## CHAPTER III

# THE EMPLOYMENT OF PRISONERS OF WAR

## A. INTRODUCTORY

From the days when the Romans first came to appreciate the economic value of prisoners of war as a source of labor, and began to use them as slaves instead of killing them on the field of battle[1] until the drafting and adoption by a comparatively large number of members of the then family of sovereign States of the Second Hague Convention of 1899, no attempt to regulate internationally the use of prisoner-of-war labor by the Detaining Power had been successful.[2] The Regulations attached to that Convention dealt with the subject in a single article, as did the Regulations attached to the Fourth Hague Convention of 1907 which, with relatively minor exceptions, merely repeated the provisions of its predecessor. A somewhat more extensive elaboration of the subject was included in the 1929 Convention; and, although still far from perfect, the provisions concerning prisoner-of-war labor in the 1949 Convention certainly constitute an enlightened attempt to legislate a fairly comprehensive code governing the major problems involved in the employment of prisoners of war by the Detaining Power.[3] The purpose of this chapter will be to analyze the provisions of that labor code and to suggest not only how the draftsmen intended them to be interpreted, but also to attempt to prognosticate what can be expected in actual implementation by Detaining Powers generally in any future major international armed conflict.

## B. HISTORICAL

Before proceeding to a detailed analysis of the labor provisions of the 1949 Convention, and how one may anticipate that they will operate in time of such armed conflict, it is both pertinent and appropriate to survey briefly the history of, and the problems encountered in, the utilization of prisoner-of-war labor during and since the

[1] *See* pp. 2–3 *supra*.

[2] Although, as we shall see, the subject of prisoner-of-war labor has been dealt with by Article 76 of Lieber's Code, Article 25 of the Declaration of Brussels, and in Articles 71–72 of the Oxford Manual of 1880, and while these efforts unquestionably influenced in material degree the decisions subsequently reached at The Hague, none of them constituted actual international legislation.

[3] Pictet, *Recuel* 91.

American Civil War (1861–65). That period is selected because it represents the point at which cartels for the exchange of prisoners of war ceased to have any considerable impact and yet belligerents were apparently still largely unaware of the tremendous potential of the economic asset which was available to them at a time of urgent need.

The American Civil War was the first major conflict involving large masses of troops and large numbers of prisoners of war in which exchanges were the exception rather than the rule.[4] As a result, both sides found themselves encumbered with great masses of prisoners of war; but neither side made any substantial use of its large pool of manpower, although both suffered from labor shortages.[5] This was so despite the fact that Article 76 of Lieber's Code specifically stated it to be a rule of international law that prisoners of war "may be required to work for the benefit of the captor's government, according to their rank and condition"; and despite the valiant efforts of the Quartermaster General of the Union army, who sought unsuccessfully, although fully supported by Professor Lieber, to overcome the official reluctance to use prisoner-of-war labor. The policy of the Federal Government was that prisoners of war would be compelled to work "only as an instrument of reprisal against some act of the enemy."[6]

It will be recalled that in 1874 an international conference, which included representatives from most of the leading European nations, met in Brussels "in order to deliberate on the draft of an international agreement respecting the laws and customs of war."[7] This conference prepared the text which, while never ratified, constituted a major step forward in the effort to set down in definitive manner those rules of land warfare which could be considered to be part of the customary law of nations. It included, in its Article 25, a provision concerning prisoner-of-war labor which adopted, but considerably amplified, Lieber's single sentence on the subject quoted above. The Article contained in the Declaration was, in turn, subsequently adopted almost verbatim in the Oxford Manual in 1880; and it furnished much of the material for Article 6 of the 1899 Hague Regulations and for the same Article in the 1907 Hague Regulations.

Despite all of these attempts and eventual successes in the effort to codify the law with respect to prisoner-of-war labor, the actual utilization of such labor remained negligible during the numerous

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[4] *See* pp. 7–8 *supra.*

[5] Lewis & Mewha 27 & 41. For a vivid fictional, but factually accurate, picture of this waste of manpower in the South, with its resulting evils to the prisoners of war themselves, *see* Kantor, *Andersonville.*

[6] Lewis & Mewha 37. These same authors state that "in the Civil War both sides were crippled by a shortage of manpower, yet both sides overlooked the vast labor pool offered by idle prisoners of war." *Ibid.*, 41.

