this provision, and of the further provision of that last paragraph of Article 98 with respect to the disposition of perishable items in parcels, see p. 306 *supra*.

Article 90 specifies that this rule is applicable even if the disciplinary proceedings are concerned with several different acts of misconduct, related or unrelated, of the prisoner of war. The third paragraph of Article 90 requires that the disciplinary punishment be put into effect within one month of being imposed.⁶⁶ And the last paragraph of Article 90 provides that when a second disciplinary punishment is imposed upon a prisoner of war (as, for example, for some act committed while he is serving the punishment imposed earlier), and either of the two punishments exceeds 10 days in duration, a period of at least 3 days must elapse between the conclusion of the first punishment and the commencement of the second.⁶⁷ And the first paragraph of Article 115 prohibits the Detaining Power from denying repatriation or accommodation in a neutral country to a prisoner of war merely because he has not completed serving the disciplinary punishment that has been imposed upon him.⁶⁸

One legal problem that arises in the area of disciplinary punishment is the limitation to be applied when the national law of the Detaining Power differs from that of the Convention provisions discussed above. While the first paragraph of Article 82 makes prisoners of war subject to the laws, regulations, and orders in force in the armed forces of the Detaining Power, it also contains the limitation that "no proceedings or punishments contrary to the provisions of this Chapter shall be allowed." Accordingly, if the law of the Detaining Power permits a more severe disciplinary punishment than does the Convention (as, for example, if such law permits the military commander to impose a disciplinary punishment of confinement for 60 days), the answer is simple: the limitation contained in the Convention is applicable. But what if the disciplinary punishment authorized by the law of the Detaining Power is less than the Convention permits?⁶⁹ A proper construction of the first part of the first paragraphs of Article 82 and of Article 87 would appear to limit the imposable punishment

⁶⁶ The need for this provision is rather difficult to discern, as no possible advantage to the Detaining Power can be discovered in a delay in the execution of the punishment, whatever its nature may be.

⁶⁷ This rule is apparently applicable even if the two disciplinary punishments imposed are of a different nature, as, for example, where the first is confinement for 20 days and the second is a fine of 50 percent of the advances of pay for 30 days.

⁶⁸ See p. 413 *infra*.

⁶⁹ After World War I an English scholar called attention to the problem that the British had encountered in this regard, as their law did not permit officers to be subjected to disciplinary punishment and restricted such punishment for other ranks to 28 days' detention. Belfield, *Treatment* 141. For a similar problem that will confront the United States in this area, see note 70 *infra*.

to the maximum allowed under the national law of the Detaining Power.⁷⁰

The foregoing discussion has undoubtedly demonstrated the lengthy and detailed provisions that the 1949 Diplomatic Conference felt itself constrained to include in the Convention in order to place upon the Detaining Power restrictions upon the imposition of disciplinary punishment that would be so clear that their evasion would be extremely difficult, and so comprehensive that there would be neither need nor opportunity for the Detaining Power to improvise.

D. PROVISIONS APPLICABLE TO JUDICIAL PROCEEDINGS

1. Laws, Regulations, and Orders Applicable

It will be recalled that Article 82 makes prisoners of war amenable to the laws, regulations, and orders of the Detaining Power. In addition, the first paragraph of Article 99 prohibits the punishment of a prisoner of war for the commission of an act that was not an offense against the law of the Detaining Power or against international law at the time it was allegedly committed—in effect, a ban on *ex post facto* criminal laws. (This might well have been made applicable to disciplinary punishments also.) The second paragraph of Article 99 prohibits the use of “moral or physical coercion” as a means of inducing a prisoner of war to confess his guilt of the offense with which he is charged.⁷¹ (This, too, might well have been made applicable to disciplinary punishments.)

Experience during World War II and in Korea would seem to indicate that rather general violations of this latter provision can be expected to occur as a governmental policy based upon the legal and political systems of a particular country. Thus, because the Soviet legal system had always relied heavily on confessions, during World War II the Soviet practice with respect to German prisoners of war was to use the whole gamut of moral and physical coercion (from a bribe

⁷⁰ Thus, while the Convention permits the disciplinary punishment of confinement for officer prisoners of war [Article 88, paragraph one], with the limitation that they may not be confined with noncommissioned officers and enlisted men [Article 97, third paragraph], Article 15, *Uniform Code*, does not permit their confinement—only their arrest in quarters or restriction to specified limits. Officer prisoners of war should be given the benefit of such a national limitation on disciplinary punishment. *U.S. Manual*, para. 172b, appears to be to the contrary, stating that an officer imposing disciplinary punishment on prisoners of war “is not subject to the limitations on the duration of commanding officers’ nonjudicial punishment established by Article 15 of the Uniform Code of Military Justice.” However, *U.S. Army Regs.* 633–50, para. 98, which is a later and more authoritative directive, contains no such statement.

