

CHAPTER IV

PROTECTIVE AGENCIES

A. INTRODUCTORY

Prisoners of war have always been, and continue to be, at the complete mercy of the Detaining Power. The rules which have evolved with respect to prisoners of war have uniformly had the objective of affording them protection against the all-powerful Detaining Power; but rules for the protection of prisoners of war are of value only if there are methods of ensuring compliance therewith.¹ Over the years a number of institutions have come into existence for the accomplishment of this purpose, including: (1) the Protecting Power; (2) the prisoners' representative; (3) the International Committee of the Red Cross; and (4) other international humanitarian organizations. While some of these institutions have other functions, a major function of each, and the one which will concern us here, is to ensure that the prisoners of war receive the full protection accorded to them by the Convention. We shall endeavor to ascertain the nature of each of these institutions, the powers that have been allocated to them, and the manner in which those powers are exercised.

B. THE PROTECTING POWER²

1. Historical

The earliest indication of what we now term the Protecting Power probably appeared in the Capitulations of the Ottoman Empire of

¹ We have already discussed the problem of compliance in the broad sense—the acceptance of the applicability of the Convention generally in the international armed conflict in which a Power is engaged. *See* pp. 26–34 *supra*. Here, we are concerned with ensuring compliance with the specifics of the Convention.

² A *Protecting Power* is a State which has accepted the responsibility of protecting the interests of a second State in the territory of a third, with which, for some reason, such as war, the second State does not maintain diplomatic relations. 1973 Draft Additional Protocol, Article 2(d), at 3; Article 2(c), 1977 Protocol I; Sior-det, Scrutiny 3. All three States must agree before the *Protecting Power* may serve as such. Heckenroth, *Puissances protectrices* 27–31, & 64; Draper, *Implementation* 46–47. In the terminology which we are using here, the second State is the Power of Origin and the third State is the Detaining Power. If the *Protecting Power* is acting as such when no state of war exists, the State in whose territory it is acting is more properly called the Power of Residence. (After the break-off of diplomatic relations between the United States and Cuba in 1961, Switzerland acted as the *Protecting Power* for the United States in Cuba and Czechoslovakia acted as the *Protecting Power* for Cuba in the United States.)

the sixteenth century.³ Curiously, in those early days protection of nonnationals 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 entrenched in customary international law and practice. In its present form, however, the Protecting Power dates back only 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 (1870–71). In that conflict, probably for the first time, all of the belligerents were represented by Protecting Powers in the territory of the enemy. Great Britain was charged with the protection of the French in Germany; and the United States, Russia, and Switzerland acted as Protecting Powers in France for the various German States.⁴ 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.⁵ Un-

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. The appearance of the Protecting Power has been attributed to a combination of three older institutions of international law: extraterritoriality; the employment of foreigners as diplomatic and consular agents; and the use of personal good offices. Franklin, *Protection* 7–29. It is doubtful that the concept of the Protecting Power as it first appeared in the Turkish Capitulations had any more direct progenitor.

⁴ Franklin, *Protection* 29 & 39. Eroglu, La représentation 10–12. Detailed information concerning the designation of Protecting Powers in most of the conflicts mentioned herein may be found in this excellent study, at 10–29. (Concerning the older institution of the "Prisoner-of-War Agent," see Article III of the *Cartel for the Exchange of Prisoners of War between Great Britain and the United States* (1813) and Basdevant, *Deux conventions* 5–6.)

⁵ Franklin, *Protection* 29.

questionably, 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 armed conflicts, many of which had, however, their own peculiar aspects. Thus, in the Sino-Japanese War (1894-95) 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.⁶ Similarly, Germany acted as the Protecting Power for both belligerents in the Italo-Turkish War (1911-12) 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 the United States, while France and Austria-Hungary acted jointly for Spain [it was during this conflict that, for the first time recorded, a belligerent, (the United States) specifically requested neutral inspection of installations within which prisoners of war were being held⁷]; and during the Balkan Wars (1912-13) France and Russia acted jointly as the Protecting Power for Montenegro. This practice of using more than one neutral State as a Protecting Power has since 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.⁸

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 Great Britain would, and would be permitted to, perform similar functions with respect

⁶ For the very interesting instructions issued by the United States to its Consul in Peking, see [1894]1 *For. Rel.* U.S. 106-08 (1895).

⁷ Flory, *Prisoners of War* 107-08.

⁸ Franklin, *Protection* 164.

to Boer prisoners of war held there.⁹ Thus, to a limited degree, the institution of the Protecting Power was recognized even in that conflict.

The Russo-Japanese War (1904-05) found the Protecting Powers once again exercising the full powers which it had become customary to assign 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.¹⁰

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.¹¹ During the course of that conflict, four definite items of progress occurred: first, public opinion in the belligerent nations achieved an ability to understand how a friendly neutral could represent, at times vigorously, an enemy belligerent and its nationals;¹² 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;¹³ third, the

⁹ *Ibid.*, 68-70.

¹⁰ Eroglu, *La représentation* 23-25; Franklin, *Protection* 78-19. 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 Japanese prisoners of war. In view of all these precedents, it is particularly difficult to comprehend why the 1899 and 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.

¹¹ Franklin, *Protection* 94-95. For the instructions issued by United States Secretary of State Bryan in August 1914, see 9 *A.J.I.L. Supp.* 118 (1915); [1914] *For. Rel. U.S. Supp.* 740-41 (1928).

¹² See Siordet, *Scrutiny* 7. World War I saw more men taken prisoner of war than in any previous conflict; and it likewise saw them held in captivity for longer periods of time. Both of these factors had the effect of focusing attention on prisoners of war. It was undoubtedly this situation which led to the more general acceptance of the idea of a wider use of Protecting Powers in the interests of prisoners of war. Pictet, *Commentary* 93-94.

¹³ Strangely, Germany, which had frequently acted as a Protecting Power, and the United States, which had not only frequently acted as a Protecting Power, but was probably the protagonist of the extension of the functions of the Protecting Power with respect to prisoners of war prior to its own entry into World War I, were the two most important belligerents to resist the activities of Protecting Powers. At the beginning of that War, Germany instituted rigid restrictions on

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;¹⁴ and, finally, the Protecting Power received legal recognition as an international institution in a number of bilateral and multilateral 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.¹⁵

The precedents established during World War I were destined to bear fruit.¹⁶ A draft prisoner-of-war convention prepared in 1921 by 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 exceeded the capacity of the diplomatic personnel of the Protecting Powers.¹⁷ However, when the Diplomatic Conference convened in Geneva in 1929 and drafted the convention which subsequently received the ratifications of the vast majority of States, the ICRC proposal was not adopted; 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 "should be distinctly set out, and their task clearly defined."¹⁸ The 1929 Prisoner-of-War Convention

visits by neutrals to its prisoner-of-war camps. By 1916 these restrictions had, due largely to the efforts of the United States, for the most part disappeared. Yet when the United States became a belligerent in 1917, the United States Secretary of War took the position that Germany had no right to designate the Swiss to inspect American prisoner-of-war camps unless under treaty law. Flory, *Prisoners of War* 108-09. His position was apparently overruled by President Wilson and the Swiss were permitted to make such inspections.

¹⁴ Eroglu, *La représentation* 27-28.

¹⁵ All of the bilateral and multilateral agreements cited in note I-39 *supra* had references to the Protecting Power. The 1918 Agreement between the United States and Germany cited therein referred to the Protecting Power in no less than 25 separate articles.

¹⁶ Franklin, *Protection* 99-100, states, or perhaps somewhat overstates, that a plan for the operations of the Protecting Power proposed by the still-neutral United States in 1915, and accepted by the British and German Governments with broadening modifications, "gained world-wide recognition and paved the way which led to the prisoner of war convention signed . . . at Geneva on July 27, 1929."

¹⁷ Rasmussen, *Code des prisonniers de guerre* 56.

¹⁸ Siordet, *Scrutiny* 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." 2B *Final Record* 19.

thus became the first international agreement negotiated in time of peace to give official recognition to the institution of the Protecting Power.¹⁹ 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.²⁰ 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 relating to prisoners of war contained in the 1907 Hague Regulations. 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, even if not as all-inclusive as they might have preferred. True, the designation and functioning of Protecting Powers on behalf of prisoners of war had previously become an almost universally accepted custom of the international law of war. But it is necessary to bear in mind that, despite this, in the Soviet Union and in 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.²¹

¹⁹ Seitz, *La Suisse* 34.

²⁰ Franklin, *Protection* 115; Janner, *Puissance protectrice* 49.

²¹ The Soviet Union took the position that as it was a Party to the Fourth Hague Convention of 1907, the Regulations annexed to which, it asserted, covered "all the main questions of the regime of captivity" (but not the question of the Protecting Power, see note 10 *supra*), there was no need for it to consider an Italian proposal to apply reciprocally the provisions of the 1929 Convention (1 ICRC Report 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 Japan in a manner even remotely resembling their manner of functioning in the territories and, particularly, the occupied territories of most of the other belligerents. *I.M.T.F.E.* 1127-36; Franklin, *Protection* 129-34. As a result of the foregoing, and of the disappearance of many Powers of Origin during the course of the hostilities, the ICRC has estimated that during World War II approximately 70 percent of all prisoners of war were deprived of the services of a Protecting Power. 2B *Final Record* 21; de La Pradelle, *Nouvelles conventions* 226. Thus, Germany denied the status of States to Poland, Yugoslavia, France, and Belgium (after the 1940 armistice agreements), 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, *Recueil* 87-88. After World War II ended, the Swiss made a detailed report of their manifold activities as a Protecting Power. Seitz, *La Suisse* 34.

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, 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, just four years later, the 1949 Prisoner-of-War Convention was signed in which, as we shall see, the functions of the Protecting Power are identified and defined with far greater particularity than had been the case in the 1929 Convention.²² Unfortunately, in not one of the numerous instances of international armed conflicts which have occurred since 1949 has the institution of the Protecting Power been utilized.²³

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 use of the Protecting Power began to take form, particularly with respect 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 Convention to which most of the nations of the world are parties.²⁴ It now becomes appropriate to an-

²² References to the Protecting Power are contained in 36 of its 132 substantive articles, as well as in two of its Annexes.

²³ U.N., *Human Rights*, A/7720, sec. 213. But see Pictet, *Humanitarian Law* 66 and note 29 *infra*. In Korea and in Vietnam the ICRC performed the humanitarian functions of the Protecting Power on one side (in South Korea and in South Vietnam) but was not allowed to do so on the other. In the Indo-Pakistani Wars (1965 and 1971), the Middle East Wars (1967 and 1973), and the Honduran-Salvador Conflict (1969), the ICRC performed these functions on both sides. (In the India-Portugal War (1961) a Protecting Power already existed because of a prior break in diplomatic relations.)

²⁴ See Appendix B. The use of the institution of the Protecting Power has since been resorted to in Article 21 of the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, where it is adopted as a means of overseeing the protection of inanimate objects—which is, actually, merely a variation of the protection furnished historically by a Protecting Power, a very large part of its energy having once been directed toward the protection of the embassy buildings and diplomatic archives of the Protected Power. See also, Articles 45 and 46 of the 1961 *Vienna Convention on Diplomatic Relations*.

alyze the form and the character which the Protecting Power received during this evolutionary process.²⁵

2. The Modern Concept of the Protecting Power

a. DESIGNATION

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. . . . (Emphasis 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(1) of the latter Convention reads:

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. . . . (Emphasis added.)²⁶

It would appear that it was intended that the designation of Protecting Powers become at least a moral obligation of the belligerents; and that, once designated, a Protecting Power has a duty not only to the Power of Origin²⁷ but also to the other parties to the conflict,

²⁵ 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, *Scrutiny* 3.

²⁶ This provision has been termed "the keystone" of the 1949 Convention. Yingling & Ginnane 397. In the *British Manual* para. 276, the Protecting Power is termed "the principal organ, apart from the Contracting Parties themselves, for ensuring the observance of the execution of the Convention." It is therefore indeed distressing to find that while Soviet International Law states (at 421) that "citizens of a belligerent who remain on enemy territory are under the protection of some neutral country," nowhere in the comparatively detailed discussion of the 1949 Prisoner-of-War Convention (at 431-34) is there even any passing reference to such a right of protection for prisoners of war or to the provisions of the Convention relating to Protecting Powers.

²⁷ It must be borne in mind that a Protecting Power is not a general agent of the Power of Origin. One author has defined the overall relationship between these two Powers as follows: "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 interest 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

to perform the functions which have been assigned to it by the Convention.²⁸ But if it was the intention of the 1949 Diplomatic Conference to make the designation of Protecting Powers mandatory in international armed conflicts, the Convention has been totally unsuccessful in accomplishing that purpose; for, as has been mentioned, there has not been a single Protecting Power designated pursuant to Article 8 since the Convention was drafted and entered into effect—and there has certainly been no lack of international armed conflict during that period. The importance of this failure cannot be overestimated.²⁹

The ICRC has identified three major reasons why the institution of the Protecting Power has not been utilized in the international armed conflicts which have taken place since the Convention became effective:

(1) The designation of a Protecting Power might be interpreted as the recognition of the enemy belligerent;

(2) Despite the armed conflict, diplomatic relations were not broken off by the belligerents;

(3) The existence of a general reluctance, because of the provisions of Article 2(4) of the Charter of the United Nations, to admit the existence of and participation in international armed conflict.³⁰

It is possible to draft provisions which would effectively eliminate the first two bases for failing to designate a Protecting Power. It would be exceedingly difficult, if not impossible, to draft a provision which would eliminate the third reason.

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." Castrén 92. *See also*, Franklin, *Protection* 114.

²⁸ Siordet has stated that the designation of a Protecting Power is no longer optional but is now "almost obligatory"; that it is now put in the "imperative form"; 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." Siordet, *Scrutiny* 36. *See also*, 1971 GE Documentation, II, at 11-12.

²⁹ In Pictet, *Humanitarian Law* 66, the statement is made that Protecting Powers have been designated in three instances since World War II: Suez (1956); Goa (1961); and Bangladesh (1971). Forsythe, *Who Guards the Guardians* 46-47 accepts that statement in its entirety. However, it is subject to major qualifications; in fact, it is arguable that none of these three instances can really be said to constitute the designation of a Protecting Power pursuant to Article 8 of the 1949 Convention.

One of the leading military-academic scholars in this field has said: "To talk of the regular application of international humanitarian law without the effective functioning of some Protecting Power system . . . is idle chatter." Draper, *Implementation* 47. Elsewhere the same author has said that "the Geneva Conventions of 1949 are virtually inoperative without the active role and participation of the Protecting Power system." *Ibid.*, 46.

³⁰ 1971 GE Documentation, II, at 16-17. For a lengthier list of reasons, *see* Abi-

The future is far from bright with respect to the overall solution of this problem, and this has received wide recognition. Area specialists are able to find little or no evidence that any Communist country—given the “spy-phobia” complexes with which all are afflicted—will ever allow a Protecting Power to function in its territory,³¹ no matter how the provisions of the Convention relating to the designation of Protecting Powers are strengthened and clearly made mandatory. Some time ago the United Nations General Assembly, after shying away from the subject for many years, officially recognized the prior lack of, and the future need for, recourse to the institution of the Protecting Power.³² Innumerable private international organizations have sought a solution to the problem.³³ At the very initiation of its proposal to review the need for the reaffirmation and development of international humanitarian law applicable in armed conflicts, the ICRC emphasized the problem in this area,³⁴ and the Conference of Government Experts convened by the ICRC in 1971 discussed the subject at great length.³⁵ The ICRC attempted to draft a provision which would not only make the designation of a Protecting Power practically mandatory, but would also eliminate several of the reasons, enumerated above, for the past failures to designate Protecting Powers.³⁶ The 1972 Conference of Government Experts once again discussed the matter at length,³⁷ this time in the context of the ICRC proposal and of the many substitute and amendatory proposals

Saab, *Le renforcement du système du droit humanitaire*, XII/2 *Revue de droit pénal militaire et de droit de la guerre* 227–28.

³¹ Miller, *The Law of War* 224, 241–42, & 254. These conclusions are undoubtedly based at least in part on the actions of the Soviet Union during World War II; the events in Korea (1950–53); the Sino-Indian War (1962); and Vietnam (c. 1965–73). Nevertheless, in commenting on the proposals contained in U.N., *Human Rights*, A/8052, Ch. XI, concerning the possibility of new machinery to replace the Protecting Power, the Soviet Union said that “it must be stated that existing institutions should be used to supervise the application of humanitarian rules in armed conflict.” U.N., *Human Rights*, A/8313, at 68. The cynic might interpret this to mean that the Soviet Union prefers a moribund, inoperative Protecting Power rather than a new, vital, mandatory institution, created for the purpose of ensuring that belligerents will apply, and will comply with, the provisions of the Convention.