[7] *Final Protocol of the Brussels Conference of 1874. See* p. 8 *supra.*

armed conflicts which preceded World War I. This last was really the first modern international armed conflict in which there was total economic mobilization by the belligerents; and there were more men held as prisoners of war and for longer periods of time than during any previous conflict. Nevertheless, it was not until 1916 that the British War Office could overcome opposition in the United Kingdom to the use of prisoner-of-war labor;[8] and after the entry of the United States into that conflict, prisoners of war held by it were not usefully employed until the investigation of an attempted mass escape resulted in a recommendation for a program of compulsory prisoner-of-war labor in part as a means of reducing disciplinary problems.[9] When the belligerents eventually did find it essential to make use of the tremendous prisoner-of-war manpower pools which were so readily available to them, the provisions of the 1907 Hague Regulations covering this subject proved completely inadequate to solve the numerous problems which arose, thereby necessitating the negotiation of a series of bilateral and multilateral agreements between the various belligerents during the course of hostilities.[10] Even so, the Report of the "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties," created by the Preliminary Peace Conference in January 1919, listed the "[e]mployment of prisoners of war on unauthorized works" as one of the offenses which had been committed by the Central Powers during the war.[11]

The inadequacies of the 1907 Hague Regulations in this and other areas, revealed by the events which had occurred during World War I, led to the drafting and ratification of the 1929 Convention.[12] It was

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[8] Belfield, Treatment 137. At that same time 75 percent (1,200,000 out of 1,600,000) of the prisoners of war in Germany were already employed. McCarthy, *Prisoner of War* 141; Vizzard, Policy 240.

[9] Lewis & Mewha 57 and source cited therein. This was not the case in France, where the American Expeditionary Force had started planning for prisoner-of-war utilization even before they were captured, the established policy of that command being that all except commissioned officers would be compelled to work. *Ibid.*, 59–62. (In Barker, *Behind Barbed Wire* 97, the present author is credited with having stated that the recommendation made in the United States was that prisoner-of-war labor be used as a disciplinary *measure*. Quite the contrary! It was recommended as a means of keeping the prisoners of war occupied in order to reduce disciplinary *problems*.)

[10] All of the bilateral and multilaterial agreements cited in note I-39 *supra*, had provisions concerning prisoner-of-war labor. The 1918 United States-German Agreement had a section of 11 articles (41–51) dealing solely with this subject For a discussion of the problems which arose with respect to the negotiations of these provisions, *see* Stone, The American-German Conference on Prisoners of War, 13 *A.J.I.L.* 406, 424–28.

[11] 14 *A.J.I.L.* 95, 115 (1920); UNWCC *History* 35.

[12] The International Law Association's Proposed International Regulations, note I-40 *supra*, had a number of provisions in its Article 10 regulating prisoner-of-war labor.

this Convention which governed most of the belligerents during the course of World War II;[13] but once again international legislation based on the experience gained during a previous conflict proved inadequate to control the more serious and complicated situations which arose during a subsequent period of hostilities.[14] Moreover, the proper implementation of any agreement the provisions of which require interpretation must obviously depend in large part upon the good faith of the parties thereto—and as belligerents in war are, perhaps understandably, not motivated to be unduly generous to their adversaries, decisions are sometimes made and policies are sometimes adopted which either skirt the bounds of legal propriety or, perhaps, arguably exceed such bounds. The utilization of prisoner-of-war labor by the Detaining Powers proved no exception to the foregoing. Practically all prisoners of war were compelled to work.[15] To this there can be basically no objection. But during the course of their employment many of the protective provisions of the 1929 Convention (and of the 1907 Hague Regulations which it complemented) were either grossly distorted or simply disregarded.