⁷¹ During World War II the conviction of two prisoners of war by a United States court-martial was set aside because during the investigation the interpreter had, pursuant to instructions of the investigating officer, told them that if they confessed “things would be much easier on them.” 4 *Bull. JAG* 421 (1945).

consisting of the promise of a light sentence to extreme physical torture) in order to obtain confessions from prisoners of war accused of war crimes;⁷² and, while the post-Stalin era has brought some changes in this area of the Soviet legal system, it remains to be seen whether a change in basic philosophy has actually occurred.⁷³ Similarly, in Korea, despite their protestations concerning the "lenient policy" applied in the treatment of prisoners of war, the Chinese Communists regularly used torture to obtain confessions, even to the commission of offenses that they well knew the prisoner of war had not committed.⁷⁴ Nothing in the post-Korea record of the People's Republic of China indicates any change, except for the worse, in this basic philosophy.⁷⁵ And there are undoubtedly other, less important, countries from which the same disregard of provisions prohibiting coercion to obtain confessions can be expected.⁷⁶

2. Pretrial Procedures

Article 103 directs that the judicial investigation of an alleged prisoner-of-war offense be conducted as rapidly as circumstances permit so that the trial, if any, may take place as soon as possible. Once again, the Convention is not encouraging the Detaining Power to prosecute prisoners of war;⁷⁷ it is merely emphasizing the requirement for a speedy trial when it is determined that the offense allegedly committed by the prisoner of war warrants judicial prosecution, that requirement being based on the same general reasons that apply in the case of other trials.

The provisions of the Convention concerning pretrial confinement are, *mutatis mutandis*, similar to those dealing with the subject of prehearing confinement in disciplinary cases.⁷⁸ The first paragraph of Article 103 prohibits placing a prisoner of war in pretrial confinement unless a member of the armed forces of the Detaining Power charged with a similar offense would be so confined—but here again there is an exception, this one being applicable "if it is essential to do so in

⁷² Miller, *The Law of War* 226.

⁷³ The entire thesis of Solzhenitsyn's *The Gulag Archipelago* (1973) suggests otherwise. Brockhaus, *The U.S.S.R. 292*, also suggests doubts—but his article was written in 1956.

⁷⁴ U.K., *Treatment* 24.

⁷⁵ Professor Cohen finds it "ludicrous" to believe that the PRC could be expected to comply with any of the provisions of the Convention dealing with the subject of penal and disciplinary sanctions Miller, *The Law of War* 247. Cohen goes on to say that "the principles of *nulla poena sine lege* [and, presumably, *ex post facto*], of no coerced confessions, and of opportunity to make a defense and to be represented by qualified counsel are simply not practiced in China." *Ibid.*

⁷⁶ With respect to the application of the laws of the Detaining Power concerning offenses punishable by death, see pp. 339–340 *infra*.

⁷⁷ See the discussion of Article 96, the parallel article dealing with disciplinary punishment, at pp. 324–325 *supra*.

⁷⁸ See pp. 325–326 *supra*.

the interests of national security.”⁷⁹ It is highly improbable that the national security of a Detaining Power would ever be adversely affected by the failure to place in close confinement a single prisoner of war who is already confined behind the barbed wire of a prisoner-of-war camp. As in the case of disciplinary punishment,⁸⁰ this exception merely affords the Detaining Power an excuse for confining a prisoner of war awaiting judicial prosecution when a member of the armed forces of the Detaining Power would not be so confined. And while the first paragraph of Article 103 concludes with an absolute prohibition against pretrial confinement in excess of three months,⁸¹ presumably this provision, too, will be disregarded “in the interests of national security.”

Further specific provisions with respect to pretrial confinement include the second paragraph of Article 103 which, like the first paragraph of 90 with relation to disciplinary punishments, provides for the deduction of the period of pretrial confinement from any sentence ultimately pronounced against the prisoner of war;⁸² and the last paragraph of Article 103 which makes the requirements and protections of Article 97 and 98, included in the provisions limited to judicial punishments,⁸³ fully applicable to pretrial confinement.⁸⁴

⁷⁹ A proposal to delete this provision was rejected at the 1949 Diplomatic Conference with a number of representatives stating their positions with respect to the proposal. 2A *Final Record* 317.