³² G.A. Res. 2852, 20 December 1971, Respect for human rights in armed conflicts, 26 GAOR, Supp. 29, at 90, U.N. Doc. A/8429 (1972). See also U.N., *Human Rights*, A/7720, § 213.

³³ See 1971 GE Documentation, II, at 22. See also 1972 I.L.A. Rep. 305, 308; U.N., *Human Rights*, A/8370, § 165.

³⁴ 1969 Reaffirmation 87–91; 1971 GE Documentation, II, at 10–34.

³⁵ 1971 GE Report, paras. 532–51.

³⁶ 1972 *Basic Texts* 6; 1972 *Commentary* 14–19.

³⁷ 1972 GE Report, I, at paras. 4.56–4.58, & 5.24.

that had been submitted by the experts of the various nations.³⁸ Out of this discussion emerged a new proposal that was submitted to the Diplomatic Conference.³⁹

Article 5 of the 1973 Draft Additional Protocol relating to international armed conflicts contained six paragraphs, the first five of which are relevant to the problem under discussion. Paragraph 1 provided that from the outset of international armed conflict, as specified in Article 2 of the 1949 Convention, each belligerent "shall without delay designate a Protecting Power . . . and . . . permit the activities of a Protecting Power designated by the adverse Party and accepted as such." Obviously, this was merely an iteration of a fundamental, customary rule of international law and no real solution to the problem. True, the belligerents were being told in grammatically authoritative language (*shall*) that they were to make use of and to permit the enemy to make use of the Protecting Power; but once again there would be no automatic remedy for the situation created where a belligerent disregarded, or even affirmatively refused to comply with, the requirements of the paragraph.⁴⁰

In paragraph 2 an attempt was made to solve the foregoing problem. It provided that where there was "disagreement or unjustified delay" in the designation of Protecting Powers, the ICRC "shall offer its good offices"—not to perform the functions of the Protecting Powers but merely to assist in their selection: it was therein authorized to ask each belligerent for "a list of at least five States which they

³⁸ *Ibid.*, II, 97–104 *passim*. For a discussion of the proposal in this regard made by the U.S. experts, see Baxter, *Perspective: the Evolving Law of Armed Conflicts*, 60 *Mil. L. Rev.* 99, 109–10 (1973).

³⁹ Article 5 of the 1973 Draft Additional Protocol; and 1973 *Commentary* 11–14. That Article was discussed, amended, and adopted by Committee I of the 1975 Diplomatic Conference. 1975 *Report of Committee I*, at 10–17; The Committee's proposal was adopted *in toto* by the Diplomatic Conference with only minor editorial changes.

⁴⁰ The 1973 Conference of Government Experts had discussed the possibility of a procedure for the automatic designation of Protecting Powers but had decided against it. 1973 *Commentary* 12. The provisions actually adopted by the Diplomatic Conference as Article 5(1) and (2) of the 1977 Protocol I read:

Article 5—Appointment of Protecting Powers and of their substitute

1. It is the duty of the Parties to a conflict from the beginning of that conflict to secure the supervision and implementation of the Conventions and of this Protocol by the application of the system of Protecting Powers, including *inter alia* the designation and acceptance of those Powers, in accordance with the following paragraphs. Protecting Powers shall have the duty of safeguarding the interests of the Parties to the conflict.

2. From the beginning of a situation referred to in Article 1, each Party to the conflict shall without delay designate a Protecting Power for the purpose of applying the Conventions and this Protocol and shall, likewise without delay and for the same purpose, permit the activities of a Protecting Power which has been accepted by it as such after designation by the adverse Party.

consider acceptable";⁴¹ the lists "shall be communicated" within 10 days; and if any State is on both lists, the ICRC is to seek its agreement.⁴² And paragraph 3 included alternative proposals for the consideration of the Diplomatic Conference as to the procedure to be followed if, despite the provisions of paragraph 2, no Protecting Powers were designated: (1) the ICRC could offer to assume the functions of a substitute for the Protecting Powers if the adverse belligerents agreed "and insofar as those functions are compatible with its own activities"; or (2) the belligerents "shall accept" the offer of the ICRC to act as a substitute for the Protecting Powers.⁴³ The first alternative still made it possible for a belligerent to prevent the ultimate designation of a Protecting Power or a substitute for a Protecting Power; the second alternative made it mandatory that the offer of the ICRC be accepted by the belligerents.

⁴¹ It was not clear whether a belligerent would be suggesting States which it desired to have act as a Protecting Power on its behalf, or which it would be willing to accept on its territory as a Protecting Power for the adverse Party, or both. However, this has been clarified in Article 5(3) of the 1977 Protocol I. See note 42 *infra*.

⁴² Presumably, the inclusion of the name of a State on the two lists would mean that it was acceptable to both belligerents and only its consent would then be needed for the trilateral agreement that is required. See note 2 *supra*, and note 50 *infra*. The provision actually adopted by the Diplomatic Conference as Article 5(3) reads:

3. If a Protecting Power has not been designated or accepted from the beginning of a situation referred to in Article 1, the International Committee of the Red Cross, without prejudice to the right of any other impartial humanitarian organization to do likewise, shall offer its good offices to the Parties to the conflict with a view to the designation without delay of a Protecting Power to which the Parties to the conflict consent. For that purpose it may, *inter alia*, ask each Party to provide it with a list of at least five States which that Party considers acceptable to act as Protecting Power on its behalf in relation to an adverse Party, and ask each adverse Party to provide a list of at least five States which it would accept as the Protecting Power of the first Party; these lists shall be communicated to the Committee within two weeks after the receipt of the request; it shall compare them and seek the agreement of any proposed State named on both lists.

(The ICRC is not instructed as to what action it is to take if, by chance, more than one State is named on both lists!)

⁴³ The ICRC had previously announced that it had decided that all of the functions of the Protecting Power were humanitarian in nature and that they could, therefore, be performed by that organization. 1972 GE Report, I, para. 4.71 (at 180). See also, *ibid.*, 208; and 1971 GE Report, paras. 553-54. The major controversy in Committee I revolved around the choice between the two alternatives proposed, as well as many suggested variations thereof. Article 5(4) of the 1977 Protocol I, as approved by the Diplomatic Conference, reads:

4. If, despite the foregoing, there is no Protecting Power, the Parties to the conflict shall accept without delay an offer which may be made by the International Committee of the Red Cross or by any other organization which offers all guarantees of impartiality and efficacy, after due consultations with the

Paragraph 4 was an attempt to eliminate one of the reasons sometimes advanced by belligerents as justification for their failure to utilize the institution of the Protecting Power in international armed conflict—the fear that this action would be interpreted as a recognition of the enemy belligerent.⁴⁴ It very specifically stated that the designation and acceptance of Protecting Powers “shall not affect the legal status of the Parties to the conflict or that of the territories over which they exercise authority.”⁴⁵ And paragraph 5 was an attempt to eliminate another of the reasons that had previously been advanced by belligerents as justification for their failure to utilize the institution of the Protecting Power in international armed conflict—that diplomatic relations had not been broken off by the belligerents.⁴⁶ It provided in relevant part that “[t]he maintenance of diplomatic relations . . . does not constitute an obstacle to the appointment of Protecting Powers”⁴⁷ Experience has demonstrated that even though diplomatic relations have not broken off, an enemy

said Parties and taking into account the result of these consultations, to act as a substitute. The functioning of such a substitute is subject to the consent of the Parties to the conflict; every effort shall be made by the Parties to the conflict to facilitate the operation of the substitute in the performance of its tasks under the Conventions and this Protocol.

Concerning the “any other organizations” referred to above, see pp. 312–314 *infra*.

⁴⁴ The several Middle East conflicts (1956, 1967, 1973) presented this problem. Pilloud, Reservations 8.

⁴⁵ See also Article 4 of the 1977 Protocol I. A provision to the same general effect may be found in Article 3(4) of the 1949 Convention, dealing with noninternational armed conflicts, and for the same reason. Article 5(5) of the 1977 Protocol I as approved by the 1975 Diplomatic Conference reads:

5. In accordance with article 4, the designation and acceptance of Protecting Powers for the purpose of applying the Conventions and the Protocol shall not affect the legal status of the Parties to the conflict or of any territory, including occupied territory.

⁴⁶ The major international armed conflict in which diplomatic relations were not broken off and in which this problem arose was the Sino-Indian War (1962). See Cohen & Chiu, *People's China 1570–71*; Cohen & Leng, *The Sino-Indian Dispute 298–300*; Draper, *Implementation 46*.

⁴⁷ Article 5(6) as adopted by the Committee I of the 1975 Diplomatic Conference was the proposed Article 5(5) of the 1973 Draft Additional Protocol with an addition which should make it even more difficult for a belligerent to use the existence of diplomatic relations as an excuse for failing to cooperate in the designation of Protecting Powers. Article 5(6) of the 1977 Protocol I, as approved by the Diplomatic Conference reads:

6. The maintenance of diplomatic relations between Parties to the conflict or the entrusting of the protection of a Party's interests and those of its nationals to a third State in accordance with the rules of international law relating to diplomatic relations is no obstacle to the designation of Protecting Powers for the purpose of applying the Conventions and this Protocol.

(For a discussion in depth of the activities of the 1975 session of the Diplomatic Conference with respect to Article 5 of what became the 1977 Protocol I, see Forsythe, *Who Guards the Guardians*.)

Embassy cannot function for the protection of its nationals, particularly prisoners of war, to an extent even remotely equivalent to a neutral State acting as a Protecting Power.⁴⁸

What are the qualifications required for designation 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 the territory of 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 (the Power of Origin) requests a neutral State which has the qualifications listed above to act on its behalf vis-à-vis a specific enemy belligerent. If the neutral State is willing to assume the functions of a Protecting Power, it so notifies the requesting State. It must then obtain the concurrence of the enemy belligerent in whose territory it has been requested to function (the Detaining Power).⁴⁹ 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.⁵⁰

⁴⁸ Cohen & Leng, *The Sino-Indian Dispute* 278 & 320; Draper, *People's Republic* 367; 1971 GE Report, para. 538. This does not apply to neutrals or cobelligerents and Article 4(2) of the Fourth Convention provides that nationals of such Powers are not protected persons while diplomatic relations are maintained. There is no such provision with respect to nationals of enemy Powers. In the Third Convention the sole reference to the effect of the continuance of diplomatic relations is in that portion of Article 4B(2) which is concerned with members of the armed forces of belligerents in the territory of neutral or "non-belligerent" Powers. This is indicative of the fact that the 1949 Diplomatic Conference did not intend that the continuing presence of enemy diplomatic personnel in the territory of a belligerent should nullify the provisions of the Convention concerning Protecting Powers. The 1972 Conference of Government Experts apparently felt quite strongly about this. 1973 *Commentary* 164; 1972 GE Report, I, paras. 4.56–4.79.

⁴⁹ Heckenroth, *Puissances protectrices* 74. This is the step that the United States apparently failed to take when it was requested to perform the functions of the Protecting Power by Great Britain during the Boer War (1899–1902), *See* p. 257 *supra*.

⁵⁰ The 1949 Convention contains no provisions with respect to the method of designating a Protecting Power, the required qualifications for a Protecting Power, etc., leaving these problems to be governed by the relevant rules of customary international law. Heckenroth, *Puissances protectrices* 62 & 224. The 1973 Draft Additional Protocol proposed, in Article 2(d), to define the term "Protecting Power" as meaning "a State not engaged in the conflict, which, designated by a Party to the conflict and accepted by the adverse Party, is prepared to carry out the functions assigned to a Protecting Power under the Conventions and the pres-

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.⁵¹ 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 opposing 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 that conflict.⁵² The limited number of States that would be available and competent to act as Protecting Powers in any future major international armed conflict might once again bring about this result.⁵³

b. SUBSTITUTES FOR PROTECTING POWERS

In the light of events of World War II, the delegates at the 1949 Diplomatic Conference could not but foresee the possibility of situations in which there would be no Protecting Power to stand between the Detaining Power and the prisoner of war.⁵⁴ They attempted to

ent Protocol." This provision, with some useful editing, was eventually approved by the Diplomatic Conference as Article 2(c) of the 1977 Protocol I. It reads:

(c) "Protecting Power" means a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol.

⁵¹ See pp. 256–257 *supra*.

⁵² Pictet, *Commentary* 95–96. The same conclusion was reached in Franklin, *Protection* 164–65, where this statement appears: "For uniformity and simplicity of administration it is obviously desirable for the protected power [Power of Origin] 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." In 1945 Switzerland alone represented 35 belligerents, and in many cases it represented both of opposing belligerents in the territory of the other. Janner, *Puissance protectrice* 24 and Annexe I, at 68–70. (Eroglu, *La représentation*, Annexe III, at 144–48, lists only 34, but he omits Yugoslavia.)

⁵³ One author has suggested the possibility that in a future international armed conflict the demand for Protecting Powers may exceed the supply available. De La Pradelle, *Nouvelles conventions* 225. Of course, since that was written the number of States in the world community has more than doubled and many of these new sovereign entities would probably be available to act, and would be fully capable of acting, as Protecting Powers.

⁵⁴ For some of these possible situations see Siordet, *Scrutiny* 48–53; and Heckenroth, *Instances protectrices* 229–36.

solve this problem, in all its varied facets, by providing in Article 10 of the Convention a number of methods for the designation of "substitutes" for Protecting Powers.⁵⁵ It must, however, be emphasized that the provisions of this Article should not be considered as affecting the basic method of selecting either the original Protecting Power or successor Protecting Powers as long as the Power of Origin continues to exist and to be able to function in its sovereign capacity. 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 customary international law as those which govern the designation of the original Protecting Power.⁵⁶ It must also be noted 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 elsewhere in the Convention, but is merely a State or organization performing some or all of the functions allocated to Protecting Powers by the various relevant provisions of the Convention.⁵⁷

⁵⁵ A substitute for the Protecting Power exercises all of the powers and performs all of the functions of a Protecting Power. *See* Article 10(6). Concerning the French proposal for an ongoing international organization to serve as the substitute for the Protecting Power and the 1949 Diplomatic Conference's decision to refer it to the governments by resolution, *see* p. 18 *supra*. The Soviet Union opposed both the 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 at the present Conference." Declaration made by the Delegation of the Soviet Union at the time of the signing of the 1949 Geneva Conventions, 1 *Final Record*, 201. The validity of that statement is considerably reduced by the fact that both the French proposal and the resolution pertained to substitutes for Protecting Powers under Article 10—and the Soviet Union made a reservation to that Article. *See* text, pp. 273–274 *infra*.

⁵⁶ Pictet, *Commentary* 117–18. Thus, when Spain withdrew as the Protecting Power for Japan in the continental United States on 30 March 1945, the Japanese Government requested Switzerland to act in that capacity, Switzerland agreed to do so, the United States gave its concurrence and, effective 21 July 1945, Switzerland assumed the functions of Protecting Power for Japan in the United States. Rich, *Brief History* 488. In this case Switzerland was a Protecting Power as successor to Spain; it was *not* a substitute for a Protecting Power.

⁵⁷ Article 2(e) of the 1973 Draft Additional Protocol defined a "substitute" as "an organization acting in place of a Protecting Power for the discharge of all or part of its functions." 1973 Draft Additional Protocol 3. As adopted by Committee I and as approved by the Diplomatic Conference as Article 2(d) of the 1977 Protocol I, this provision now reads:

(d) "substitute" means an organization acting in place of a Protecting Power in accordance with Article 5.
Article 5(6) of the 1973 Draft Additional Protocol stated that whenever mention was made therein of a Protecting Power, this "also implies the substitute within the meaning of Article 2(e)." 1973 Draft Additional Protocol 4. (This latter pro-

The first paragraph of Article 10 authorizes the High Contracting Parties to agree "to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers." It is on the basis of the foregoing that a legal foundation already exists for the various international organizations which have been proposed as substitutes for Protecting Powers;⁵⁸ and it is here that the ICRC's recently expressed willingness to assume the functions of a substitute for a Protecting Power⁵⁹ would be implemented. Moreover, if this provision and the provisions of the second paragraph of Article 10, discussed immediately below, fail to produce a substitute for a Protecting Power, then under the third paragraph of Article 10 the Detaining Power "shall request or shall accept" the services of a humanitarian organization such as the ICRC to assume the humanitarian functions of the Protecting Power.⁶⁰

The second paragraph of Article 10 contains the controversial provisions with respect to substitutes for Protecting Powers. It provides, in substance, that where, "*no matter for what reason*" (emphasis added), there is no Protecting Power (designated under Article 8)

vision is substantially the same as Article 10, paragraph 6, of the 1949 Convention). With some minor editing Article 5(6) of the 1973 Draft Additional Protocol was adopted by the Diplomatic Conference as Article 5(7) of the 1977 Protocol I.