The leaders of Hitler's Nazi Germany were aware of its shortage of manpower during World War II and appreciated the importance of the additional pool of labor afforded by prisoners of war as a source of that precious wartime commodity. Nevertheless, for a considerable period of time they permitted their ideological differences with the Communists to override their common sense and urgent needs.[16] And

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[13] As the Soviet Union was not a party to this Convention, it considered that its relations with Germany and the latter's allies on prisoner-of-war matters were governed by the 1907 Hague Regulations. 1 ICRC *Report* 412. (No mention was made by the Soviet Union of the situation created by the *si omnes* clause contained in the Fourth Hague Convention of 1907.) Japan, which was likewise not a party to the 1929 Convention, nevertheless announced its intention to apply that Convention, *mutatis mutandis*, on a basis of reciprocity. *Ibid.*, 443.

[14] "The international instruments regulating the treatment of prisoners of war were drawn up on the basis of the experience gained in the war of 1914–18 and did not contemplate the wholesale and systematic use which many countries have since made of captive labor." Anon., Conditions of Employment 169.

[15] In February 1944, only 60 percent of the prisoners of war in the United States were being employed; by April 1945, that figure exceeded 90 percent. Lewis & Mewha 125. In Germany "[t]he mobilisation of prisoner labour [had] been organised as part of the general mobilisation of man-power for the execution of the economic programme. . . ." Anon., Employment in Germany 318. It has been estimated that by February 1944, the 2,500,000 working prisoners of war represented 8 percent of the German labor force. Vizzard, Policy 262.

[16] Thus, it has been stated that the improved feeding of Russian prisoners of war by the Germans in 1942 was instituted in order to obtain an adequate labor performance, and "must be assessed as a tactical sacrifice of dogma for the sake of short-range benefits to the warring Reich." Dallin, *German Rule* 423. In the Milch Case, 2 T.W.C. at 782, the Military Tribunal quoted a 1943 statement of Himmler who, in speaking of the Russian prisoners of war captured early in the

in Japan, which, although not a party to the 1929 Convention, had committed itself to apply its provisions, those relating to prisoner-of-war labor were among the many which were assiduously violated.[17]

Like all of the other belligerents during World War II, the United States found an urgent need for prisoner-of-war labor, both within its home territory and in the rear areas of the embattled continents. One study even goes so far as to assert that the use of the labor of the Italian prisoners of war in the Mediterranean theater was the only thing which made it possible for the United States to sustain simultaneously both the Italian campaign and the invasion of Southern France, thereby hastening the downfall of Germany.[18] Similarly, it was found that in the United States the use of prisoners of war for work at military installations, and in agriculture and other authorized industries, served to release both army service troops and civilians for other types of work which were more directly related to the war effort.[19]

While the benefits of prisoner-of-war labor to the Detaining Power are patent, benefits flowing to the prisoners of war themselves as a result of their use in this manner are no less apparent. The reciprocal benefits resulting from the proper use of prisoner-of-war labor are well summarized in the following statement:

> The work done by the PW has a high value for the Detaining Power, since it makes a substantial contribution to its economic resources. The PW's home country has to reckon that the work so done increases the war potential of its enemy, maybe indirectly: and yet at the same time it is to its own profit that its nationals should return home at the end of hostilities in the best possible state of health. Work under normal conditions is a valuable antidote to the trials of captivity, and helps PW to preserve their bodily health and morale.[20]

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conflict, a very large number of whom did not survive their first winter of captivity, deplored the fact that at that time the Germans "did not value the mass of humanity as we value it today, as raw material, as labor."

[17] The I.M.T.F.E. stated (at 1082) that "[t]he policy of the Japanese Government was to use prisoners of war and civilian internees to do work directly related to war operations." *See also, Trial of Tanabe Koshiro;* Vizzard, Policy 259, & 263.

[18] Lewis & Mewha 199.

[19] Fairchild & Grossman 194.

[20] 1 ICRC *Report* 327. *See also,* Pictet *Commentary* 260; Flory, *Prisoners of War* 71; Girard-Claudon, Les prisonniers de guerre en face de l'évolution de la guerre 151, Feilchenfeld, *Prisoners of War* 47; *PMG Review,* III-372. Article 49 of the 1949 Convention specifically states that the utilization of prisoners-of-war labor is "with a view particularly to maintaining them in a good state of physical and mental health." And, of course, the working pay which a prisoner of war will receive for his labor will frequently permit him to acquire extra items which would otherwise be beyond his reach.