⁸⁰ See pp. 325–326 *supra*.

⁸¹ This is another method of attempting to bring pressure on the Detaining Power to expedite the reaching of a decision whether to prosecute and to bring the case to trial promptly if trial is the decision reached.

⁸² The second paragraph of Article 103 concludes with a clause providing that the period of pretrial confinement shall also be “taken into account in fixing any penalty.” A proposal to delete it, made at the 1949 Diplomatic Conference, was not acted upon. 2A *Final Record* 317, 327. This clause is either redundant or requires that the prisoner of war be given dual credit for pretrial confinement. (If the prisoner of war has served two months in pretrial confinement and the court believes that the circumstances of the offense of which he is subsequently found guilty are such that he should receive a one-year sentence, does the sentencing judge take the pretrial confinement “into account in fixing [the] penalty” and sentence the prisoner of war to only 10 months in posttrial confinement? And then does the commanding officer of the place of confinement deduct the pretrial confinement from the sentence actually pronounced, reducing the period to be served to 8 months? This is a logical interpretation of the overall provision, even though it certainly was not the result intended by the Diplomatic Conference.)

⁸³ For a discussion of the coverage of these two articles, see pp. 327–328 *supra*.

⁸⁴ Rather strangely, the only prolonged discussion of the provisions of Article 103 at the 1949 Diplomatic Conference was concerned with the right (that was found to exist) of the Detaining Power to transfer to another prisoner-of-war camp a prisoner of war awaiting trial. 2A *Final Record* 312 & 317. That decision was apparently reached without any consideration being given to the difficulties it might create for the defense in preparing a case for trial and in trying it at a substantial distance from the place of the occurrence of the alleged offense.

The routine to be followed before trial is laid out in detail in the Convention. The first paragraph of Article 104 provides that when the Detaining Power decides to proceed with a judicial prosecution against a prisoner of war it shall so notify the Protecting Power. The notification must be received by the Protecting Power at least three weeks before the date that the trial is to begin.⁸⁵ Compliance with this provision is jurisdictional,⁸⁶ inasmuch as the last paragraph of Article 104 states that unless evidence is presented at the opening of the trial that such notice was received by the Protecting Power, the prisoners' representative, and the accused prisoner of war,⁸⁷ the trial must be ad-

⁸⁵ The second paragraph of Article 104 enumerates in detail the information that the notice must contain: (1) specified identity material; (2) the place at which the accused prisoner of war is interned or confined; (3) the charges on which he is to be tried, with the law applicable; and (4) the court in which he is to be tried, with the date and place for the opening of the trial. The third paragraph of Article 104 requires that the same notice be furnished by the Detaining Power to the prisoners' representative. (During World II the United States decided that the requirement of notice to the Protecting Power did not apply to trials by summary courts-martial, the inferior court in the United States hierarchy of courts-martial. SPJGW 1944/1873, 8 April 1949; 3 *Bull. JAG* 135 (1944). While the desire to be able to impose minor punishments promptly was understandable, it is doubtful that such a decision would constitute compliance with Article 104 of the 1949 Convention. However, it is apparently intended to continue with the same interpretation as U.S. Army *Regs.* 655-50, para. 108a provides for such notice only in the case of trial by general or special court-martial.)

⁸⁶ See U.S. Army *Regs.* 633-50, para. 108d; *British Manual*, para. 222 & n.3. In *Public Prosecutor v. Koi*, [1968] A.C. at 860, the members of the Privy Council, although disagreeing on other issues, were apparently unanimous in finding that the trial court should have, as to one defendant, "refrained from continuing the trial in the absence of notices [pursuant to Article 104]." For a similar decision reached during World War II, see *Rex v. Giuseppe*. During and after World War II the United States Supreme Court held that compliance with the comparable notice provision of the 1929 Convention did not apply to trials for offenses against the law of war (*Johnson v. Eisentrager*), or to trials for precapture offenses (*Matter of Yamashita*). In view of the provisions of Article 85 of the 1949 Convention, compliance with Article 104, as well as all of the other articles relating to judicial prosecution, is now required even when the prosecution is for one of these offenses, if the accused falls within one of the categories specified in Article 4. See pp. 379-382 *infra*.