⁵⁸ The French proposal, incorporated into Resolution 2 of the 1949 Diplomatic Conference, was an early example of such an organization. See note 55 *supra*. See also U.N., *Human Rights*, A/7720, §§ 224-25; *ibid.*, A/8052, paras. 245-50; 1971 GE Report, §§ 540-48; 1972 *Commentary* 25-26. One of the major functions of the new international entity proposed by the present author (see pp. 19-20 *supra*) would be as an automatic substitute for a Protecting Power. See Levie, Working Paper 11-14. (The "International Fact-Finding Commission" created by Article 90 of the 1977 Protocol I does not have this function.) At the 1949 Diplomatic Conference the ICRC representative indicated that the first paragraph of Article 10 contemplated an agreement entered into in peacetime entrusting the functions of the Protecting Power to a named organization. 2B *Final Record* 61. While this is certainly a possibility, and is the basis for the proposals herein referred to, there is no reason why it could not also be implemented by the belligerents in wartime.

⁵⁹ See note 43 *supra*. This expressed willingness on the part of the ICRC to act as a substitute for a Protecting Power was a complete reversal of policy. At the 1949 Diplomatic Conference the ICRC representative had stated that the ICRC "could on no account be taken into consideration" to act as the organization contemplated by the first paragraph of Article 10. 2B *Final Record* 61.

⁶⁰ It is here that the ICRC felt that it belonged when the statement quoted in note 59 *supra* was made. 2B *Final Record* 63; Pictet, *Commentary* 119. However, inasmuch as it has now determined (and properly so) that all of the functions of a Protecting Power are humanitarian in nature (see note 43 *supra*), the difference between "the duties incumbent on the Protecting Powers," contained in the first paragraph of Article 10, and "the humanitarian functions performed by Protecting Powers," contained in the third paragraph of Article 10, has, for all practical purposes, disappeared. It must be borne in mind, however, that while the first paragraph of Article 10 requires the agreement of the Detaining Power and the Power of Origin, action under the third paragraph of Article 10 may be taken by the Detaining Power acting alone. Heckenroth, *Puissance protectrices* 263-65.

and no organization entrusted with the duties of the Protecting Power (pursuant to the first paragraph of Article 10), "the Detaining Power shall request a neutral State, or such an organization" to undertake to perform the functions assigned to the Protecting Powers by the Convention. On the surface this appears to be just one more effort to ensure the existence of a Protecting Power or of a substitute for a Protecting Power in the absence of an actual Protecting Power. The dispute which has arisen may be ascribed to the inclusion of the clause "no matter for what reason." This appears to give to the Detaining Power, acting alone, *carte blanche* to select a neutral State or an organization "which offers all guarantees of impartiality and efficacy" to perform the duties of a Protecting Power whenever for the moment there is no Protecting Power in being. This clause, and the entire paragraph, has been interpreted by some commentators as being limited in its application to instances in which the Power of Origin "intentionally abstains, or systematically refuses, to appoint a Protecting Power, or again, if it disappears entirely."⁶¹ However, it can be argued just as strongly, and possibly with more legal justification, that "no matter for what reason" means exactly what it says. The Soviet and other delegates at the 1949 Diplomatic Conference objected to the quoted clause in that they believed that the right of the Detaining Power to act unilaterally in the selection of a substitute for a Protecting Power for the Power of Origin should be limited to situations in which the Power of Origin had ceased to exist.⁶² There is much merit to the argument. Where the Power of Origin continues to exist, no valid reason can be discerned for discarding the established and customary procedure for the selection of either the original Protecting Power or of a successor Protecting Power.

It is true that there might be instances in which the Power of Origin fails to designate a Protecting Power—but that should not create a right in the Detaining Power to designate a substitute for the Protecting Power. Such a failure by the Power of Origin would in no manner affect the right of the Detaining Power, in its capacity as a Power of Origin, to designate a Protecting Power to act on its behalf in its enemy's territory. The Power of Origin that does arbitrarily refuse to designate a Protecting Power to act on its behalf may believe that it has good reasons for so doing—and it should not be told that if it does not take specific action to provide protection for the captured members of its armed forces, its enemy, the Detaining Power, will have the right to do so.

⁶¹ 1971 GE Documentation, II at 13; *accord*, Knitel, *Less Délégations du Comité International de la Croix-Rouge* 88. Even in his attempt to justify the provisions of the second paragraph of Article 10, Siordet concedes that the provision is not "clear." Siordet, *Scrutiny* 59–60.

⁶² 2B *Final Record* 29, 347, & 351.

The major objection to the procedure contemplated by paragraph two of Article 10 is that situations may arise in which, through no fault of the Power of Origin, it has no Protecting Power, and, before it can take action to remedy this deficiency, the Detaining Power exercises its power under the second paragraph of Article 10, designating a weak and friendly "neutral" State as a substitute for a Protecting Power, and then refusing to concur in the designation of a true Protecting Power by the Power of Origin on the ground that there is no need for such a designation. To accomplish this it might refuse to concur in the designation of a Protecting Power named by the Power of Origin, or it might withdraw a concurrence previously given, or it might take action before a Protecting Power could be appointed at the onset of hostilities, or it might take action when a Protecting Power has withdrawn and there has not been time for the Power of Origin to go through the full procedure for the designation of a successor Protecting Power. All of these examples fall within the clause "no matter for what reason"; in none of them is there justification for unilateral action by the Detaining Power.⁶³

All of the Communist countries (and Portugal) made reservations to Article 10 to the general 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 has been obtained."⁶⁴ While there is a perhaps not unnatural tendency to view with suspicion this position, taken at Geneva almost uniquely by the Soviet Union and its satellites,⁶⁵ it appears to have a valid basis. If there is a Power

⁶³ Pictet insists that the second paragraph of Article 10 "does not affect the process of appointment of the Protecting Power" and that successor Protecting Powers are not "substitutes" for prior Protecting Powers. Pictet, *Commentary* 117-18. The latter statement is completely correct. See note 56 *supra*. While his statement indicates the opinion that this paragraph of Article 10 was not intended to affect the process of appointment of Protecting Powers, nowhere does he even attempt to explain the significance of the clause "no matter for what reason."

⁶⁴ Reservation of the Soviet Union to Article 10 of the 1949 Prisoner-of-War Convention, 191 *U.N.T.S.* 367, maintaining the reservations made at the time of signing, 75 *U.N.T.S.* 458-60, and 1 *Final Record* 355. The other reservations to Article 10 are substantially identical to the foregoing (minor differences are probably due to translations from different languages), except that Hungary specified that Article 10 "can only be applied if the Government of the State of which the protected persons are nationals, no longer exists." Reservation of the Hungarian People's Republic, 198 *U.N.T.S.* 338; 1 *Final Record*, 347. It would be interesting to learn why the words "country of which the prisoners of war [protected persons] are nationals" (emphasis added) were used rather than "country of which the prisoners of war are members of the armed forces."

⁶⁵ See, e.g., Brockhaus, *The U.S.S.R.* 291. All of the Communist and Communist-oriented countries which have adhered to the Convention since 1949 have made similar reservations to Article 10.

of Origin *in esse*, 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 in the first place. And the statements made at the 1949 Diplomatic Conference by the Soviet delegates making it clear that they merely desired to limit the right of the Detaining Power to select a substitute for a Protecting Power to those cases where there is no existing Power of Origin was a limitation as to which there should have been no dispute. It is to be hoped that by overruling the Soviet thesis the 1949 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.

The fourth paragraph of Article 10 establishes two requirements for any neutral Power or organization invited by the Detaining Power to perform the functions of a Protecting Power (pursuant to the second paragraph of Article 10) or any humanitarian organization invited by the Detaining Power or itself offering to perform the humanitarian functions normally performed by a Protecting Power (pursuant to the third paragraph of Article 10): first it must act with a sense of responsibility toward the Power of Origin;⁶⁶ and, second, it must furnish assurances that it has both the capability and the intent to perform the allocated functions and to perform them impartially.⁶⁷

The fifth paragraph of Article 10 prohibits the derogation of the prior provisions of Article 10 by special agreements between the Detaining Power and the Power of Origin in those cases where the latter is unable to negotiate with the Detaining Power on terms of equality because of "military events" or the occupation of all or much of its territory.⁶⁸ Inasmuch as any such derogation would "adversely affect the situation of prisoners of war," no matter what the relative status of the two Powers, it was already prohibited by the last sen-

⁶⁶ This requirement clearly indicates that the designation by the Detaining Power of a substitute for a Protecting Power is not limited to instances where the Protecting Power has ceased to exist as an independent sovereignty—unless we are to assume that the sense of responsibility is owed to a Power of Origin despite the fact that it no longer exists.

⁶⁷ There is no indication as to whom the assurances are to be given. If the Detaining Power is to be the recipient, and there does not appear to be any other entity that could or should be, the provision has little meaning—except as an exhortation—as the Detaining Power, by making the selection, has disclosed its acceptance of the competence of the particular Power or organization.

⁶⁸ The wording of the provision appears to contemplate the parallel possibility that the Detaining Power might be the weaker Power in the negotiations, rather than the Power of Origin. As a practical matter, this is inconceivable. When "military events" go against a Detaining Power, or its territory is occupied by the enemy, it ceases to be a Detaining Power. See, e.g., Article XIX of the 1940 *Franco-German Armistice Agreement*.

tence of the first paragraph of Article 6.⁶⁹ However, the draftsmen of the Convention should certainly not be criticized for employing what might be characterized as an excess of caution for the protection of prisoners of war. They were unquestionably motivated by the events of World War II and an understandable desire to leave no doubt that there was a specific prohibition of such conduct in any future international armed conflict.⁷⁰

c. PERSONNEL OF THE PROTECTING POWER

Article 8 of the Convention provides in part 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 Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

It is obvious that the Convention has accorded to a Protecting Power three sources of personnel for the performance of its functions as such Protecting Power: its diplomatic and consular officers stationed within the territory of the Detaining Power;⁷¹ others of its nationals specifically appointed for the purpose; and nationals of other neutral Powers specifically appointed for the purpose.

The normal and natural source of personnel for the execution of the functions of a Protecting Power is, of course, the diplomatic and consular personnel of the Protecting Power 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 officials of the Detaining Power, and, perhaps most important, they are already present within the area in which the Protecting Power is to operate. It is, of course, true that they already have their

⁶⁹ It is difficult to understand why Article 10 is included in the list of articles in the first paragraph of Article 6 as one of the articles of the Convention expressly providing for special agreements, inasmuch as the prohibition mentioned in the text is the only reference in the Article to such agreements.

⁷⁰ After France and Belgium had capitulated in 1940, and were substantially (France) or completely (Belgium) occupied, Germany refused to continue to recognize a Protecting Power for either of them and required the "governments" of the two countries to act on behalf of the prisoners of war whom Germany continued to hold. 2B *Final Record* 112. The French "Scapini Mission" and the Belgian "T'Serclaes Mission" rarely succeeded in obtaining a solution favorable to the prisoners of war of any problem that arose; and frequently they acted as agents to fulfill German demands which violated the provisions of the 1929 Convention, rather than as "substitutes" for the Protecting Powers.

⁷¹ Neither the 1929 Convention nor the Stockholm Draft that served as the working document at the 1949 Diplomatic Conference included the term "consular" in specifying the authorized representatives of a Protecting Power. The authorization for the use of this category of personnel by Protecting Powers was proposed by Australia during the Conference and was unanimously approved. 2B *Final Record* 58.

usual functions to perform; but many of these functions disappear or are seriously curtailed upon the advent of war (commercial, immigration, tourists and tourism, etc.). While any large-scale armed conflict of lengthy duration will undoubtedly make it necessary for Protecting Powers to supplement their 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 necessary a buildup of the personnel performing the functions of the Protecting Power. 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 that Switzerland had during World War II, it would obviously have been impossible for it to have made even a pretense of performing its farflung responsibilities as a Protecting Power without a considerable increase in its staffs in the territories of the many Detaining Powers where it had agreed to serve as a Protecting Power. To meet its personnel requirements in this respect, the Swiss Government recruited locally and in Switzerland and then sent to its various affected embassies and legations "camp inspectors," who had the assigned duty of visiting prisoner-of-war camps and labor detachments 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 Protecting Power personnel, the use of which is authorized by the first paragraph of Article 8 of the 1949 Convention—the noncareer national who is selected by the government of the Protecting Power solely for the purpose of assisting it to perform the functions of that office.⁷² These individuals may also be nationals of another neutral Power, the third source of Protecting Power personnel authorized, but normally the Protecting Power would resort to this type of selection only after it had exhausted its own manpower potential. Of course, a major source of noncareer 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

⁷² The Convention appears to use the term "representative" for the diplomatic and consular personnel of the Protecting Power and "delegate" for the noncareer personnel, whether nationals of the Protecting Power or of another neutral State. Throughout this study the term "representative" has been used to include all individuals performing duties for the Protecting Power *qua* Protecting Power, without regard to their prior status. (The word "delegate" is used with respect to the ICRC personnel. This latter is in accordance with the Convention practice.)

necessary. The Protecting Power may find it more convenient, when it has exhausted the manpower pool of its own nationals residing within the territory of the Detaining Power as a source, to use nationals of other neutral Powers residing within the territory of the Detaining Power before resorting to the policy of recruiting its own nationals in its own territory and sending them to the territory of the Detaining Power.⁷³

It will have been noted that these noncareer, or auxiliary, persons, selected to assist in the performance by the Protecting Power of its functions under the Convention, are subject to the approval of the Detaining Power. This provision was the occasion for considerable discussion at the 1949 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 government of the Power 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 Power. There is certainly no reason why the individuals who will serve as supernumeraries to the Embassy of the Protecting Power in the territory of the Detaining Power for the purposes of the Convention should be subject to fewer restrictions than the career personnel of the Embassy and the consular corps who will actually be the first to perform the functions of a Protecting Power for their country.⁷⁴

⁷³ The problem of the availability of competent personnel to serve as supernumeraries has been a matter of concern for a considerable period of time and to many organizations. See, e.g., Resolution XXII of the XXth International Conference of the Red Cross, held in Vienna in 1965, reproduced in 1971 GE Documentation, II, at 020; Articles 2-5 of the *Regulations Drafted by the Commission Médico-Juridique de Monaco* in 1971, reproduced in U.N., *Human Rights*, A/8370, at 80-81 (English) and in 1972 *I.L.A. Rep.* 307 (French); 1971 GE Report 108, & 114; 1972 *Basic Texts* 7; and Article 6 of the 1973 Draft Additional Protocol. (This latter, with some editing has become Article 6 of the 1977 Protocol I.) Thus, Europeans without training or experience are likely to cause problems if given duty in an area with a completely unfamiliar climate and culture. A camp inspector who reports that the prisoners of war are not getting enough meat, when they are receiving their national diet of fish and rice, is not being very helpful; nor is the inspector who criticizes the Detaining Power for not providing mattresses when it has furnished the prisoners of war with the pallets on which they are accustomed to sleep.

⁷⁴ Siordet, Scrutiny 27. A provision of the Stockholm Draft that served as the working document at the 1949 Diplomatic Conference would have required a Detaining Power to give "serious grounds" for any refusal to approve the nomination of a noncareer individual by a Protecting Power. Revised Draft Conventions 54; 1 *Final Record* 75. This proposal was completely lacking in logic. A State need give no reason for refusing to agree to the assignment to a post in its territory of a member of the diplomatic or consular service of a Protecting Power, or for declaring such an individual *persona non grata*. Why, then, should it be required

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 to perform its functions properly. 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, or even declare *persona non grata* a number of the persons in these categories already serving within its territory. Any of these acts would constitute a violation of the spirit, and probably of the letter, of the Convention. Moreover, the Protecting Power, a friendly neutral Power, might well consider any such action by the Detaining Power as an unfriendly act.

Requiring the Detaining Power's approval of the individual supernumeraries is also logical from another standpoint. The individuals concerned will, in the performance of their duties, be required to do considerable traveling in a country at war. Any country at war will have instituted 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 fulfilling its obligations 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.⁷⁵ 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 United States Secretary of State Bryan in 1914, that they are "representatives of a neutral power whose attitude toward the parties to the conflict is one of impartial amity."⁷⁶

d. FUNCTIONS OF THE PROTECTING POWER

With only a very few exceptions, the draftsmen of the 1949 Convention apparently thought it best to avoid any attempt to specify in detail the functions of a Protecting Power or even to include functions in the form of specific powers granted to a Protecting Power. Most frequently the functions are expressed either in the form of duties of

to do so with respect to noncareer supernumeraries? The provision of the Stockholm Draft was deleted at Geneva. 2B *Final Record* 58, 110.