During the close reappraisal of the 1929 Convention which followed World War II, the provisions thereof dealing with the subject of prisoner-of-war labor were not overlooked; and the conferences which culminated in the 1949 Diplomatic Conference, as well as that Conference itself, redrafted many of those provisions of the 1929 Convention in an effort to plug the loopholes which the events of World War II had revealed. While there are obvious differences between the employment of workers available through a free labor market and the employment of prisoners of war, even a casual and cursory study will quickly disclose a remarkable number of similarities. The labor union which is engaged in negotiating a contract for its members with their employer is vitally interested in: (1) the conditions under which they will work, including safety provisions; (2) working hours and the holidays and vacations to which they will be entitled; (3) the compensation and other monetary benefits which they will receive; and (4) the grievance procedures which will be available to them. Because of the uniqueness of prisoner-of-war status, the 1949 Diplomatic Conference felt it necessary, in drafting provisions for the benefit and protection of future prisoners of war, to continue to provide guidance with respect to certain types of problems in addition to those mentioned above, such as the categories of prisoners of war who may be compelled to work (a problem which does not normally exist for labor unions operating in a free civilian society, although it may come into existence to some extent in a total war economy); and, collateral to that, the specific industries in which they may or may not be employed. Inasmuch as these two latter problems lie at the threshold of the utilization of prisoner-of-war labor, they will be considered before those enumerated above.

## C. CATEGORIES OF PRISONERS OF WAR WHO MAY BE COMPELLED TO WORK

In general, Article 49 of the 1949 Convention provides that all prisoners of war, except commissioned officers, may be compelled to work. However, this statement requires considerable elaboration and is subject to a number of limitations.

### 1. Physical Fitness

Under the first paragraph of Article 49 only those prisoners of war who are physically fit may be compelled to work by the Detaining Power; and the work which they are called upon to perform must be of a nature to maintain them "in a good state of physical and mental health." In determining physical fitness, it is prescribed that the Detaining Power must take into account the age, sex, and physical aptitude of each prisoner of war as an individual. It may be assumed that these criteria are to be considered not only in determining whether a prisoner of war should be compelled to work, but also in deter-

mining the type of work to which the particular prisoner of war should be assigned. For example, older prisoners of war should not be assigned to types of work which require great and constant exertion; women prisoners of war should not be assigned to tasks requiring the lifting and moving of heavy loads, tasks which may be beyond their physical capabilities; and male prisoners of war, although physically fit to work, may not have the physical aptitude for certain jobs by reason of their size, weight, strength, lack of experience, etc.[21] It would appear that the provisions of the first paragraph of Article 49 of the 1949 Convention require the Detaining Power to assure the assignment of the right man, from the physical point of view, to the right job.

Under the provisions of Article 31 and the first paragraph of Article 55 of the 1949 Convention, the determination of physical fitness must be made by medical personnel and at regular monthly intervals. It should be noted that the first of the cited articles is a general one which requires the Detaining Power to conduct thorough "medical inspections," monthly at a minimum, primarily in order to supervise the general state of health of all prisoners of war and to detect contagious diseases;[22] while the second, which calls for a "medical examination" at least monthly, is intended to verify the physical fitness of the prisoner of war for work, and particularly for the work to which he is assigned.[23] It is evident that one medical examination directed simultaneously toward both objectives would meet the dual

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[21] During World War II the German use as miners of prisoners of war who did not have the necessary physical aptitude for this type of work and who were inexperienced was a constant source of dispute. The ICRC delegate in Berlin finally proposed to the German High Command that prisoners of war over 45 years of age be exempted from working as miners, but this proposal was rejected by the Germans on the ground that the 1929 Convention made no reference to age as a criterion of physical qualification for compulsory labor. 1 ICRC *Report* 329–31. This situation has now been rectified.