⁸⁷ This is the only provision indicating a requirement that a copy of the notice referred to in the first two paragraphs of Article 104 must also be served on the accused prisoner of war. The requirement that particulars of the charge be furnished to the prisoner of war is contained in the fourth paragraph of Article 105. That provision does not include all of the detail of the second paragraph of Article 104, nor does it specify the three-week notice, but merely "in good time before the opening of the trial." However, the last paragraph of Article 104 establishes the fact that a minimum of three weeks is required in order to be "in good time before the opening of the trial."

journed, presumably for a period sufficiently long to complete the proper advance-notice period.⁸⁸

Article 105 is the bill of rights for prisoners of war. A copy of the charges on which he is to be tried, together with any other documentation that, under the law of the Detaining Power, would be furnished to a member of its armed forces being tried under the same circumstances, must be served upon him "in good time before the opening of the trial"⁸⁹ and in a language that he understands, while an identical copy thereof must be provided to his counsel (Article 105, fourth paragraph); the accused prisoner of war is entitled to the assistance of a fellow prisoner of war, of qualified counsel of his own choice, and of a competent interpreter if he considers this latter necessary;⁹⁰ and he must be advised of these rights by the Detaining Power far enough prior to the trial to make them meaningful and to ensure compliance with other provisions containing time limitations (Article 105, first paragraph); if the prisoner of war cannot, or does not, himself obtain the assistance of counsel, the Protecting Power must do so for him,⁹¹ being allowed one week to accomplish this mission, and being authorized to call upon the Detaining Power for a list of qualified counsel if it so desires; and if the Protecting Power does not select counsel within the time allotted, the Detaining Power is obligated to appoint competent counsel for the prisoner of war (Article 105, second paragraph).⁹² Once appointed, counsel for the accused prisoner of war must be allowed a minimum of two weeks prior to the beginning of the trial in which to prepare the defense and he must be afforded ade-

⁸⁸ Concerning the problems related to judicial prosecutions when there is no Protecting Power, see 1 ICRC *Report* 352-64. See also *British Manual*, para. 222 n.3.

⁸⁹ The fourth paragraph of Article 105 uses the term "shall be communicated" to the prisoner of war. In the overall context of these provisions, it is clear that this particular communicating must be done in writing. (The "fundamental guarantees" listed in Article 75 (4) of the 1977 Protocol I should be read in connection with this paragraph of the text.)

⁹⁰ During World War II an opinion of the Judge Advocate General of the United States Army held that, barring a specific request of the accused prisoner of war, it was not necessary that every word of the judicial proceedings be translated for him as long as he knew "the charges and specifications upon which he is arraigned, the general nature of the testimony given for and against him, and the substance of the arguments made by the trial judge advocate [prosecutor] and his counsel." SPJGW 1945/2241, 5 March 1945.

⁹¹ *German Regulations* No. 2, para. 7 provided that if the prisoner of war selected his own counsel, he was to bear the expense; but that if the Protecting Power made the selection, it was to bear the expense. (Of course, in this latter case, the Protecting Power would be reimbursed by the Power of Origin.)

⁹² U.S. Army *Regs.* 633-50, No. 109b provides, without qualification, that "at least one United States officer will serve as defense counsel (or assistant) in every general or special court-martial" of a prisoner of war. It is doubtful that such counsel could, or should, serve—even as an assistant—in the face of objection by the accused prisoner of war.

quate facilities for this purpose, being permitted to consult his client freely and in private,⁹³ and also to interview witnesses for the defense [Article 105, third paragraph].⁹⁴

3. Courts

The basic provisions with respect to the type of courts in which a prisoner of war may be tried are contained in Articles 84⁹⁵ and 102. Once again, the standard selected is the national standard of the Detaining Power, Article 102 providing that he must be tried "by the same courts . . . as in the case of members of the armed forces of the Detaining Power" and the first paragraph of Article 84 providing that he may be tried only by a military court unless the "existing laws"⁹⁶ of the Detaining Power "expressly permit" the trial of members of its own armed forces by civil courts.⁹⁷ Most countries authorize, and will probably prefer to conduct, the trials of prisoners of war in military tribunals.⁹⁸ But trying prisoners of war in the same courts that try members of the armed forces of the Detaining Power does not necessarily assure a fair trial for the prisoner of war.⁹⁹ Accordingly,

⁹³ During World War II the Germans permitted prisoners of war to communicate with their counsel, but only in writing, until the day before trial when a personal conference was permitted. *German Regulations* No. 25, para. 349. The third paragraph of Article 105 remedies a patent defect in the 1929 Convention.

⁹⁴ The first paragraph of Article 105 gives the prisoner of war the right to call witnesses. A denial of the trial rights enumerated in the text can constitute a grave breach of the Convention, *See* pp. 363-365 *infra*.