⁷⁵ de LaPradelle, *Le contrôle* 344. See also note 27 *supra*.

⁷⁶ See note 11 *supra*. See also Franklin, *Protection* 114.

the Detaining Power or of rights of the prisoners of war. Where a precedent had previously been established, it is usually set forth in appropriate detail. Where no precedent had previously been established, the problem is frequently 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 by the first paragraph of Article 8, that of surveillance to ensure that there is, at all times, full compliance with the provisions of the Convention; reinforced by the provisions of the second paragraph of Article 8, which require the belligerents to facilitate "to the greatest extent possible" the work of the Protecting Powers. Should a Protecting Power ascertain that there is a default in the performance by the Detaining Power with respect to a particular provision, it is probably assumed that it will advise the Detaining Power thereof, and find some means of procuring a correction of the situation, even though the procedure by which it is to accomplish this is not specified.⁷⁷

Nevertheless, the Convention does contain repeated references to the institution of the Protecting Power and a function may usually be implied in a particular instance merely from such reference. It is indeed difficult 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 partially successful efforts have been made to list these references on a functional basis.⁷⁸ This discussion will consider them under three very general categories: (1) powers and duties; (2) liaison functions; and (3) miscellaneous functions.

(1) *Powers and Duties*

The basic and overriding power granted to a Protecting Power by the 1949 Convention is, of course, that contained in the first paragraph of Article 8, the very first sentence of which, as we have seen, 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."⁷⁹ Strangely enough, the

⁷⁷ At the 1949 Diplomatic Conference the representative of New Zealand, Quentin-Baxter, made the following statement: "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 unscrupulous 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." 2B *Final Record* 344.

⁷⁸ Thus, Heckenroth, *Puissances protectrices* 135 and Janner, *Puissance protectrice* 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 (reproducing a list that had originally appeared in Siordet, *Scrutiny* 73-75).

⁷⁹ See p. 262 *supra*.

only extended debate on this extremely crucial article that took place at the 1949 Diplomatic Conference concerned the selection of the proper word to characterize the activities of the Protecting Power, and that debate, it developed, occurred primarily as a result of difficulties of translation. The delegates at the Conference were agreed that the Protecting Power could not give orders or directives to the Detaining Power. The idea desired to be conveyed 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.⁸⁰ In the text of the Stockholm Draft, the working draft used at the 1949 Diplomatic Conference, the words "under the supervision of the Protecting Powers" 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 whose mother tongue was English. 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, and unanimous agreement was ultimately reached on the word "scrutiny."⁸¹

The importance of the first paragraph 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 uniformly 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 reason for the prohibition of correspondence, even though Article 76, dealing with this subject, contains no mention of the Protecting Power; and, again, it might seek a report as to the action taken with respect to a complaint made by a prisoner of war or a prisoners' representative,

⁸⁰ 2B *Final Record* 110.

⁸¹ *Ibid.* For some of the many English words proposed, see *ibid.*, 19-20 & 57-58. See also Siordet, *Scrutiny* 24-25.

through the Protecting Power, regarding the conditions of captivity, even though the second and fourth paragraphs of Article 78, which provide for such complaints, do not specifically provide for such reports.

The first two paragraphs of Article 126 empower 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 of war are confined; to go to the place of departure, passage, and arrival of prisoners of war who are being transferred;⁸² and to interview prisoners of war and prisoners' representatives without witnesses.⁸³ The background of these provisions warrants discussion.

As we have seen, the difficulties encountered by Protecting Powers early in World War I gradually disappeared and, before its conclusion, the Protecting Powers were generally enabled by the Detaining Powers to visit and inspect prisoner-of-war camps.⁸⁴ Thereafter, the second paragraph of Article 86 of the 1929 Convention authorized the Protecting Power to visit any place, "without exception," where prisoners of war were interned.⁸⁵ Despite the clear import of this provision, early in 1940 problems were again encountered in this area.⁸⁶ However, apart from Japan, and, to some extent, Germany, the Detaining Powers and the Protecting Powers of World War II were largely able to resolve these difficulties in due course. Unfortunately, even though the problem which had arisen with regard to visits to prisoner-of-war camps in occupied territories was well known, the draftsmen of the 1949 Convention took no clear-cut action to ensure against its recurrence. True, the first paragraph of Article 126 authorizes the representatives of the Protecting Power "to go to all places where prisoners of war may be, particularly to places of internment,

⁸² See pp. 187-194 *supra*.

⁸³ See p. 283 *infra*.

⁸⁴ See note 13 *supra*. See also Charpentier, *La Convention de Genève* 38-39.

⁸⁵ Two widely disparate authors have termed this the most important activity of the Protecting Power (Janner, *Puissance protectrice* 52) and one of the most important safeguards for prisoners of war (Mason, *Prisoners of War* 41).

⁸⁶ 6 Hackworth, *Digest* at 285. In particular, difficulties continued to be encountered with respect to visits to prisoner-of-war installations located in occupied territories despite the "without exception" clause in the 1929 Convention. *Ibid.*; *I.M.T.F.E.* 1129. (Article XI of the 1917 *Anglo-Turkish Agreement* had specifically excluded prisoner-of-war camps located in occupied territory from those which the representatives of the Protecting Powers would be permitted to visit. It may be assumed that this was one of the reasons for the "without exception" provision in the subsequently drafted 1929 Convention.)

imprisonment and labour";⁸⁷ and the second paragraph thereof states that such representatives "shall have full liberty to select the places they wish to visit"; and it was without any doubt the intent of the 1949 Diplomatic Conference that these broad provisions should include prisoner-of-war installations located in occupied territories. However, any possibility of a dispute with regard to the interpretation of the quoted provisions could have been completely eliminated by merely adding the phrase "including those located in occupied territories" wherever appropriate. This was particularly desirable because the omission of the words "without exception" could arguably be construed as an intent to make the visitation privilege granted by the first two paragraphs of Article 126 less all-inclusive than it had been under the second paragraph of Article 86 of the 1929 Convention.

During World War II a number of Detaining Powers required that the Protecting Powers provide them in advance with a schedule of proposed visits to prisoner-of-war installations. This was sometimes justified by the provision of the third paragraph of Article 86 of the 1929 Convention, which stated that "[t]he military authorities shall be informed of their visits." During World War I it had frequently been found that this type of requirement rendered the inspection comparatively ineffective;⁸⁸ and events of World War II disclosed the same deficiency.⁸⁹ The quoted provision of Article 86 of the 1929 Convention was omitted from Article 126 of the 1949 Convention, which may be considered to be the successor article. However, there is no specific rejection of the requirement, and it is unlikely that Detaining Powers will discontinue the practice of requiring advance notice of visits of inspection by representatives of the Protecting Power.⁹⁰

The procedure followed by the representatives of the Protecting Powers in conducting an inspection of a prisoner-of-war installation is not prescribed in detail⁹¹ and will largely be determined by the

⁸⁷ The right of visitation granted by the first paragraph of Article 126 is iterated in Articles 56 as to labor detachments; 98 as to prisoners of war undergoing disciplinary punishment; and 108 as to prisoners of war undergoing judicial punishment.

⁸⁸ United Kingdom, Foreign Office, *The Treatment of Prisoners of War in England and Germany during the First Eight Months of the War* 8 (1915); Charpentier, *La Convention de Genève* 39 & 43.

⁸⁹ Maughan, *Tobruk* 763; Mason, *Prisoners of War* 42. The ICRC delegates labored under the same handicap. 1 ICRC Report 230 & 244.

⁹⁰ United States Military Assistance Command, Vietnam (MACV), Directive 190-6, 22 September 1970, Military Police; ICRC Inspection of Detainee/Prisoner of War Facilities, para. 6a, specified the action to be taken "[u]pon receipt of proposed itinerary of the ICRC delegation." In recommending the deletion of the provision requiring notice to the military authorities prior to a visit to a prisoner-of-war installation, the ICRC itself indicated that the procedure should be "settled by practice." *Draft Revised Conventions* 133.

⁹¹ It may be noted that during World War II some Detaining Powers limited the number of visits which could be made to a prisoner-of-war installation by the

inspector himself, usually based upon specific instructions received from his government, the Protecting Power.⁹² While the inspector will normally wish to visit every part of the installation (quarters, kitchens, mess halls, washrooms, toilets, showers, laundries, medical facilities, recreational and sports facilities, prison, etc., etc.), a great deal of his most valuable information with respect to deficiencies on the part of the Detaining Power will usually come from the prisoners' representatives and from the prisoners of war themselves. The second paragraph of Article 86 of the 1929 Convention permitted him to interview these individuals and provided that such interviews would be "as a general rule without witnesses." Such a provision was, of course, an invitation for the Detaining Power to make every case the one which does not fall within the general rule.⁹³ This escape clause was properly omitted when the first paragraph of Article 126 of the 1949 Convention was drafted, the words "as a general rule" being dropped so that the interview is now to be "without witnesses" in all cases.⁹⁴

Two practices have evolved with regard to the results of the inspections: first, the representative of the Protecting Power who makes

representatives of the Detaining Power. Article 126 now provides in its second paragraph that "the duration and frequency of these visits shall not be restricted."

⁹²The checklist used by the United States as a Protecting Power in the early period of World War II may be found in Franklin, *Protection* 224-25. Concerning the checklist used by Switzerland, containing 50 items, see *ibid.*, 224 n.83. One critic characterized the inspection visits as being "très courtes et très superficielles." Tchirkovitch, *Nouvelles conditions* 106. Prisoners of war whose places of internment were visited usually felt otherwise. See, e.g., *American Prisoners of War* 30 & 39. There is always the danger that a camp inspector raised in one culture will be unable to make a proper evaluation of the facilities of a prisoner-of-war camp that are established for (and, perhaps, by) individuals of a completely different culture. See, e.g., note 73 *supra*.

⁹³I.M.T.F.E. Prosecution Exhibit No. 1965 included a set of Japanese "Detailed Regulations for the Treatment of Prisoners of War," dated 21 April 1943. (This was probably a revision of an earlier set dated 31 March 1942. See *I.M.T.F.E.* 1107-08.) Article 13 of those Regulations provided that "a guard shall also be present at this interview." This provision was the subject of repeated, but unsuccessful, objections by the Swiss Minister, representing the Protecting Power. *I.M.T.F.E.* 1132.

⁹⁴Here we are fortunate in having some very clear legislative history. The Australian delegate at the 1949 Diplomatic Conference proposed the elimination of the words "without witnesses" from the then Article 115 and the Venezuelan delegate strongly opposed such action. 2A *Final Record* 303. The matter was referred to Committee II which, in its report, did not adopt the Australian proposal. *Ibid.*, 379. (In Franklin, *Protection* 227, the author states that during World War II it was standard practice for the representative of the Protecting Power to refuse to accept from, or to give to, a prisoner of war during the private interview any paper or object not previously passed by the camp authorities. The United States has indicated its expectation that this practice will continue. U.S. Army *Regs.* 633-50, para. 45c.)

the inspection will usually conclude his visit by discussing with the camp commander any objectionable practices which he has found to exist, thus seeking to eliminate them without the need for a formal report of the deficiency;⁹⁵ and, second, the Protecting Power's formal report is submitted to the Power of Origin only, not to the Detaining Power.⁹⁶ This latter practice probably evolved as a result of the desire of Protecting Powers to avoid being the recipient of recriminations from the Detaining Power because of an adverse report.⁹⁷ However, the result is that, apart from any information received informally by the camp commander directly from the representative of the Protecting Power making the inspection, the Detaining Power is not advised of the existence of violations of the Convention of which it may be completely unaware, and there is no opportunity for the Detaining Power to rectify the situation until it has attained the status of a formal protest by the Power of Origin.

The importance of visits by representatives of Protecting Powers to all places where prisoners of war may be detained was emphasized during the hostilities in Vietnam, where the ICRC was permitted to perform the humanitarian functions of the Protecting Power, including inspections of prisoner-of-war installations, in the Republic of Vietnam (South Vietnam), but not in the Democratic Republic of Vietnam (North Vietnam). The XXIst International Conference of the Red Cross, an international organization which includes as members almost every national Red Cross Society in the world, meeting in Istanbul in 1969, adopted a resolution calling upon "all Parties to allow the Protecting Power or the International Committee of the Red Cross free access to prisoners of war and to all places of their detention";⁹⁸ and the General Assembly of the United Nations adopted a resolution in 1970 calling upon "all parties to any armed conflict . . . to permit regular inspection, in accordance with the Convention, of all places of detention of prisoners of war by a protecting Power or humanitarian organization such as the International Committee of the Red Cross."⁹⁹ Even though these two calls were completely disregarded by the Democratic Republic of Vietnam, they take their place in history as indicative of a widely acknowledged recognition of the need for the Protecting Power to be permitted to perform the extremely important function allocated to it by the Convention—the visitation to, and inspection of, all prisoner-of-war installations.

⁹⁵ Franklin, *Protection* 226–27; Rich, *Brief History* 487.

⁹⁶ Janner, *Puissance protectrice* 53; Rich, *Brief History* 487. For the different ICRC practice, see p. 311 *infra*.

⁹⁷ Franklin, *Protection* 225.

⁹⁸ Resolution XI, XXIst International Conference of the Red Cross, 9 *I.R.R.C.* 614 (1969).

⁹⁹ G.A. Res. 2676, 25 U.N. GAOR Supp. 28, at 77, U.N. Doc. A/8028 (1970).

The second paragraph of Article 78 grants to prisoners of war the right, which may not be restricted by the Detaining Power, to make complaints to the Protecting Power "regarding their conditions of captivity"—which, of course, means that they may complain to the Protecting Power regarding alleged failures of the Detaining Power to comply with the provisions of the Convention.¹⁰⁰ These complaints may be made and submitted through the prisoners' representative, or, if the prisoner of war so desires, directly to the representatives of the Protecting Power.¹⁰¹ The third paragraph of Article 78 provides that if a complaint is made in writing it must be transmitted immediately and it may not be counted against the complaining prisoner of war's correspondence quota;¹⁰² and, even if it is found to be without any foundation, such a complaint may not be the basis for the punishment of the prisoner of war by the Detaining Power.¹⁰³

Other powers and duties of the Protecting Power are indeed varied. For example, the first paragraph of Article 11 directs it to lend its good offices to assist in settling disputes with respect to the application and interpretation of the Convention;¹⁰⁴ the second paragraph of Article 65 authorizes it to inspect the financial records of individual prisoners of war;¹⁰⁵ the first paragraph of Article 71 empowers it, in the overall interests of the prisoners of war, to permit the Detaining Power to reduce below the specified minimum the number of items of correspondence which may be dispatched each month by each prisoner of war;¹⁰⁶ the third paragraph of Article 72 permits

¹⁰⁰ This practice originated in the bilateral agreements negotiated during the course of World War I. See, e.g., Article LIV of the 1918 *Anglo-German Agreement* and Article 118 of the 1918 *United States-German Agreement*. It was thereafter included in the second paragraph of Article 42 of the 1929 Convention.

¹⁰¹ During World War II some Detaining Powers required that the complaint be in writing and be submitted through channels (e.g., *German Regulations*, No. 20, para. 226); while others permitted it to be made orally and directly to the representative of the Protecting Power while he was visiting and inspecting a prisoner-of-war installation. *POW Circular No. 1*, para. 165.

¹⁰² See note II-179 *supra*.

¹⁰³ Article 120 of the 1918 *United States-German Agreement* made an unfounded complaint a basis for punishment if it contained "intentionally insulting statements or intentionally false accusations." This would provide too much latitude to the Detaining Power and would have a chilling effect on the exercise by prisoners of war of their right to complain. Article LIV of the 1918 *Anglo-German Agreement* merely permitted the Detaining Power to withhold complaints "which are intentionally false or are written in insulting language." During World War II, on at least one occasion, the Japanese tortured a prisoner of war for daring to complain to the representative of the Protecting Power and prevented him from seeing the representative on the latter's next visit to the prisoner-of-war camp. *I.M.T.F.E.* 1132-33.

¹⁰⁴ See p. 81 *supra*.

¹⁰⁵ See note II-470 *supra*.

¹⁰⁶ See p. 147 *supra*.

it, once again in the overall interests of the prisoners of war, to propose a limit on the number of packages which each prisoner of war may receive;¹⁰⁷ the first paragraph of Article 75 allows it to take over the transport of capture cards, correspondence, packages, and legal documents should military operations prevent the Detaining Power from fulfilling its obligations in this respect;¹⁰⁸ the first paragraph of Article 96 gives it the right to inspect the records of disciplinary punishment;¹⁰⁹ and the second and fifth paragraphs of Article 105 establish its duty to find counsel for a prisoner of war against whom judicial proceedings have been instituted, and its right to attend the trial.¹¹⁰

(2) *Liaison Functions*

In its liaison capacity the Protecting Power is actually little more than a conduit—but a very important one. It serves as the means of relaying necessary communications between the Detaining Power and the Power of Origin. Not infrequently, it will be 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 a protecting Power may improvise and undertake liaison missions which are not among those enumerated in the Convention.