[22] *See* pp. 133-139 *supra.*

[23] The procedures followed in the United States during World War II were as follows: "Prisoners of war . . . are given a complete physical examination upon their first arrival at a prisoner of war camp. At least once a month thereafter, they are inspected by a medical officer. Prisoners are classified by the attending medical officer according to their ability to work, as follows: (a) heavy work; (b) light work; (c) sick, or otherwise incapacitated—no work. Employable prisoners perform work only when the job is commensurate with their physical condition." McKnight, POW Employment 64. The quoted statement was based, at least in part, on *POW Circular No. 1,* para. 87, which was, in turn, taken from Article 48 of the 1918 United States–German Agreement.

obligations thus imposed upon the Detaining Power.[24]

The provisions of the second paragraph of Article 55, authorizing a prisoner of war to appear before the camp medical authorities whenever he considers himself incapable of working, is undoubtedly essential, but it has grave potentialities. Certainly, if a prisoner of war does not feel capable of working he should be given an opportunity to have his condition verified by the medical authorities, not only so that, if medically appropriate, he may be excused from working, but also so that he may receive the medical treatment to which he is entitled under the first paragraph of Article 30.[25] However, it can be anticipated that well-organized prisoners of war, intent upon creating as many difficulties as possible for the Detaining Power, will sometimes be directed by their anonymous leaders to report themselves *en masse* and at frequent intervals as being incapable of working and to request that they be permitted to appear before the medical authorities of the camp. Is the Detaining Power to be helpless if thousands of prisoners of war, many more than can be examined by available medical personnel, all suddenly elect to claim physical unfitness for work and to demand the right to appear before the medical authorities? Where the Detaining Power has good grounds for believing that such is the situation, and this will normally be quite apparent, it would undoubtedly be fully justified in compelling every prisoner of war to work until his turn to appear before the medical authorities was reached in regular order with the complement of medical personnel which had previously been adequate for that particular prisoner-of-war camp. Thus, the act of the prisoners of war themselves in attempting to turn a provision intended for their protection into an offensive weapon, illegal in its very inception, would actually result in the causing of harm to the very people whom it was intended to protect—the truly ailing and physically unfit prisoners of war. If such a procedure is followed by the Detaining Power, the use of the provisions of the second paragraph of Article 55 and the penultimate paragraph of Article 30 will quickly revert to that for which they were intended.

The suggestion has been made that the medical examinations to determine physical fitness for work should preferably be made by the retained medical personnel of the Power of Origin.[26] This suggestion

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[24] Article 31 speaks of "medical inspections," while the first paragraph of Article 55 uses the term "medical examinations." (A similar variance is found in the French version of the 1949 Convention.) It does not appear that any substantive difference was intended, particularly inasmuch as Article 31 considerably amplifies the term "inspection," making it quite clear that much more than a mere visual inspection was intended.

[25] *See p.* 134 *supra.* The second paragraph of Article 55 parallels the general provision contained in the first sentence of Article 30.

[26] Pictet, *Commentary* 212 & 289. For a discussion of "retained medical personnel," *see* pp. 70-74 *supra.*

is apparently based upon the fact that the third paragraph of Article 30, in providing for the general medical care and treatment of prisoners of war, states that they "shall have the attention, preferably, of medical personnel of the Power on which they depend and, if possible, of their nationality." However, there is considerable difference between assigning the medical personnel of the Power of Origin to render medical care and treatment to a fellow prisoner of war who is ill or injured, and permitting such personnel to say whether or not the prisoner of war is physically qualified to work. It is not believed that any Detaining Power would, or that the Convention intended that it should, permit retained medical personnel to make final decisions in this regard.[27]

**2. Rank**

While Article 76 of Lieber's Code did contain the clause specifying that prisoners of war could be required to work "according to their rank," there was really no indication therein that the labor of all prisoners of war, regardless of rank, was not available to the Detaining Power in some capacity. However, Article 25 of the Declaration of Brussels and Article 71 of the Oxford Manual both provided that prisoners of war could only be employed on work that would not be "humiliating to their military rank." Article 6 of the 1899 Hague Regulations reverted to Lieber's rather vague phrase, "according to their rank"; but the 1907 Hague Regulations went a step further, adding to the foregoing phrase the words "officers excepted," thereby for the first time giving a legislative basis to a practice that had, in fact, already been generally followed.[28]