⁹⁵ While Article 84 is concerned solely with courts, and therefore has no relevance to disciplinary punishments, it was, for some indiscernible reason, included under the rubric "General Provisions," rather than under the more appropriate "Judicial Proceedings." For this reason it was not mentioned in the discussion of the former.

⁹⁶ If the term "existing laws" was used as a method of precluding Detaining Powers from changing their laws in midwar in order to authorize the trials of prisoners of war by civil courts, the purpose was not accomplished.

⁹⁷ During World War II several prisoners of war held in Canada were charged, tried, and convicted of the murder of a fellow prisoner of war in a civil court. On appeal, they contended that the civil courts were without jurisdiction. The Supreme Court of Alberta held that under Canadian law not only could the civil courts try Canadian servicemen, but that they had exclusive jurisdiction over the offense of murder. *Rex v. Perzenowski*.

⁹⁸ *See, e.g.,* Article 2(9), *Uniform Code*; and Berman & Kerner, *Soviet Military Law and Administration* 106. Article 102 of the Convention is, in effect, a reiteration of the requirement of the first paragraph of Article 84 that prisoners of war may be tried only in the courts that would have jurisdiction to try members of the armed forces of the Detaining Power.

⁹⁹ In the post-World War II *Trial of Harukei Isayama* for having executed American airmen after a purported trial that was, in fact, little more than a farce—one that was lacking in every vestige of fairness—the defense argued that the conduct of that trial (false evidence, denial to the defense of the opportunity to obtain evidence, denial of counsel, failure to interpret the proceedings, etc.) was the same that would have been accorded Japanese servicemen. The court obviously did not accept this as a valid defense.

the second paragraph of Article 84 adds some specific requirements with respect to such courts. They must offer the essential guarantees of (1) independence (not subjected to direction by the military commander or civilian executive); (2) impartiality; and (3) the trial safeguards set forth in Article 105.¹⁰⁰

It is, perhaps, relevant to mention one type of court which is not, and never has been, a legal one—the court created and manned and whose decisions are executed by the prisoners of war themselves. Prisoners of war are subject to the laws and the courts of the Detaining Power for their behavior in the prisoner-of-war camp while they remain in that status; and they are subject to the laws and the courts of their Power of Origin for their behavior in the prisoner-of-war camp when they have returned to the custody of their own armed forces.¹⁰¹ At no time are they ever legally subject to the jurisdiction of kangaroo courts consisting of fellow prisoners of war.¹⁰²

4. Trial Procedure

The 1949 Convention contains very little with respect to the actual conduct of the trial of a prisoner of war. This is understandable, because in this area the standard procedures established by the laws of the Detaining Power will necessarily govern. There are, however, a few items that warrant discussion.

It has been seen that the trial of a prisoner of war must open with evidence that there has been compliance with the provisions of Article 104 relating to notice to the Protecting Power, the prisoners' representative, and the accused prisoner of war;¹⁰³ the last paragraph of Article 105 authorizes representatives of the Protecting Power to at-

¹⁰⁰ For a discussion of the trial safeguards of Article 105, see pp. 334–335 *supra*. In its *Nürnberg Principles*, the International Law Commission was much more terse, but probably just as cogent. Principle V states: "Any person charged with a crime under international law has a right to a fair trial on the facts and law."

¹⁰¹ See, e.g., Article 105, *Uniform Code*; Article 29, U.S.S.R. Law of December 25, 1958. After Korea the United States tried several members of its armed forces for misconduct while in Communist prisoner-of-war camps. *United States v. Floyd*; *United States v. Batchelor*; etc.

¹⁰² There were a number of incidents involving fanatical Nazis who tried, convicted, and executed fellow German prisoners of war who were judged to be insufficiently motivated. See, e.g., *Rex v. Werner*; and 5 *Bull. JAG* 262 (1946). (Some years ago considerable publicity was given in Canada to a charge that in Holland in 1945 Canadian troops had provided German prisoners of war with weapons with which to carry out two death sentences imposed by a German prisoner-of-war court. There does not appear to have been any acceptable factual resolution of the charge.) There were many such incidents on the part of fanatical Communists interned in the United Nations Command prisoner-of-war camps in Korea. UNC, *Communist War* 26–27.