Article 23, paragraph three, requires the Detaining Power to give to the Protecting Power for relay to the Power of Origin information concerning the geographical location of all prisoner-of-war camps so that the prisoners of war will not, as has happened, accidentally become the target of their own compatriots.¹¹¹ The fourth paragraph of Article 60 provides that the reasons for any limitation placed by the Detaining Power on the amount of funds made available to prisoners of war from advances of pay must be conveyed to the Protecting Power, presumably for transmittal to the Power of Origin.¹¹² The first paragraph of Article 62 obligates the Detaining Power to advise the Protecting Power, for relay to the Power of Origin, of the rate of daily working pay which it has fixed.¹¹³ Transmittals of funds by prisoners of war to recipients in their own country are, pursuant to the third paragraph of Article 63, made by notification from the Detaining Power to the Power of Origin through the medium of the Pro-

¹⁰⁷ See p. 161 *supra*. (The article fails to indicate to whom the proposal is to be made.)

¹⁰⁸ See p. 162 *supra*.

¹⁰⁹ See p. 325 *infra*.

¹¹⁰ See pp. 334, & 336–337 *infra*.

¹¹¹ See p. 123 *supra*.

¹¹² See p. 200 *supra*.

¹¹³ See p. 202 *supra*.

protecting Power.¹¹⁴ Notifications with respect to the status of the financial accounts of prisoners of war (Article 65, last paragraph)¹¹⁵ and of prisoners of war whose captivity has terminated, through escape, death, or any other means (Article 66, first paragraph)¹¹⁶ are also sent by the Detaining Power to the Power of Origin through the medium of the Protecting Power. The first paragraph of Article 68 provides that claims of prisoners of war for injury or disease arising out of assigned work are similarly transmitted.¹¹⁷ Article 69 requires that information with respect to the measures taken by the Detaining Power to enable prisoners of war to communicate with the exterior must be transmitted to the Power of Origin through the Protecting Power.¹¹⁸ The first paragraph of Article 100 states that the Protecting Power must be informed, presumably for relay of the information to the Power of Origin, as well as for its own use, of all offenses punishable by death under the laws of the Detaining Power.¹¹⁹ And Article 128 provides that during the course of the hostilities each belligerent will furnish to the other, through the Protecting Power, an official translation of the Convention (this assumes that the Party's language is other than English, French, Russian, or Spanish, in which languages there are, pursuant to Article 133, universal translations) and of all laws and regulations adopted to ensure the application thereof.

In several instances the Convention provides for the exchange of information between the belligerents without specifying how this exchange is to be accomplished. Unquestionably, these are areas in which, as stated above, the Protecting Power would feel qualified to intervene, even though it has no specific mandate. For example, the last paragraph of Article 21 provides for an exchange of information between belligerents as to their respective laws and regulations on the subject of parole;¹²⁰ the first paragraph of Article 43 provides for an exchange of information with respect to military titles and ranks;¹²¹ and the second paragraph of Article 43 requires the De-

¹¹⁴ See p. 208 *supra*.

¹¹⁵ See pp. 209-210 *supra*.

¹¹⁶ See p. 211 *supra*.

¹¹⁷ See p. 251 *supra*.

¹¹⁸ See p. 153 *supra*.

¹¹⁹ See p. 339 *infra*. This presumption is buttressed by the fact of the requirement of the second paragraph of Article 100 that other offenses may not thereafter be made punishable by death without the concurrence of the Power of Origin.

¹²⁰ See p. 400 *infra*.

¹²¹ See p. 168 *supra*. Subparagraph (b) of Article 33, the comparable provision with respect to medical personnel, provides that the belligerents "shall agree at the outbreak of hostilities on the subject of the corresponding ranks of the medical personnel." To reach such an agreement the belligerents would assuredly avail themselves of the services of their Protecting Powers.

taining Power to recognize the promotions of prisoners of war of which it has been notified by the Power of Origin:¹²² but none of these provisions states how the information is to be exchanged or conveyed. The Protecting Powers are available and competent to perform this liaison function; and it may be assumed that either the belligerents will request their services for this purposes or the Protecting Powers will 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, the second and third paragraphs of Article 12 provide that if a Detaining Power, to whom prisoners of war have been transferred by another Detaining Power, fails to carry out the provisions of the Convention with respect to those transferred prisoners of war, the transferor 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 of war concerned.¹²³ And the first paragraph of Article 58 indicates, without specifically so providing, that at some point 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.¹²⁴

The last paragraph of Article 60 directs the Detaining Power to provide to the Protecting Power "without delay" the reasons for any limitations imposed on the amount available to prisoners of war from their advances in pay; the last paragraph of Article 78 provides that the prisoners' representative may send periodic reports to the Protecting Power concerning the conditions of captivity and the special needs of the prisoners of war;¹²⁵ the fourth paragraph of Article 79 requires the Detaining Power to inform the Protecting Power of its reason therefor when it refuses to approve a duly elected prisoners' representative;¹²⁶ and the last paragraph of Article 81 requires the

¹²² See p. 169 *supra*.

¹²³ See pp. 105-106 *supra*.

¹²⁴ See p. 196 *supra*.

¹²⁵ See pp. 301-302 *infra*. Presumably, matters falling within the first area would be a basis for investigation upon the next visit of representatives of the Protecting Power to the particular prisoner-of-war camp; and matters falling within the second area would be passed on to the Power of Origin or to representatives of humanitarian or relief organizations operating in the territory of the Detaining Power.

¹²⁶ See p. 297 *infra*.

Detaining Power to inform the Protecting Power of its reasons for dismissing a prisoners' representative.¹²⁷ In none of these articles is there any indication of the action which 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, be passed to the Power of Origin, in many cases this action alone would have little or no significance. However, under its general right to scrutinize the application of the Convention, the Protecting Power would undoubtedly, in appropriate cases, take issue with the Detaining Power's action.

Further, the first two paragraphs of Article 121 provide that the Detaining Power shall investigate and make a full report to the Protecting Power with respect to 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 the last paragraph of Article 121 provides that if guilt is indicated, the Detaining Power shall prosecute the responsible persons. Certainly, it is expected that the Protecting Power would forward a copy of 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.¹²⁸

It is believed that the foregoing short presentation of only a few of the provisions contained in the 1949 Convention clearly discloses that a Protecting Power has certain miscellaneous functions, both specified and unspecified, which can probably become whatever a particular Protecting Power desires them to be.

(4) *Limitations on the Activities of Protecting Powers*

The last paragraph of Article 8 imposes two specific limitations on the activities of the representatives of the Protecting Power: first, they may not exceed their mission; and, second, in performing their mission they must "take account of the imperative necessities of security" of the Detaining Power.¹²⁹ Certainly, it should not even be

¹²⁷ See p. 299 *infra*.

¹²⁸ Pictet, *Commentary* 571. This was apparently the reaction of the ICRC, when performing the humanitarian functions of the Protecting Power in India in 1972, to episodes involving the killing of a number of Pakistani prisoners of war by Indian guards. *Washington Post*, 23 December 1972, at A-16, col. 1.

¹²⁹ The Soviet Union had proposed a provision restricting the activities of the representatives of the Protecting Power with respect to "sovereignty," "security," and "military requirements." 2B *Final Record* 59. The French representative at the 1949 Diplomatic Conference then made a substitute proposal which included not only the two limitations mentioned but also a proposed third sentence of the last paragraph of Article 8 discussed in the text. The Soviet proposal was rejected and the French proposal was adopted. *Ibid.*, 74 & 110-11.

necessary to admonish a representative of the Protecting Power that he should not go beyond his mission. (If he does so, or attempts to do so, he will very quickly find himself *persona non grata*, not only to the Detaining Power but also to his own State, the Protecting Power.) There can therefore be no objection to this provision which is, at worst, surplusage.

If we could be certain of the meaning of the directive to "take account of the imperative necessities of security" of the Detaining Power, we would be better able to judge the need for its inclusion in the Article. What are some of the "imperative necessities of security" of the Detaining Power? As we shall see in a moment, they are not "imperative *military* necessities." In any event, inasmuch as the representatives of the Protecting Power are the ones called upon to make the ultimate decision, and not the Detaining Power, any attempt by the latter to restrict the activities of the representatives of the Protecting Power on the basis of "imperative necessities of security" when, in the considered opinion of such representatives there is no valid ground for such a restriction, would undoubtedly constitute a flagrant violation of the provisions of the Convention and would result in a protest by the Protecting Power and, probably, by the Power of Origin.¹³⁰

As originally approved, the last paragraph of Article 8 had a third sentence which did permit the Detaining Power to restrict the activities of the representatives of the Protecting Power "as an exceptional and temporary measure when this is rendered necessary by imperative military necessities."¹³¹ At that time an article identical to Article 8 was contained in the drafts of each of the four conventions then under consideration at the 1949 Diplomatic Conference.¹³² When the matter eventually came before the Plenary Meeting, it was proposed that the limitation quoted immediately above be retained in the First and Second Conventions but that it be deleted from the Third and Fourth Conventions. 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.¹³³ While on its face the decision reached by the Diplomatic

¹³⁰ Of course, if the representative of the Protecting Power decides that there are no "imperative necessities of security" to be taken into account and the Detaining Power disagrees, the representative of the Protecting Power may shortly find himself *persona non grata*; but this will not affect his decision.

¹³¹ See note 129 *supra*.

¹³² It was the so-called Common Article 6/7/7/7. In the final drafts of the four conventions it became Common Article 8/8/8/9.

¹³³ The proponents of the making 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," but

Conference to adopt the proposal was plainly a victory for those who sought to exclude to the maximum extent 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.¹³⁴

The second paragraph of Article 126, authorizing the representatives of the Protecting Power to select the prisoner-of-war installations which they desire to visit, continues to include in its provisions a restriction similar to the one that was stricken from the last paragraph of Article 8. It provides that such visits "may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure."¹³⁵ Assuming that the Detaining Power desires to impose such "exceptional and temporary" restrictions on the visits of representatives of the Protecting Power to certain prisoner-of-war installations, or the even more extensive restrictions on the activities generally of the Protecting Power which are 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 necessity" does, in fact, exist? There is one school of thought which has advanced 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.¹³⁶ While there is much to be said in favor of this position from a strictly humanitarian point of view, it cannot, as a practical matter, be justified. If, for example, the Detaining Power deems it essential to keep

that as to the Prisoner-of-War and Civilians Convention "the vital force which animates those rules and gives them effect is the presence of the Protecting Power." 2B *Final Record* 344.

¹³⁴ The pessimism which may be apparent in the text is occasioned by the fact that the Soviet Union took the position that, even without such a restrictive limitation in the Convention, it would exist in fact. *Ibid.*, 345. It is to be feared that this attitude presages an attitude by the Soviet Union, with respect to the activities of the Protecting Power, similar to that taken by Japan during World War II. See note 21 *supra*.

¹³⁵ The failure to strike this provision from the second paragraph of Article 126 when it was stricken from the last paragraph of Article 8 was not inadvertent. 2B *Final Record* 344-45. It is the sole area in which the 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 course of an actual attack.

¹³⁶ Pictet, *Commentary on the First Convention* 101. Even there it is admitted that "this is precisely what it [the Protecting Power] would, in such a case, be debarred from doing. It will only be possible to show after the event whether or not the restriction was justified." In Pictet, *Commentary* 611, published 8 years later, a much more realistic approach was taken.

representatives of the Protecting Power temporarily out of an area where prisoner-of-war installations are located, lest military movements 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 necessity actually existed and whether the restriction on visits to that area was really justified. This is unquestionably a matter which will adjust itself in the course of events and through reciprocal actions of the belligerents, inasmuch as time and experience will very quickly result in an informal mutual appreciation as to where the line is to be drawn.¹³⁷

3. Conclusions

The past century has seen tremendous advances made in the concept of the Protecting Power as an institution of international law both in the role which it is called upon to play and in the prestige which it enjoys and which contributes substantially in enabling it to perform the numerous functions which have now been assigned to it. It appears beyond dispute 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.¹³⁸

The accomplishments of the 1949 Diplomatic Conference with respect to the Protecting Power reveal clearly that the nations of the world were generally prepared to erect a solid basis for its activities. It was assigned a mission of close observation of the application of the provisions of the conventions drafted at that Conference, including the Prisoner-of-War Convention, 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 sizable expansion was made in its specified functions and, correlatively, in its power of authority; provision was made for substitutes for Protecting Powers in order to ensure that prisoners of war would at all times benefit from the presence and activities of a Protecting Power, thus correcting the situation which had arisen all too frequently during

¹³⁷ In Pictet, *Commentary* 611 the following remedial procedure is suggested: ". . . 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 event, 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."

¹³⁸ Heckenroth, *Puissances protectrices* 229 (transl. mine).

World War II; and the use of the institution of the Protecting Power was extended not only to the redrafted First and Second Conventions, but also to the completely new Fourth Convention. These few examples alone demonstrate the great distance that had been traversed since 1907 when the Hague Regulations of that year contained no reference whatsoever to the Protecting Power.

In many respects the provisions of the 1949 Convention relating to the Protecting Power, like its provisions in other areas, represent compromises. Positions reached solely in order to bring about agreement between the extremes of opposing viewpoints can rarely be considered perfect, and the present case is no exception. However, it is better to have imperfect solutions which are acceptable to the great majority of States than to have perfect solutions which are acceptable to, and will be complied with by, only a few States. The provisions of the 1949 Convention relating to the Protecting Power unquestionably represent a great step forward in the evolution of the international law of war and would undoubtedly be viewed with amazement by even the most humanitarian of those who drafted the first Red Cross Convention in 1864, or even by those who had acted on behalf of the Protecting Powers as recently as 1914, at the beginning of World War I.

The Protecting Power is now a generally accepted and firmly established institution of international law. It is the subject of international agreements to which most of the States of the world are parties. It has been called upon to function during critical periods in recent world history and it has performed its mission in a satisfactory manner. It is foreseeable that in any future major international armed conflict it will be called upon by the belligerents to perform not only the missions specifically assigned to it in the 1949 Convention, but also numerous new functions on behalf of States at war.

C. THE PRISONERS' REPRESENTATIVE

1. Historical

The protective agency with which we shall now concern ourselves has come into being and evolved during little more than the past century as an institution of international law functioning uniquely in the prisoner-of-war area. Today it is known as the "prisoners' representative" in English and as the "*homme de confiance*" ("man of confidence") or "*représentant des prisonniers de guerre*" ("prisoners' representative") in French; but it has had many other titles.¹³⁹

¹³⁹ It has been known as the "spokesman," "man of confidence," "camp leader," "agent," "prisoners' representative," etc. See Maughan, *Tobruk* 781. The draft convention approved at Stockholm used the term "spokesman." Revised Draft Conventions 80-81. As late as 8 July 1949 the delegates at the Diplomatic Conference

The origin of the institution which has become the prisoners' representative can be traced to the Franco-Prussian War (1870-71) when the Prisoner-of-War Agency which the still very youthful ICRC had just brought into being¹⁴⁰ recommended to the military authorities of the belligerents—and the latter agreed—that one prisoner of war be designated as a “man of confidence” in each prisoner-of-war camp to be responsible for the receipt and distribution of collective relief supplies.¹⁴¹ Despite the success of this innovation, the idea was not incorporated into either the 1899 or the 1907 Hague Regulations. However, it was widely adopted in the various World War I agreements,¹⁴² and the prisoners' representative became an accepted fact which was duly institutionalized in Articles 43 and 44 of the 1929 Convention. Moreover, the functions of the office had broadened considerably since its initiation in 1870, no longer being confined to relief activities. Thus, Article 43 provided that the prisoners' representative (therein termed the “agent”) should be entrusted “with representing them [the prisoners of war] directly with military authorities and protecting Powers” as well as “with the reception and distribution of collective shipments.”

Like any other wartime relationship, the prisoners' representative did not always operate as intended during World War II.¹⁴³ For example, some Detaining Powers disregarded the directive of the first paragraph of Article 43 that the prisoners of war should be allowed to “appoint” their own prisoners' representative (“agent”).¹⁴⁴ However, as far as the prisoners of war themselves were concerned, the prisoners' representative was a definite success;¹⁴⁵ and the real-

were still referring to the “spokesman” in their discussions. 2A *Final Record* 372-73, 380. The Draft Report of Committee II (Prisoners of War), distributed on 19 July 1949 (*ibid.*, 404), used the term “prisoners' representative” (*ibid.*, 570, 591-92), and that term thereafter remained in the Convention.