Both the 1929 and the 1949 Conventions are much more specific in this regard, the latter amplifying and clarifying the already much more detailed provisions of its predecessor. Thus, while the first paragraph of Article 49 of the 1949 Convention authorizes the Detaining Power to utilize the labor of "prisoners of war," the second paragraph of Article 49 specifies that noncommissioned officers (NCOs) may only be required to do supervisory work, and the last paragraph of Article 49 states without reservation that officers may not be compelled to work. It thus becomes clear that, as used in the first paragraph of

[27] Similarly, the function of determining whether a prisoner of war should be repatriated during hostilities for medical reasons is not assigned to the retained medical personnel, but is the responsibility of the medical personnel of the Mixed Medical Commissions consisting of two neutral members and one member appointed by the Detaining Power. *See* Article 112 and Annex II. For a discussion of the Mixed Medical Commissions, *see* pp. 411–412 *infra*.

[28] One Japanese scholar has asserted that during the Russo-Japanese war (1904–05), the Japanese exempted officer prisoners of war from the requirement to work. Ariga, *Guerre russo-japonaise* 114. However, another claims that Japan did not require any Russian prisoners of war to work. Takahashi, *Russo-Japanese War* 125.

Article 49, the term "prisoners of war" really refers only to enlisted men below the noncommissioned-officer grade—in other words, privates.

During World War II several problems arose with respect to the identification of noncommissioned officers for labor purposes. In the first place, many NCOs had had their identification documents taken from them upon capture (probably for intelligence purposes) and were thereafter unable to establish their entitlement to recognition of their grade.[29] On the other hand, a number of prisoners of war apparently claimed NCO grades to which they were not actually entitled, probably in order to avoid hard labor.[30] The 1949 Convention attempts to obviate these problems. Thus, Article 21 of the 1929 Convention provided only that, upon the outbreak of hostilities, the belligerents would communicate to one another the titles and ranks in use in their armies in order to assure "equality of treatment between corresponding ranks of officers and persons of equivalent status." This was construed as limiting the requirements of this exchange of information to the ranks and titles of commissioned officers. The first paragraph of Article 43 of the 1949 Convention makes it clear that information is to be exchanged concerning the ranks and titles of *all* persons who fall within the various categories of potential prisoners of war enumerated in Article 4 of the Convention.[31] Further, during World War II the military personnel of each belligerent carried only such identification documents, if any, as that belligerent elected to provide to its personnel. In addition, as just noted, if the prisoner of

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[29] The ICRC has stated that 26,000 German noncommissioned officers who were prisoners of war and whose identity papers had been taken from them in England were compelled to work while interned in the United States because of their inability to prove their status. 1 ICRC *Report* 339. *See* note II-288 *supra*. The German General Staff urged German noncommissioned-officer prisoners of war to work, very probably in order to avoid the deterioration, both physical and mental, which inevitably overtakes the completely inactive prisoner of war. 1 ICRC *Report* 339.

[30] Early in 1945 the military authorities in the United States discovered that many German prisoners of war had false documents purporting to prove noncommissioned officer status. They thereupon required all German prisoners of war who claimed to be noncommissioned officers to produce proof of such status in the form of a *soldbuch* or other official document. Thousands were unable to do so and were reclassified as privates. Rich, Brief History 516. To some extent these may have been the same prisoners of war referred to in the preceding note.

[31] *See pp.* 168–169 *supra*. It appears to the writer that the United States Army may have created problems for some of its members in this respect by the establishment of a "specialist" classification of enlisted men who, although grouped in the same statutory grades as noncommissioned officers, are apparently not such. Manes, Barbed Wire Command 14. The strict interpretation of the term "noncommissioned officers" contemplated by the Soviet Union is evidenced by its desire, expressed at the 1949 Diplomatic Conference, to limit the exemption of noncommissioned officers from the requirement to do work other than supervisory to regular army ("re-enlisted") personnel. 2A *Final Record* 348, 361 & 566.