¹⁰³ See pp. 333–334 *supra*.

tend the trial¹⁰⁴ except when it is held *in camera* “in the interest of State security”;¹⁰⁵ the last paragraph of Article 99 provides that no prisoner of war “may be convicted without having had an opportunity to present his defense” and the assistance of qualified counsel; and Article 102 permits the sentencing of a prisoner of war only “if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power,” with the further proviso that all of the provisions of the Convention concerned with penal sanctions must have been observed.¹⁰⁶

It is obvious that these specific trial requirements do not deviate materially from the national standard—unless the national standard is so far below the norm as to leave no doubt that a fair trial is virtually impossible.¹⁰⁷ Even then the Convention assures the prisoner of war undergoing judicial prosecution only of an opportunity to be assisted by counsel, to present a defense, and to have a neutral observer present—certainly not very far-reaching innovations under the legal systems of most countries.

5. Sentencing

The first paragraph of Article 87, as we have seen, provides that the only punishments that may be adjudged against a prisoner of war shall be those that could be adjudged against a member of the armed forces of the Detaining Power who has committed the same act. The second paragraph of Article 87 provides that in adjudging the punishment, after a prisoner of war has been found guilty of an offense charged, the court of the Detaining Power shall take into consideration the fact that the individual to be sentenced (1) is not a national of the Detaining Power, (2) owes it no duty of allegiance, and (3) is in its power

¹⁰⁴ During World War II the representatives of the Protecting Power were free to attend all courts-martial of prisoners of war conducted in the United States, but did so on only rare occasions. Rich, *Brief History* 464.

¹⁰⁵ This is a “national security” exception that Detaining Powers have apparently found it unnecessary to invoke. *Ibid.*

¹⁰⁶ During the course of the discussion of the report of the Sub-Committee on Penal Sanctions by Committee II (Prisoners of War) of the 1949 Diplomatic Conference, the statement was made that the Sub-Committee had decided to include in Article 93 (now 103) “two principles of fundamental justice. One was the right of a prisoner [of war] to a speedy trial, and the other was his right to be considered innocent until he was proven guilty.” 2A *Final Record* 312. The first such principle was certainly so included; but nowhere in the article drafted by the Sub-Committee (*ibid.*, 308), or anywhere else in the Convention, is there any provision establishing a presumption of innocence if there is no such presumption in the national law of the Detaining Power. (Article 75(4)(d) of the 1977 Protocol I does require such a presumption.)

¹⁰⁷ Unfortunately, this appears to be the situation in the People’s Republic of China. Miller, *The Law of War* 247. See note 75 *supra*.

through circumstances beyond his control.¹⁰⁸ It is extremely doubtful that this provision will have any effect whatsoever on the sentences imposed on prisoners of war; indeed, in most trials of prisoners of war, it will be completely irrelevant. When, for example, a prisoner of war assaults or kills a fellow prisoner of war, why should the court take into consideration in the sentencing that he is not a national of the Detaining Power, or that he owes it no duty of allegiance, or that he is not in the prisoner-of-war camp by choice? How does his situation actually differ from that of a national of the Detaining Power who, while a convicted criminal serving a sentence in a penitentiary, assaults or kills a fellow prisoner? Even if the victim is a guard, rather than a fellow prisoner of war, no reason can be discerned for distinguishing the case from that of the prisoner convict. A prisoner of war is certainly not entitled to preferential treatment in the sentencing merely because he is not a national of the Detaining Power and owes it no duty of allegiance,¹⁰⁹ and his status of not being a prisoner of war by choice is identical with that of the prisoner convict who is certainly not in the penitentiary by choice.

When the court reaches a finding of guilty in the trial of a prisoner of war and imposes sentence, it will usually do so in the presence of the prisoner of war concerned. If it does not do so, the first paragraph of Article 107 specifies that the Detaining Power must immediately notify him, in a language that he understands, of the judgment and sentence and of his right of appeal, if any. It must send a "summary communication" containing the foregoing information to the Protecting Power and to the prisoners' representative; and it must thereafter inform the Protecting Power of the decision reached by the prisoner of war with respect to the right of appeal.

Article 106 is directly concerned with the subject of appeals from conviction and sentence. Once again the national standard is adopted: the prisoner of war is given the same rights in this regard as are conferred by the national legislation upon members of the armed forces of the Detaining Power. Moreover, the prisoner of war must be fully advised concerning these rights, including the time limit within which they must be exercised.¹¹⁰ And, finally, the second para-

¹⁰⁸ The provision actually includes the term "courts or *authorities* of the Detaining Power" (emphasis added), indicating that it is equally applicable in disciplinary proceedings and judicial prosecutions. It was not mentioned in connection with the discussion of the former because its impact there is considered to be nonexistent.

¹⁰⁹ If he were, then every civilian alien should likewise be entitled to this special treatment when sentenced by a foreign court for the commission of a crime.