¹⁴⁰ 2 ICRC *Report* 5. See also note II-208 *supra*.

¹⁴¹ Preux, *Homme de confiance* 449; 1 ICRC *Report* 342-43.

¹⁴² Preux, *Homme de confiance* 450; 1 ICRC *Report* 343.

¹⁴³ The ICRC seems to have considered it improper that the transit camps in Great Britain did not have prisoners' representatives. *Ibid.* It is rather difficult to see how any Detaining Power could be expected to go through the formal procedure of having prisoners of war select prisoners' representatives in transit camps with their daily prisoner-of-war population shifts.

¹⁴⁴ American Prisoners of War 1; 1 ICRC *Report* 343.

¹⁴⁵ *Ibid.*, 345. One author has related an incident that occurred early during World War II when the general opinion among the prisoners of war was that the prisoners' representative was a rather useless office. As a result of an unsolved theft of German Government property, collective punishment consisting of loss of food for two days (a doubly prohibited penalty) was imposed on all of the prisoners of war at the camp where the theft had occurred, numbering some 20,000. The prisoners' representative complained to the camp commander and the collective punishment order was rescinded. “From that day we had a man who was our representative and in whom we placed our confidence.” Tedjini, *Témoignage* 632

ization of this was undoubtedly a strong motivating factor in the further institutionalizing of the prisoners' representative as well as the further extensive broadening of his functions which are to be found in the 1949 Convention.¹⁴⁶

2. Selection of the Prisoners' Representative

The first paragraph of Article 79, the introductory paragraph of the chapter of the 1949 Convention dealing with prisoners' representatives, is concerned with the manner of selecting these individuals, who are to represent the prisoners of war of their installation before the military authorities of the Detaining Power, the Protecting Power, the ICRC, and any other aid organization. They are to be "freely elected," the vote is to be by "secret ballot," an election is to be conducted every six months, or when a vacancy occurs, and the prisoners' representative is eligible for reelection. None of these provisions was to be found in the 1929 Convention. None of them would seem to present any serious problem of interpretation or application; but that problems can be created where none appears to exist has already been frequently demonstrated. Thus, the events in Korea demonstrated that when belligerents care little about the rule of law, or about what happens to their own personnel who have been captured, they can and will ruthlessly disregard any provisions of a humanitarian convention if they consider that their ultimate objective will be better served by such a procedure. The North Korean and Chinese prisoners' representatives in the prisoner-of-war camps maintained by the United Nations Command were interested in furthering the Communist political cause and not in ensuring the protection of their fellow prisoners of war.¹⁴⁷ And the selection of prisoners' representatives among the United Nations Command personnel in Communist prisoner-of-war camps, particularly those maintained by the Chinese, was a farce—but not a humorous one.¹⁴⁸ And while the practices in this regard in the prisoner-of-war camps maintained by the South Vietnamese was far from reaching the nadir of Communist practices, prisoners' representatives were frequently selected by the camp commander, rather than by the prisoners of war.¹⁴⁹

(transl. mine). This article by a former French prisoner of war, himself a long-time prisoners' representative, gives a valuable insight into life in a prisoner-of-war camp in general (the author was a prisoner of war from June 1940 to May 1945) and the activities of a prisoners' representative in particular.

¹⁴⁶ The prisoners' representative is mentioned in 18 different articles and in two Annexes of the Convention.

¹⁴⁷ Vetter, Mutiny 65; UNC., Communist War 5-6.

¹⁴⁸ U.K., *Treatment* 16-17; Miller, *The Law of War* 246. The activities of some of these "progressive" prisoners' representatives were undoubtedly one of the reasons for the drafting and promulgation of Article IV of the *Code of Conduct*.

¹⁴⁹ *Vietnam, Article-by-Article Review*, Article 78.

There are not a few Powers among the present community of nations who consider it to be "democratic" to present the voter with a ballot containing no alternatives—in this case, with a single candidate, probably handpicked by the camp commander. Can it then be said that the prisoners of war are being permitted to "freely elect" their prisoners' representative? What if the camp commander rejects any candidate for prisoners' representative whom he considers "unfit," refusing to permit the name of any candidate to appear on the ballot unless the individual concerned has previously demonstrated his willingness to "collaborate" with the camp authorities? Could the candidate who emerges successfully from this type of screening be "entrusted with representing" the prisoners of war in disputes with the camp authorities concerning the conditions of captivity? Is a ballot "secret" when the military authorities of the Detaining Power insist upon examining it before it is placed in the ballot box? All of these procedures were followed by the Chinese Communists in Korea.¹⁵⁰ And, unfortunately, there is no reason to believe that they will not be the manner in which prisoners' representatives will be selected in any future major international armed conflict involving like-minded nations as belligerents.

However, we must assume that the governments of the large majority of States that are Parties to the 1949 Convention are law-abiding and will apply the provisions of the Convention in good faith, and that practices such as those adopted by the Chinese Communists in Korea will be the exception rather than the rule. Based upon that assumption, any prisoner of war may be a candidate for election as the prisoners' representative at the installation in which he is confined; the prisoners of war of that installation will cast their secret ballots for the candidate of their choice; and the candidate receiving the greatest number of votes will be elected.¹⁵¹ At this point the Detaining Power may legally impose its will upon the election—but only negatively. Under the provisions of the fourth paragraph of Article 79 the successful candidate for prisoners' representative may not assume his functions in that capacity until he has been approved by the Detaining Power.¹⁵² If the Detaining Power refuses to approve him, it would appear, although it is not specifically so provided, that

¹⁵⁰ See note 148 *supra*.

¹⁵¹ If the prisoners' representative so elected is not the ranking individual in the prisoner-of-war camp, acceptance of his status by the other American servicemen in the camp might well be a violation of Article IV of the *Code of Conduct*. See the *Instructional Material* for this article of the Code.

¹⁵² It should be noted that this requirement of approval of the prisoners' representative by the Detaining Power applies only to one who is elected and that it therefore does not apply to the prisoners' representative who obtains his office by virtue of being the senior officer present. See text in connection with note 156 *infra*.

the prisoners of war would have no alternative but to continue to conduct elections until an individual acceptable to the Detaining Power has been elected. By this method a Detaining Power probably could, eventually, bring about the election of a collaborator just as successfully as it could by improperly controlling the names which appear on the ballot. That is, of course, basically the same problem which was encountered with respect to the provisions of the first paragraph of Article 8 that require Detaining-Power approval of the representatives of the Protecting Power.¹⁵³ There is one additional safeguard here against arbitrary action by the Detaining Power—if it refuses to approve and accept the elected prisoners' representative, it is required to advise the Protecting Power of the reason for such action.¹⁵⁴ However, the Protecting Power is apparently so advised for informational purposes only, as the Convention does not authorize it to take any action even if it considers the reason given by the Detaining Power to be totally without basis. Nevertheless, the need to advise the Protecting Power of its disapproval and of the reason therefor should constitute at least a small brake on completely arbitrary action by the Detaining Power and will, in some cases, undoubtedly inhibit repetitive arbitrary disapprovals of the individual chosen by his fellow prisoners of war to be their representative in dealing with the Detaining Power.

The election of a prisoners' representative just discussed refers to a prisoner-of-war installation in which no officers are confined. The second paragraph of Article 79 covers the other two possibilities: camps where there are only officers; and camps where there are both officers and enlisted men.¹⁵⁵ In either such case, the senior officer present is automatically the prisoners' representative.¹⁵⁶ If there are only officers in the camp, one or more "advisers" are to be "chosen" by the other officer prisoners of war; if it is a mixed camp, with

¹⁵³ See p. 278 *supra*.

¹⁵⁴ This resembles the procedure which was originally included in, but was deleted from, the first paragraph of Article 8. See note 74 *supra*.

¹⁵⁵ Retained medical personnel and chaplains are not prisoners of war (see pp. 71-72 *supra*) and are, therefore, not included under these provisions. Subparagraph (b) of Article 33 places upon the senior medical officer in a camp the duties with respect to retained medical personnel, officer and enlisted, that the prisoners' representative has with respect to prisoners of war. Chaplains act individually on behalf of themselves only. Like the senior medical officer, each has access to the camp commander. Pictet, *Commentary on the First Convention* 249-50; U.S. Army Regs. 633-50, para. 32e.

¹⁵⁶ Apparently some question arose as to whether this was so under the last paragraph of Article 43 of the 1929 Convention, as that Article used the term "intermediary" for the senior officer present, rather than the term "agent," used throughout that Convention to signify what we now call the prisoners' representative. Preux, *Homme de confiance* 457; 1 ICRC *Report*, 346; Rich. Brief History 398. The wording of the second paragraph of Article 79 clarifies the former am-

both officers and enlisted men, one or more "assistants" are to be "elected" by the latter.¹⁵⁷

There is one set of circumstances under which the senior officer present will not necessarily be the prisoners' representative. The third paragraph of Article 79 provides that officer prisoners of war of the same nationality as the enlisted prisoners of war constituting a labor detachment shall be assigned to such detachments to perform the necessary administrative duties and that these officers "may be elected as prisoners' representatives." In other words, even though the labor detachment will, to a certain extent, be a "mixed" camp, the senior officer detailed to it to perform the administrative details will not automatically be the prisoners' representative, but he will be eligible for election to that office.¹⁵⁸

The prisoner of war who is elected prisoners' representative or who occupies such office by virtue of his seniority of rank must, of course, be one who is interned in the prisoner-of-war installation in which he is to function as prisoners' representative. The last paragraph of Article 79 establishes certain other qualifications that must be met: he must always have "the same nationality, language and customs as the prisoners of war whom he represents." Inasmuch as the third paragraph of Article 22 provides that prisoners of war are to be assembled in camps or camp compounds according to the same three criteria,¹⁵⁹ this should cause no particular problems. Moreover, if prisoners of war with different nationalities, languages, and customs are confined in different compounds in the same prisoner-of-war

biguity. The senior officer present is specifically stated to be the prisoners' representative. One author sees a conflict of interest for this officer between the requirements of the Convention (to further the welfare of his fellow prisoners of war) and those of the Code of Conduct (to defeat the enemy). Smith, Code of Conduct 112. Such a situation would certainly seem to have the same reprehensible characteristics as those attributed to the Communist prisoners' representatives in the United Nations Command camps in Korea. See text in connection with note 147 *supra*.

¹⁵⁷ The functions of the "advisers" and the "assistants" are probably intended to be identical, the difference in terminology being a recognition of the military hierarchy. Preux, *Homme de confiance* 457. Preux also explains the use of the word "chosen" for the officers instead of the word "elected" used for the enlisted men as being the result of a desire to avoid imposing the formality of an election on the officers. *Ibid.*, 458. Presumably the officers would make their choice by some type of consensus.

¹⁵⁸ *Ibid.*, 459. If an officer is elected prisoners' representative, his assistants must be enlisted men.

¹⁵⁹ See p. 175 *supra*.

camp,¹⁶⁰ each compound is to have its own prisoners' representative, so that each such prisoners' representative will meet the stated qualifications.¹⁶¹

There are two methods by which a Detaining Power may rid itself of a prisoners' representative whom it finds to have gadfly characteristics—dismissal¹⁶² and transfer. Article 81 envisages the possibility that a Detaining Power may dismiss a prisoners' representative inasmuch as its last paragraph provides that in such an event the Protecting Power must be informed of the reasons therefor.¹⁶³ As is the case when the Detaining Power conveys to the Protecting Power the reason for its refusal to approve a prisoners' representative who has been elected, the Convention merely calls for the communication of the information and does not authorize the Protecting Power to pass on the merits of the action. Of course, the dismissal would mean that a vacancy existed and, under the first paragraph of Article 79, this would necessitate a new election.

The fifth paragraph of Article 81 foresees situations in which the prisoners' representative may be transferred away from the prisoner-of-war camp in which he is performing his functions. If he is so transferred, he ceases to occupy the position of prisoners' representative. This is obviously a simple way for the Detaining Power to

¹⁶⁰ The last paragraph of Article 79 refers to "different sections of the camp," while the third paragraph of Article 22 refers to "camp compounds." The latter is the technical term properly applied to the subdivisions of a prisoner-of-war camp. (It might also be noted that both the third paragraph of Article 22 and the first sentence of the last paragraph of Article 79 used the terminology "nationality, language and customs" (emphasis added), while the second sentence of the last paragraph of Article 79 substitutes an "or" for the "and" in both the English and the French versions of the Convention. Obviously, the use of the disjunctive in this instance was intentional.)

¹⁶¹ This practice had, apparently, been followed by at least some Detaining Powers during World War II. See, e.g., *German Regulations*, No. 22, para. 266. It would seem to eliminate the problem involving the United States Code of Conduct that might arise in a camp with prisoners of war from the United States armed forces if the senior officer in the camp were from the armed force of another Power of Origin. But see Manes, *Barbed Wire Command* 17.

¹⁶² Although the Convention is silent on the subject, it is not believed that the Detaining Power could dismiss an officer prisoners' representative of a prisoner-of-war camp, as he would continue to be the senior officer present and there is no provision for anyone other than the senior officer to be the prisoners' representative in a camp with either an all-officer or a mixed prisoner-of-war population.

¹⁶³ In the debriefing which occurred after the repatriation of prisoners of war at the end of World War II, a former prisoner of war from Stalag 2B (in Germany) stated that after he had served as the camp prisoners' representative for almost a year, the Germans refused to deal further with him as prisoners' representative when they discovered that he was Jewish. *American Prisoners of War* 55. It would appear that there is no provision of the 1949 Convention which would prohibit this from being given by a Detaining Power to a Protecting Power as the "reason" for the dismissal of a prisoners' representative.

rid itself of a prisoners' representative whom it considers "undesirable," as it need not even devise a reason to give to the Protecting Power. The only limitation on its right to take this action is the requirement that it must give the prisoners' representative sufficient advance notice of the proposed transfer to allow him a reasonable period of time in which to brief his successor with regard to current problems.

Reference has been made to the selection of officer advisers or enlisted assistants when the prisoners' representative is an officer. Apart from these, Article 81 provides in its second paragraph that the prisoners' representative may himself select such additional assistants as he may require. Although the Convention does not mention the Detaining Power in this regard, it may be assumed that the latter will have some veto power if it decides that the prisoners' representative is attempting to use too many prisoners of war as assistants, particularly because, as we shall see, the prisoner's representatives and all of his assistants are paid out of canteen funds or, if there are none available, then by the Detaining Power.¹⁶⁴

One aspect of the provisions dealing with the subject of the designation of prisoners' representatives is somewhat confusing. The second paragraph of Article 56 provides that labor detachments "shall remain under the control of and administratively part of a prisoner of war camp"; yet the third paragraph of Article 79 indicates that "labor camps"¹⁶⁵ are to have their own prisoners' representatives. It has been suggested that the prisoners' representative in the labor detachment represents the other prisoners of war of that detachment vis-à-vis the detachment commander, while the camp prisoners' representative represents them vis-à-vis the camp commander when a problem is not resolved at the lower level.¹⁶⁶ This is probably as good a solution as can be devised, even though the labor detachment prisoners' representative is not designated as an assistant to the camp prisoners' representative by the Convention. Moreover, such a system of hierarchical echelons would definitely not be applicable to the prisoners' representative of the various compounds containing prisoners of war of different nationality, language, and customs selected pursuant to the fifth paragraph of Article 79, each of whom would be of

¹⁶⁴ *But see* Preux, *Homme de confiance* 469-70. He believes that, while the Detaining Power may express its displeasure at the number of assistants designated by the prisoners' representative, the final decision is to be made by the latter.

¹⁶⁵ This is apparently just another instance of careless draftsmanship. There is no doubt that it refers to the "labor detachments" of Article 56.

¹⁶⁶ Preux, *Homme de confiance* 456. The fourth paragraph of Article 81 indirectly supports this interpretation as it provides that communications between the prisoners' representative in the labor detachment and the prisoners' representative of the principal prisoner-of-war camp are not to be included in the personal mail quotas established under the first paragraph of Article 71.

equal stature and equally entitled to direct access to the camp commander and to the representatives of the Protecting Powers.

3. Functions of the Prisoners' Representative

The prisoners' representative has three major functions and a myriad of less important ones. The major functions are (1) representing the prisoners of war before the military authorities, the Protecting Power, the ICRC, and other similar organizations [Article 79, first paragraph]; (2) furthering their physical, spiritual, and intellectual well-being [Article 80, first paragraph]; and (3) supervising their organization for mutual assistance and collective relief [Article 80, second paragraph].¹⁶⁷

The third paragraph of Article 81 authorizes a prisoners' representative to visit all premises where prisoners of war are detained. Obviously, this provision refers to premises constituting a part of the prisoner-of-war installation of which he is the prisoners' representative. Moreover, this same paragraph provides that all prisoners of war (of the particular installation) must be permitted to consult freely with the prisoners' representative;¹⁶⁸ and they are authorized, by the second paragraph of Article 78, to submit complaints concerning the conditions of their captivity to the prisoners' representative for transmittal to the Protecting Power. To reinforce this latter provision, the first paragraph of Article 126 requires that the Protecting Power be permitted to interview the prisoners' representative without witnesses; and the clear implication of the second paragraph of Article 126 is that this may be done as often as the Protecting Power desires. Of course, by this method the prisoners' representative will be in a position to present to the representative of the Protecting Power not only the complaints formally submitted to him for transmittal, but also those which he has received informally, as well as any that he desires to make himself, particularly as, in his capacity

¹⁶⁷ The first paragraph of Article 80 assigns to the prisoners' representative the broad function of furthering "the physical, spiritual and intellectual well-being of prisoners of war." Preux believes that the three major functions of the prisoners' representative are relief activities, relations between the prisoners of war and the military authorities, and supervision of the application of certain guaranties expressly provided by the Convention. *Ibid.*, 464. The present author would, for the most part, include the last function enumerated by Preux under the major function of representing the prisoners of war before the military authorities. U.S. DA Pam 27-161-2, at 84, has still a third list of the functions of the prisoners' representative.

¹⁶⁸ In an attempt to preclude a recurrence of one situation noted during World War II that left certain prisoners of war with virtually no channel of complaint concerning the conditions of their captivity, frequently very bad, the second paragraph of Article 57 specifically provides that prisoners of war employed by private individuals or concerns shall have the right to communicate with and to receive communications from the prisoners' representative of the prisoner-of-war camp to which they are administratively assigned. (See p. 246 *supra*.)

as prisoners' representative, he will usually be aware of all that is transpiring in the camp.¹⁶⁹ When the information that he has thus received and the inquiries that he has made indicate that the Detaining Power is not complying fully with the provisions of the Convention, the prisoners' representative may conclude that the particular violation is of a nature that can be corrected by bringing it to the attention of the camp commander; or he may decide that it is of a nature that requires that it be brought to the attention of the Protecting Power.¹⁷⁰ If he follows the former path, only to learn that the camp commander denies that the procedure objected to constitutes a violation of the Convention, or that he refuses to take any action (perhaps because the condition objected to has been specifically ordered by higher military authority of the Detaining Power), the prisoners' representative would clearly have no alternative but to pass the complaint on to the representative of the Protecting Power under the authority contained in the last paragraph of Article 78.

The second paragraph of Article 41 provides that all regulations, orders, notices, and publications issued by the Detaining Power and pertaining to prisoners of war must not only be posted in the prisoner-of-war camps in a language which the prisoners of war understand, but that copies must be furnished to the prisoners' representative. He is thus in a position to ensure that the contents of such documents are in accord with the Convention and that the prisoners of war are actually made aware thereof. Moreover, he then has a file of all such documents and will be in a position to intervene to ensure that prisoners of war are not punished for the violation of a rule which has not been properly promulgated by posting and delivery to the prisoners' representative, or where the violation occurred before the rule was properly so promulgated.

As we have seen, the first paragraph of Article 79 bestows upon the prisoners' representative the function of representing the prisoners of war "before the military authorities." There can be no question that the camp commander and his subordinates come within this terminology—but what of the higher military authorities of the Detaining Power, right up to the Ministry of Defense itself? One author considers it inconceivable that a camp prisoners' representative should communicate directly with the military authorities of the Detaining Power superior to the camp commander.¹⁷¹ There is

¹⁶⁹ During World War II the prisoners' representative is stated to have had the tasks of "forwarding of petitions and complaints, making of enquiries, and collecting of information." 1 ICRC *Report* 344.

¹⁷⁰ Of course, he should winnow out the complaints which are without basis, as the submission of groundless complaints merely detracts from the weight given to valid ones. *Ibid.*, 345.

¹⁷¹ Preux. *Homme de confiance* 456.

considerable merit to this view. However, the fourth paragraph of Article 81 provides that the prisoners' representative must be accorded facilities for "communication by post and telegraph with the detaining authorities."¹⁷² Surely, the draftsmen of the Convention did not believe that the prisoners' representative had a need for these facilities merely in order to communicate with the camp commander of his own prisoner-of-war camp. It would thus appear that the prisoners' representative has at least an implied right to communicate directly with any level of the military authorities of the Detaining Power;¹⁷³ but it would also appear that when he is unable to obtain satisfaction from the camp commander he would be well advised to channel his resort to higher authority through the Protecting Power, rather than to use the implicit right of direct communication.

During World War II the German military authorities ordered that, in general, all searches of prisoner-of-war quarters for security purposes should be accomplished in the presence of the prisoners' representative or his equivalent.¹⁷⁴ This appears to fall within the category of relations with the military authorities and is a logical function of the prisoners' representative. On the other hand, the United States issued an order making the prisoners' representative ("spokesman") responsible for the "maintenance and cleanliness of the quarters."¹⁷⁵ This does not appear to be the type of function which should be assigned to the prisoners' representative.¹⁷⁶

It is, perhaps, appropriate to mention at this point several of the provisions of the Convention that were included in order to protect the prisoners' representative and to facilitate his mission. Thus, the first paragraph of Article 81 provides that he is not to be required to perform any other work if to do so will make the accomplishment of his mission more difficult. Inasmuch as the functions of the prisoners' representative in most prisoner-of-war camps will be full time, not only for the prisoners' representative himself but also for his assistants, this position will normally mean that he should not be

¹⁷² In explaining this provision at the 1949 Diplomatic Conference, the representative of the ICRC referred to its provisions for communicating "with the Protecting Power and the various relief organizations," pointedly omitting any reference to the fact that the "detaining authorities" were also mentioned therein. 2A *Final Record* 289-90.

¹⁷³ U.S. Army Regs. 633-50, para. 32, provides that postal and telegraph facilities will be made available to the prisoners' representative for the purpose of communicating with, among others, "United States Army authorities." This certainly appears to refer to military authorities at a higher level than the camp commander.

¹⁷⁴ *German Regulations*, No. 44, para. 811.

¹⁷⁵ *POW Circular No. 1*, para. 44.

¹⁷⁶ It must be borne in mind that the prisoners' representative has no disciplinary powers, all such powers residing exclusively in the Detaining Power. See the third paragraph of Article 96. See also *German Regulations*, No. 32, para. 511; U.S. Army Regs. 633-50, para. 32k.

required to perform any other work.¹⁷⁷ The third paragraph of Article 80 provides that the prisoners' representative may not be held responsible *ex officio* for offenses committed by other prisoners of war. This is particularly relevant with respect to incidents such as the construction of a tunnel to be used for the purpose of escape. The military authorities of the Detaining Power will probably assume, and with some justification, that this could not have occurred unknown to the prisoners' representative—but whether he knew of it or not, he is not to be held responsible if he did not personally participate in it.¹⁷⁸

We have just seen that a prisoners' representative may appoint the assistants that he considers necessary and that he may visit all of the premises constituting a part of the prisoner-of-war installation of which he is the prisoners' representative. In order that he be physically able to exercise this right of visitation, the second paragraph of Article 81 requires the Detaining Power to grant him "a certain freedom of movement" so that he may visit labor detachments under his jurisdiction, as well as the points at which relief supplies are received, warehoused, issued, etc. The fourth paragraph of Article 81 not only instructs the Detaining Power to facilitate the prisoners' representative's efforts to communicate by post and telegraph with the military authorities, the Protecting Power, the ICRC, the Mixed Medical Commissions, and other aid organizations,¹⁷⁹ but also that such communications are not to be counted against the personal mail quotas established under the first paragraph of Article 71.¹⁸⁰

Finally, the third paragraph of Article 62 provides that the prisoners' representative, his advisers, and his assistants shall receive their working pay¹⁸¹ out of the canteen fund, with the prisoners' represen-

¹⁷⁷ In officers' camps and in mixed camps this will present no problem, as the senior officer present will be the prisoners' representative and officers may not be compelled to work. See p. 224 *supra*. If an officer is elected prisoners' representative of a labor detachment, he will probably be required to continue to work, both because his official duties should not be that onerous and because he was specifically assigned to the detachment to perform necessary administrative functions (for which he had, presumably, volunteered).

¹⁷⁸ This is another prohibition of vicarious punishment in a specific instance. For the general prohibition of collective punishment, see Article 87, third paragraph.

¹⁷⁹ Note the difference between the enumeration set forth here and that set forth in the first paragraph of Article 79. See p. 295 *supra*. Concerning the Mixed Medical Commissions, see pp. 411-412 *infra*.

¹⁸⁰ It is possible to interpret the provision concerning mail quotas as being applicable only to communications between the prisoners' representative of a labor detachment and the prisoners' representative of the principal prisoner-of-war installation. However, it is believed that the broader interpretation given in the text is not only more logical but that it is supported by the legislative history. See 2A *Final Record* 405.

¹⁸¹ Concerning "working pay," see pp. 201-205 *supra*.

tative himself setting the scale of such payments, subject to the approval of the camp commander. Should there be no canteen fund, then the Detaining Power is required to pay these individuals "a fair working rate of pay." No provision is made as to how the fair working rate of pay is to be set, so it appears that the Detaining Power would make that decision. It certainly could not establish a scale of pay for the prisoners' representative and his staff that was less than that established for the prisoners of war generally under the first paragraph of Article 62.¹⁸²

With respect to the prisoners' representative's function of furthering the physical, spiritual, and intellectual well-being of the prisoners of war, established by the first paragraph of Article 80 of the Convention, there is little to say. All of the discussions of the activities of the prisoners' representative during World War II agree that the prisoners' representatives were extremely active and successful in this field, organizing sports, orchestras, and theatricals, establishing camp libraries and publications, arranging for educational facilities, and sometimes even acting in a spiritual capacity.¹⁸³

It will be recalled that the office of the predecessor of the prisoners' representative, the "man of confidence," was specially created for the purpose of providing a reliable prisoner of war who would supervise the organization of the prisoners of war for mutual assistance and collective relief.¹⁸⁴ Under the provisions of the second paragraph of Article 80 this remains one of the major functions of the prisoners' representative. The second paragraph of Article 73 states specifically that even a special agreement between the belligerents cannot affect the prisoners' representative's function of taking possession of all collective relief shipments and of distributing them or otherwise disposing of them in the interests of the prisoners of war.¹⁸⁵ Annex III to the 1949 Convention, entitled *Regulations concerning Collective Relief*, contains the detailed rules with respect to the receipt, warehousing, distribution, and other disposal of collective relief supplies that are to apply in the absence of a special agreement. In all aspects of this matter, the prisoners' representative has both the responsi-

¹⁸² During the discussion of pay for prisoners' representatives in the Subcommittee of Financial Experts at the 1949 Diplomatic Conference, it was suggested that if the prisoners' representative were to be paid by the Detaining Power, the latter might be able to use this as a source of pressure on the former. 2A *Final Record* 541. Nevertheless, the alternative method of payment adopted is exactly the one concerning which the warning was issued.

¹⁸³ 1 ICRC *Report* 344-45; Preux, *Homme de confiance* 462, 470; Tedjini, *Témoignage* 633.

¹⁸⁴ See p. 294 *supra*.

¹⁸⁵ Article 125, fourth paragraph, requires the prisoners' representative to furnish a receipt for relief supplies received from relief organizations. This gives some assurance to the donors that the supplies donated actually reached the prisoners of war and were not intercepted and used by the Detaining Power.

bility and the power for the handling of all collective relief supplies at his prisoner-of-war camp.¹⁸⁶

The various functions of the prisoners' representative that we have just discussed are those that he exercises on behalf of the entire prisoner-of-war population of the prisoner-of-war installation that he represents. In addition, there are many functions that he exercises on behalf of individual prisoners of war. Thus, under the third paragraph of Article 48 he will ensure that the personal (and community) property that prisoners of war, transferred from his prisoner-of-war camp to another one, were unable to take with them because of the weight limitations contained in the preceding paragraph of Article 48, is forwarded to them; under Annex V, implementing the third paragraph of Article 63, he countersigns, with the prisoner of war concerned, the notification of the transmittal of funds abroad from the personal account of the prisoner of war;¹⁸⁷ under the first paragraph of Article 65 he countersigns entries in the account of a prisoner of war on behalf of the individual concerned; under the fourth paragraph of Article 96 he must be advised of any disciplinary punishment pronounced against a prisoner of war;¹⁸⁸ under the last paragraph of Article 98 he is to be given custody of parcels and remittances of money addressed to individual prisoners of war who are undergoing confinement as a disciplinary punishment, and he is given the authority to donate any perishable items contained in such parcels to the camp infirmary; under the last paragraph of Article 104 he is to receive the same advance notice of the Detaining Power's intention to institute judicial proceedings against a prisoner of war that the Protecting Power receives;¹⁸⁹ under the first paragraph of Article 107 he is to receive the same notice of a judgment and sentence pronounced upon a prisoner of war, and of appellate rights, that the Protecting Power receives;¹⁹⁰ and under the last paragraph of Article 113 he has the right to be present at the examination by a Mixed Medical Commission of any prisoner of war who presents himself for that purpose.¹⁹¹

It is obvious that the many functions delegated to the prisoners' representative reach into every activity in the prisoner-of-war camp affecting the prisoners of war. The extent of the impact of his activities upon the daily life of the prisoners of war is incalculable. An efficient prisoners' representative can literally mean the difference between survival or death for the prisoners of war confined in camps

¹⁸⁶ Concerning relief supplies generally, see pp. 158-163 *supra*.

¹⁸⁷ Concerning the transmittal of funds abroad, see pp. 207-208 *supra*.

¹⁸⁸ See p. 325 *infra*.

¹⁸⁹ See note V-85 *infra*.

¹⁹⁰ See p. 338 *infra*.

¹⁹¹ See p. 412 *infra*.

maintained by some Detaining Powers. While using common sense and carefully selecting his fields of battle, he must be prepared to challenge any action of the Detaining Power, or its representatives, that he considers to be a violation of the provisions of the Convention and contrary to the best interests of the prisoners of war. The strong and competent prisoners' representative will quickly win the confidence of the prisoners of war whom he represents and the respect of the prisoner-of-war camp commander and his staff. When he has accomplished this, he has already done much to improve the lot of the prisoner-of-war population of the camp of which he is the prisoners' representative.

D. THE INTERNATIONAL COMMITTEE OF THE RED CROSS

1. Historical

The International Committee of the Red Cross (ICRC) came into being as a result of the fact that Henri Dunant, a Swiss civilian, was a witness to the postbattle horrors resulting from the battle of Solferino (June 1859) between the Austrians and the Allies (primarily the French). Approximately 40,000 of the 300,000 men who participated in that battle were killed or wounded during its course of little more than 12 hours—and, subsequently, there were thousands of additional deaths from among the participants, many of them because of the lack of any system of organized medical care.¹⁹² In November 1862 Dunant's book, *Souvenir de Solferino* (Memory of Solferino) was published in Geneva; in February 1863 the "Committee of Five," the genesis of the ICRC, was created by the Geneva Public Welfare Society; an International Conference, called by the Committee of Five, met in Geneva in October 1863; and on 22 August 1864, less than two years after the publication of Dunant's book, the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field had been drafted and signed by a Diplomatic Conference called by the Swiss Government.¹⁹³ This was the first of the long series of humanitarian Geneva Conventions which culminated in the four Geneva Conventions of 1949.¹⁹⁴

¹⁹² For the story of this episode and its humanitarian repercussions, see generally Gumpert, *Dunant—the Story of the Red Cross*.

¹⁹³ All of the major European and several American States had been invited to participate in the Diplomatic Conference. The United States, then engaged in the American Civil War, was represented by an observer. It did not ratify the 1864 Convention until 1882.

¹⁹⁴ The national delegates to the Diplomatic Conference for the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which met in Geneva in 1974, 1975, 1976, and 1977, signed a Final Act on 10 June 1977 and signed a Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (herein referred to as the 1977 Protocol I) on 12 December 1977.

Despite the first word in its title, the ICRC is not international (except in its outlook). Its headquarters are located in Geneva; its membership is exclusively Swiss in nationality; and it maintains this membership by co-option. Not a little of the success of the ICRC may undoubtedly be attributed to the fact that, since the Congress of Vienna, Switzerland has existed under a state of perpetual neutrality which, unlike that of certain other small European states less fortunate from the point of view of geography, has been maintained. This has ensured the ICRC not only the fact of neutrality, but an aura of neutrality, a situation that would have been impossible had it been based in any other country of today's world.

Traditionally, the delegates of the ICRC have been found wherever there have been victims of disaster, natural or man-made. Earthquakes, floods, droughts, and armed conflicts, international or internal, all produce human victims; and all quickly bring an offer of assistance from the ICRC. We shall, of course, inquire into only its activities on behalf of prisoners of war in international armed conflict.