¹¹⁰ The third paragraph of Article 105, establishing the rights and privileges of defense counsel, states that he shall continue to have the benefit of these "until the term of appeal or petition has expired." While the phrase is not notable for its clarity of meaning, presumably he would retain these rights and privileges until the final appeal has been decided.

graph of Article 107 provides that when the conviction becomes final,¹¹¹ the Detaining Power shall promptly furnish the Protecting Power with detailed information with respect to (1) the precise wording of the finding and sentence,¹¹² a summary of the preliminary investigation¹¹³ (if any), and of the trial, "emphasizing in particular" the elements of the "prosecution and the defence";¹¹⁴ and (3) notification, where applicable, of the confinement facility to which the prisoner of war has been, or will be, sent to serve the sentence.

6. Death Sentences

Because of the propensity of the courts of Detaining Powers to adjudge the death penalty in cases involving prisoners of war without the reluctance frequently displayed by those same courts when sentencing their own nationals, and because of the irreversibility of the sentence when executed, there are several provisions of the Convention concerned with this problem.¹¹⁵

The first paragraph of Article 100 requires that prisoners of war and the Protecting Power be informed "as soon as possible" of the offenses punishable by death under the laws of the Detaining Power. Such notification to the Protecting Power early in the conflict will accomplish the double purpose of making the identity of such offenses known to the Protecting Power and, under the second paragraph of Article 100, of freezing the list as of the date of such notification. However, it is a little difficult to grasp the significance of the requirement of notification to the prisoners of war. A number of prisoners of war may be captured every day over a period of years. Must the Detaining Power make a daily announcement of the criminal offenses punishable by death to each new group of prisoners of war? What is the effect if it fails to do so? It would have been far more appropriate, and useful, to provide for posting this information in each prisoner-of-war camp, along with the copy of the Convention and the regulations, orders, and notices that Article 41 requires to be posted.¹¹⁶

¹¹¹ This may occur because of the decision of the prisoner of war not to appeal, by affirmance on appeal, by denial of leave to appeal, etc.

¹¹² Presumably, the "finding" would be "guilty."

¹¹³ It would seem that the material accumulated during the course of the preliminary investigation would have little significance after the trial unless the law of the Detaining Power allows trial on the dossier prepared during that investigation.

¹¹⁴ It is difficult to conceive of a summary of a trial that would fail to include "the elements of the prosecution and the defence."

¹¹⁵ Of course, in view of the prohibition contained in the first paragraph of Article 87 against adjudging any penalty except those that could be adjudged against a member of the armed forces of the Detaining Power, this problem will not arise in a Detaining Power that has, by national action, abolished capital punishment.

¹¹⁶ See pp. 165-167 *supra*.

The second paragraph of Article 100, besides freezing the list of offenses punishable by death to those so notified to the Protecting Power, also provides that additions to the list may be made only with the concurrence of the Power of Origin.¹¹⁷ As to the actual imposition of death sentences, the last paragraph of Article 100 provides that the court must, before pronouncing sentence, specifically have called to its attention the three separate matters that the second paragraph of Article 87 requires it to take into consideration before sentencing in any case: (1) that the prisoner of war is not a national of the Detaining Power; (2) that he owes it no duty of allegiance; and (3) that he is in its power through circumstances beyond his control.¹¹⁸ The second paragraph of Article 107 requires that as soon as possible after a sentence to death has been adjudged (without regard to the possibility or pendency of an appeal), the Detaining Power furnish to the Protecting Power the detailed notification that is not normally required until after the decision becomes final.¹¹⁹ And, finally, Article 101 prohibits the execution of the death sentence prior to the expiration of at least six months from the date upon which the Protecting Power actually receives the notification to which reference has just been made.¹²⁰

7. Confinement

A number of the provisions of the Convention with respect to permissible punishments, including confinement, have already been discussed.¹²¹ There are, however, several others that it appears appropriate to mention at this point in the sequence of events in a judicial proceeding.

¹¹⁷ Such concurrence would, of course, affect only the prisoners of war who depend on the Power of Origin so concurring.

¹¹⁸ See pp. 337–338 *supra*. In order to give the second paragraph of Article 87 any significance, it too, like the third paragraph of Article 100, should have had the requirement that its provisions be called to the attention of the court.

¹¹⁹ See p. 338 *supra*.

¹²⁰ The period of delay was increased to six months from the three months of the second paragraph of Article 66 of the 1929 Convention in order to give the Power of Origin an adequate opportunity to undertake diplomatic negotiations concerning the matter, should it be so inclined. 1947 GE Report 230–31. In 1971 the ICRC proposed the discontinuance of the imposition of capital punishment during the course of hostilities “except of persons found guilty of serious war crimes by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” 1971 GE Documentation, VI at 52–53.

¹²¹ See pp. 322–324 *supra*.

The first paragraph of Article 108 again adopts the national standard of the Detaining Power—this time for the places in which and the conditions under which the confinement is to be served. The sentenced prisoner of war will serve his sentence in the same type of penal institution and under the same conditions as a member of the armed forces of the Detaining Power;¹²² but with certain additional provisions that, in fact, establish an international standard. Thus, Article 108 requires that the conditions of the confinement conform to the requirements of health and humanity;¹²³ the third paragraph of Article 108 provides that prisoners of war placed in confinement after judicial prosecution continue to have the benefit of the privileges established in Article 78 (the right to make complaints with respect to the conditions of their confinement) and in Article 126 (the right to confer privately with representatives of the Protecting Power); and they must be permitted to send and receive correspondence; to receive at least one relief parcel during each month of confinement; to exercise daily in the open air; to have any medical attention that may be required; to have any spiritual assistance that they may desire; and to have the benefits of the prohibitions on punishments set forth in the third paragraph of Article 87.¹²⁴

Should a prisoner of war who is being judicially prosecuted, or who has already been convicted, become eligible for repatriation or accommodation in a neutral country during the course of hostilities, pursuant to the provisions of Articles 109–114, the second paragraph of Article 115 states that he may only be so repatriated or accommodated if the Detaining Power consents;¹²⁵ the third paragraph of Article 115 directs the opposing Parties to exchange the names of prisoners of war detained because of judicial prose-

¹²² In the United States, when the sentence includes a punitive discharge and lengthy confinement, after the discharge has been executed the ex-serviceman is sometimes transferred from the military confinement facility to a Federal prison. Inasmuch as a prisoner of war cannot be sentenced to a discharge and continues to be subject to the military law of the Detaining Power, it would appear that he should not be so transferred.

¹²³ This requirement of the first paragraph of Article 108 must be read in conjunction with the provisions of the third paragraph of Article 87 prohibiting corporal punishment, imprisonment in premises without daylight, and torture. See pp. 322–323 *supra*.

¹²⁴ Understandably, the privileges to which they are entitled, beyond those included in the national standard, are perceptibly less than those to which a prisoner of war is entitled when he is confined pursuant to disciplinary sanctions. See pp. 327–328 *supra*. However, it is not easy to understand why the prohibitions against punishments that are inhuman, brutal, or dangerous to health, contained in the last paragraph of Article 89, were not made applicable to judicial punishment as they are to disciplinary punishment.

¹²⁵ See pp. 413 and 415 *infra*.

cution or conviction. Similarly, the penultimate paragraph of Article 119 provides that when repatriation takes place upon the termination of hostilities, a prisoner of war against whom a judicial prosecution for "an indictable offense" is pending, or who has already been convicted of such an offense, may be detained until the end of the proceedings and until the completion of punishment.¹²⁶ And, once again, the last paragraph of Article 119 directs the opposing Parties to exchange the names of prisoners of war so detained.

E. CONCLUSIONS

In the nature of things, prisoners of war have frequently been the victims of injustice at the hands of their captors, such injustice varying from the extreme of a complete denial of all of the judicial guarantees recognized as indispensable by the great majority of national groupings of civilized people to the almost completely unavoidable human situation of the biased judge. The draftsmen of the 1949 Convention, building on the precedent of the 1929 Convention and the practices of World War II, attempted to draft provisions that would ensure, to the maximum extent possible, fair treatment to the prisoner of war charged by his captors with misconduct, whether of a minor disciplinary or of a major criminal nature. In the heat of armed conflict it requires strong measures to ensure fair treatment by the captors of the enemy who have fallen into their power. It is doubtful that it will become evident in practice that the draftsmen were as successful in this area of the Convention as they were in others.

¹²⁶ See p. 420 *infra*. Of course, although not specifically mentioned in the fifth paragraph of Article 119, as it is in the second paragraph of Article 115, there would be no problem if the Detaining Power consented to the repatriation of the prisoner of war despite the pending proceedings or the conviction. (Concerning the Chinese Communist attempt to apply the provisions of the fifth paragraph of Article 119 in Korea, despite the provision of the Armistice Agreement for the repatriation of *all* prisoners of war, see note VII-128 *infra*.)