2. The Position of the ICRC in International Armed Conflict

Article 9 of the 1949 Convention contains the basic international recognition of the ICRC and its activities on behalf of prisoners of war. It states:

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

It will be noted that this Article follows immediately after the basic Article with regard to the Protecting Power. This positioning was unquestionably intentional. During World War II it was sometimes necessary for the ICRC to exert great effort in order to overcome the impression of some belligerents that it was attempting to duplicate the functions of the Protecting Power. While it did, for the most part, succeed in convincing them that such was not the case¹⁹⁵—by placing the two basic provisions of the Convention relating to the Protecting Power and the ICRC in such juxtaposition, and by the phraseology used—the 1949 Diplomatic Convention clearly indicated its expectation and intent that the two institutions could, without any interference in each other's activities, function side by side.¹⁹⁶

¹⁹⁵ 1 ICRC *Report* 39.

¹⁹⁶ Unquestionably, many of their activities are identical—but this was understood and intended. How else can we explain a provision such as that contained in the last paragraph of Article 126 that specifically gives to the ICRC delegates “the same prerogatives” of visitation of prisoner-of-war installations as the first two paragraphs of Article 126 give to the representatives of the Protecting Power?

Moreover, recognizing the very real possibility of a shortage of states available to act as Protecting Powers in any future major international armed conflict, the first paragraph of Article 10 authorizes the belligerents "to agree to entrust [the duties of the Protecting Power] to an organization which offers all guaranties of impartiality and efficacy."¹⁹⁷ The ICRC is unquestionably such an organization; and, as has already been noted, it has formally announced that, contrary to the position previously taken by it, it will in the future consider accepting an invitation to act in that capacity.¹⁹⁸

Furthermore, the second paragraph of Article 10 provides that, absent a Protecting Power or an organization designated under the first paragraph of that Article, the Detaining Power may designate a neutral Power, or such an organization as mentioned above, to perform the functions of a Protecting Power.¹⁹⁹ The ICRC, of course, likewise meets the requirements for designation under this provision. And the third paragraph of Article 10 provides that when the Detaining Power is unsuccessful in obtaining the required services under the second paragraph of Article 10, it may 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 the Protecting Power."²⁰⁰

From the foregoing it is clear that it was the hope of the 1949 Diplomatic Conference that the Protecting Power and the ICRC would function simultaneously, supplementing each other, in order to provide the prisoners of war with the maximum protection and service; but that should there for any reason fail to be a Protecting Power, it was intended that the ICRC—or another similar organization, if such there be—should fill the vacuum and perform either all of the functions of a Protecting Power, or, at least, all of its humanitarian functions, if any of its functions were deemed not to fall within that category.²⁰¹

3. Activities of the ICRC

As we have seen, the provisions of the first two paragraphs of Article 126 authorize the representatives of the Protecting Power to visit all places where prisoners of war may be and give them wide

¹⁹⁷ See note 58 *supra*.

¹⁹⁸ See note 59 *supra*.

¹⁹⁹ See p. 271 *supra*.

²⁰⁰ As has been seen (see note 43 *supra*), the ICRC has now reached what is believed to be the correct conclusion that all of the functions of the Protecting Power are basically humanitarian in nature. It had previously felt differently. See notes 59 and 60 *supra*.

²⁰¹ When the ICRC, or any other organization, acts pursuant to either of the first three paragraphs of Article 10, it does so as a substitute for a Protecting Power, not as an actual Protecting Power which, by definition, must be a State. See note 2 *supra*.

latitude in performing this function.²⁰² The fourth paragraph of that Article provides that the ICRC delegates "shall enjoy the same prerogatives."²⁰³ All that has been said in this respect with regard to the representatives of the Protecting Power is equally applicable to the delegates of the ICRC. That the ICRC performed this function, and performed it vigorously, is evidenced by the statistics—during World War II ICRC delegates made a total of 11,175 visits to installations where prisoners of war and civilian internees were confined.²⁰⁴ During their visits the delegates of the ICRC, like the representatives of the Protecting Power, have the right to interview prisoners of war and without witnesses.²⁰⁵ They will thus learn of the complaints of the prisoners of war concerning the conditions of their captivity.²⁰⁶ In addition to this parallel right of visitation,²⁰⁷ the ICRC delegates are also given a parallel right of access to the prisoners' representative.²⁰⁸ While the prisoners' representative can, and probably will, on occasion, advise the delegates of the ICRC of deficiencies in the conditions of captivity,²⁰⁹ this is probably not the principal reason for giving the

²⁰² See pp. 281–284 *supra*.

²⁰³ See note 196 *supra*. That paragraph also provides, like the last sentence of the first paragraph of Article 8 concerning the "delegates" of the Protecting Power, that ICRC delegates must be approved by the Detaining Power.

²⁰⁴ 1 ICRC Report 83. During and after the Sino-Indian War (1962), the People's Republic of China gave another example of its ability to disregard, or to misinterpret in its own interest, the clearest possible provisions of international agreements voluntarily entered into by it. Despite the unambiguous provisions of the last paragraph of Article 126, the PRC took the position that this article did not apply to the ICRC! Draper, People's Republic 366. See also note 47 *supra*.

²⁰⁵ A general statement of the procedure followed by an ICRC delegate during and after a visit to a prisoner-of-war installation is presented in Anon., The Protection of Prisoners of War. 14 *I.R.R.C.* 191.

²⁰⁶ This right of the ICRC to interview prisoners of war without witnesses and to receive complaints was contested by some Detaining Powers during World War II. 1 ICRC Report 342. Of course, there was no specific provision such as the last paragraph of Article 126 in the 1929 Convention. However, these functions were performed by the ICRC during World War II. See, e.g., *ibid.*, 346; and *POW Circular No. 1*, para. 99. Although the ICRC is not mentioned in the second paragraph of Article 78, concerning complaints, it is somewhat difficult to visualize what else the ICRC delegate and the prisoner of war are going to discuss in the private interviews that the last paragraph of Article 126 certainly authorizes.

²⁰⁷ The right of visitation includes not only the prisoner-of-war camp, but "all places where prisoners of war may be." For several other places specifically mentioned in the Convention, see note 87 *supra*.

²⁰⁸ The first paragraph of Article 126, the fourth paragraph of Article 126, and the first paragraph of Article 79, and the fourth paragraph of Article 81 all authorize communication between the prisoners' representative and the ICRC delegates.

²⁰⁹ After almost a decade and a half of additional study of the subject, the author is inclined to be a little less sure that the legislative history of the second paragraph of Article 78 establishes that the ICRC delegates are not authorized recipients of prisoner-of-war complaints. See Levie, Prisoners of War and the Protecting Power, 55 *A.J.I.L.* 374, 395–96, and particularly note 55 therein. As indicated

prisoners' representative and the delegates of the ICRC a mutual right of access. It will be recalled that the position which we now denominate the "prisoners' representative" was originally brought into existence for the purpose of supervising prisoner-of-war relief matters.²¹⁰ It is undoubtedly in this area that the need for communication between the prisoners' representative and the delegates of the ICRC will be most needed and most useful. A very considerable part of the time of the ICRC delegates will be occupied with the extremely important function of ensuring that relief supplies, both from neutrals and, at times, from the Power of Origin, reach the prisoner-of-war camps where they are most needed and are thereafter properly distributed. The provisions of the Convention having to do with relief matters uniformly place the ICRC on the special footing which it rightly deserves because of its traditional major interest in such matters.²¹¹

The procedure followed by the ICRC in its relations with the opposing belligerents differs in one very material respect from that of the Protecting Powers—unlike the latter, who submit the reports of their visits to the Power of Origin only,²¹² the ICRC submits its reports to both the Power of Origin and the Detaining Power;²¹³ in fact, if there is another Power concerned, as where the Capturing Power has transferred the custody of the particular prisoners of war to another Detaining Power, such Capturing Power will also receive a copy of the ICRC report.²¹⁴ There is much to be said for this practice.²¹⁵

It has already been mentioned that the ICRC originally conceived and executed the idea which brought into being the Central Prisoners of War Information Agency.²¹⁶ Its continued interest and usefulness in this respect has been recognized in the first paragraph of Article 123, authorizing the ICRC to propose to the belligerents (as it has done in the past) that such an Agency be organized. It may be as-

in the text here, it was probably not the principal reason for providing for communication between the prisoners' representative and the ICRC—but the ICRC has traditionally performed the function of receiving complaints without a legislative directive and the new guarantee of access in private practically ensures that it will continue to do so.

²¹⁰ See p. 294 *supra*.

²¹¹ See, e.g., Articles 125; 72; 73; the first two paragraphs of Article 75; and Annex III, Article 9. For a review of ICRC relief activities during World War II, see 3 ICRC Report, *passim*.

²¹² See p. 284 *supra*.

²¹³ 1 ICRC Report 240-41; Rich, Brief History 489.

²¹⁴ 1 ICRC Report 241. Among their other improper actions, during World War II the Japanese insisted on censoring the copy of the reports sent by the ICRC to the Power of Origin. *Ibid.*, 229. A censored report has, of course, little significance.

²¹⁵ A detailed outline of the matters covered by the report may be found at 1 ICRC Report 233-38.

²¹⁶ See p. 154 *supra*.

sumed that, in any future major international armed conflict, not only will the ICRC propose the organization of this central clearinghouse of information,²¹⁷ but that it will, as it has in the past, assume the responsibility for the establishment and operation thereof.²¹⁸

The ICRC is a unique organization which has played an indispensable humanitarian role in every armed conflict for more than a century. There is every reason to believe that, if permitted to do so by the belligerents, it will continue to play such a role in future armed conflicts, making the life of prisoners of war on both sides more livable and, in many cases, being the major reason for the survival of prisoners of war. It remains to be seen whether the ICRC will be permitted to perform the functions envisaged for it by the 1949 Diplomatic Conference, as it has been in the majority of cases, or will be denied the right to perform any of these functions, as it was by the Soviet Union (1940–45),²¹⁹ North Korea (1950–53),²²⁰ the People's Republic of China (1950–53; 1962),²²¹ and North Vietnam (c. 1965–73).²²²

E. OTHER IMPARTIAL HUMANITARIAN ORGANIZATIONS

Article 9 of the 1949 Convention provides that humanitarian activities for the benefit of prisoners of war may be performed not only by the ICRC, but also by "any other impartial humanitarian organization."²²³ The Convention does not identify any organization, other

²¹⁷ During a visit to the ICRC in Geneva the author was shown through the archives of the World War II Central Agency. The name of a close personal friend who had been a prisoner of war during World War II was mentioned—and in a matter of minutes his card was produced with entries showing the several prisoner-of-war camps in which he had been interned, with the dates of arrival at, and departure from, each one.

²¹⁸ For a review of the activities of the Central Prisoners of War Agency during world War II, see 2 ICRC *Report*, *passim*.

²¹⁹ 1 ICRC *Report* 408–36. Having denied the ICRC the right to function on its territory during World War II, during the Korean hostilities (1950–53) the Soviet Union supported the charge of the Chinese Communists that the ICRC was a "capitalist spy organization." U.K., *Treatment* 33–34. Under the circumstances, it is unexpected, indeed, to find the Soviet Union communicating to the Secretary-General of the United Nations its belief in the need for the ICRC to undertake additional tasks relating to the protection of human rights in armed conflict. U.N., *Human Rights*, A/8052, at 119–20.

²²⁰ The frustration of the ICRC in its attempts to be permitted to function in North Korea is well-documented in the two volumes of ICRC, *Conflit de Corée*, *passim*.

²²¹ Draper, People's Republic, 353–67.

²²² ICRC *Annual Report*, 1970, at 40–41; *ibid.*, 1972, at 40–41. The confidence in the ICRC which is typical of most States is demonstrated by the provisions of Article 81 (1), (2), and (3) of the 1977 Protocol I.

²²³ The first paragraph of Article 10 refers to "an organization which offers all guarantees of impartiality and efficacy"; and the third paragraph of that Article

than the ICRC, which falls within the quoted term, nor does it amplify that term. However, it is possible to draw certain conclusions with respect to the nature of the organizations meant to be included within the term from analogous and collateral material.

Article 88 of the 1929 Convention, which was the direct progenitor of Article 9 of the 1949 Convention, did not include the possibility of the intervention of any "humanitarian organization" other than the ICRC for the purpose of furnishing assistance to prisoners of war. That possibility received recognition for the first time at the 1949 Diplomatic Conference when a proposal was made by the Italian representative to add the words "or any other impartial humanitarian body" following the reference to the ICRC in the original draft of what became Article 9.²²⁴ It was adopted by the Joint Committee of the Diplomatic Conference after a debate in which the representative of the United States had supported the use for humanitarian purposes of "welfare organizations of a non-international character" and the Committee had rejected a Burmese proposal to narrow the Italian proposal to "any other *internationally recognized* impartial humanitarian body."²²⁵ It was approved at a Plenary Meeting of the Diplomatic Conference without debate.²²⁶

The foregoing is the substance of the legislative history concerning the addition of the words "or any other impartial humanitarian organization" to Article 9 of the 1949 Convention.²²⁷ There are clearly three basic requirements before an organization can claim to come within the meaning of the Article: first, it must be *impartial* in its operations; second, it must be *humanitarian* in concept and function; and third, it must have some institutional, operational, and functional *resemblance to the ICRC*. Negatively, it need not be international in creation and it need not be neutral in origin.²²⁸

refers to "a humanitarian organization such as the ICRC." From the context it would appear that the draftsmen intended that an organization would have the same qualifications in any of the three situations, even though different words were used and different goals were sought. Article 81 (4) of the 1977 Protocol I refers to "the other humanitarian organizations referred to in the Conventions and this Protocol." Article 5 (4) of the Protocol adopts the language of the first paragraph of Article 10 of the 1949 Convention quoted above.

²²⁴ 2B *Final Record* 21.

²²⁵ *Ibid.*, 60 (emphasis added).

²²⁶ *Ibid.*, 346.

²²⁷ At some point in the deliberations the word "body" was changed to "organization," but this author was unable to pinpoint the event—a result not unique to this particular matter.

²²⁸ For a discussion in depth of this problem, see Levie, *Repatriation* 697–701. The organization referred to in note 58 *supra* would probably qualify. This author has strong reservations concerning both the "impartiality" and the "efficacy" of any alleged humanitarian organization with political parentage, such as one that is a creature of the United Nations. See pp. 18–19 *supra*.

Assuming, as we have, that the humanitarian organizations mentioned in Articles 9 and 10 of the Convention were intended to have identical qualifications, and that the ICRC serves as the prototype for "an impartial humanitarian organization," much that has been said with respect to the ICRC would, in an appropriate case, be applicable to any organization authorized by one or more of the belligerents to function under either of those articles.²²⁹ Notable exceptions to the foregoing statement are to be found in the first paragraph of Article 123 which refers only to the ICRC in authorizing the proposal of the creation of a Central Prisoners of War Information Agency; the fourth paragraph of Article 123 which refers to the humanitarian activities of the ICRC "or of the relief societies provided for in Article 125"; and the last paragraph of Article 126 which very pointedly assigns only to the ICRC and its delegates the prerogatives enjoyed by the Protecting Power of visiting prisoner-of-war installations and interviewing prisoners of war privately, with no mention whatsoever of any other organization of any kind.²³⁰ All in all, it may be said that while other humanitarian organizations recognized by one or more of the belligerents are accorded many of the privileges which the Convention accords to the ICRC, the latter still occupies a very special position insofar as assistance to prisoners of war is concerned.²³¹

²²⁹ While various terms are used to designate the other humanitarian organizations (*see*, for example, the third paragraphs of Articles 72 and 73, the first paragraph and subparagraph (b) of Article 75, and the first paragraph of Article 79), the import of many of the provisions of the Convention, with the exceptions noted in the text, is that what the ICRC may do, another humanitarian organization may do, if it has been approved by one or more of the belligerents.

²³⁰ Conversely, the ICRC is not specifically mentioned in the first paragraph of Article 125, which requires the Detaining Power to provide the representatives of "religious organizations, relief societies, or any other organization assisting prisoners of war . . . with the necessary facilities for visiting the prisoners [of war]." However, this right of visitation is not for the purpose of inspection or interview, but solely for the purpose of the distribution of relief supplies and other materials intended to improve morale; and even here, the third paragraph of Article 125 recognizes the special position of the ICRC in this field. (Of course, an organization designated as a substitute for a Protecting Power under the provisions of the three paragraphs of Article 19 would enjoy the prerogatives of visitation and interview under the provisions of the first two paragraphs of Article 126.)

²³¹ *See* Article 5 (3) and (4) of the 1977 Protocol I.