war did have an identification document in his possession when captured, it was not unusual for the personnel of the Capturing Power to seize these documents for whatever intelligence value they might have, leaving the prisoner of war with no official identification material. The 1949 Convention attempts to remedy both of these defects. The third paragraph of Article 17 requires each belligerent to issue to the members of its armed forces an identification card containing, as a minimum, certain information concerning identity, including rank; prescribes the desirable type of card; provides that it be issued in duplicate; and states that while the prisoner of war must exhibit it upon the demand of his captors, under no circumstances may it be taken from him.[32] This Article, if complied with by the belligerents, should do much to eliminate the problem of identifying noncommissioned officers that existed during World War II and that undoubtedly resulted in denying to many prisoners of war the rights to which they were entitled.[33]

Two other problems connected with the labor of noncommissioned officers are worthy of comment. On occasion, disputes may arise as to the types of work that can be construed as falling within the term "supervisory." The 1949 Diplomatic Conference made no attempt to solve this problem. There is much merit in the position taken by the ICRC that the term denotes "administrative tasks which usually consist of directing other ranks; it obviously excludes all manual labor."[34] The other problem concerns the right of a noncommissioned officer who has exercised the privilege given him under both the 1929 and the 1949 Conventions to request work other than supervisory, thereafter to withdraw his request. During World War II different practices were followed by different belligerents. Thus Germany gave British noncommissioned officers the right to withdraw their requests,[35] while the policy of the United States was not to grant such requests for nonsupervisory work in the first place, unless they were

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[32] *See pp.* 111–112 and 168–169 *supra.*

[33] Many men legitimately promoted in the combat zone may go for long periods of time without having an opportunity to obtain an identification card showing their new ranks and may become prisoners of war during that period. In view of the new concept of "advances of pay" contained in the first paragraph of Article 60, it is all the more important for a sergeant to be able to establish that he is such. *See* pp. 198–200 *supra.*

[34] Pictet, *Commentary* 262.

[35] *German Regulations* No. 13, para. 59. The seeming magnanimity of this provision is somewhat nullified by the last two sentences thereof, which indicate that "the employment of British noncommissioned officers has resulted in so many difficulties that the latter have far outweighed the advantages. The danger of sabotage, too, has been considerably increased thereby."

for the duration of captivity in the United States.[36] It has been urged that, inasmuch as a noncommissioned officer is free to volunteer to undertake nonsupervisory work, he should be equally free to discontinue such work at will—subject to the right of the Detaining Power to provide him with such employment when he volunteers only if he agrees to work for a fixed term, which may be extended upon his request.[37] This appears to be a logical and practical solution to the problem, although it is probably one to which not every belligerent will subscribe.

The last paragraph of Article 49 is very clear that officers cannot be compelled to do any type of work, even supervisory, unless they volunteer. Once they have done so, the problems relating to their labor are quite similar to those relating to the voluntary labor of noncommissioned officers, except that as a matter of practice they were apparently rather generally permitted to discontinue working whenever they decided to do so.[38] In general, the labor of officers has not been the cause of any material dissension between belligerents.[39]

### 3. Other Prisoners of War Exempted from Working

Scattered throughout the 1949 Convention are a number of other provisions specifically limiting the work which may be required of certain categories of captured enemy personnel, prisoners of war or other, held by the Detaining Power. Thus, medically trained personnel who, when captured, were not assigned to the medical services in the enemy armed forces and who are, therefore, ordinary prisoners of

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[36] U.S. War Dept., Technical Manual TM 19-500, *Enemy Prisoners of War*, Ch. 5, Sec. 1, para. 4c. This is no longer the policy of the United States. U.S. Army *Regs.* 633–50, para. 206a(2) provides that a noncommissioned officer ". . . may at any time, revoke his voluntary request for work other than supervisory work."

[37] Pictet, *Commentary* 262. The *Commentary* continues with the statement that "during the Second World War, however, prisoners of war were sometimes more or less compelled to sign a contract for an indefinite period which bound them throughout their captivity; that would be absolutely contrary to the present provision." The present writer agrees that this should be the rule but confesses himself as unable to identify the provision of the second paragraph of Article 49 of the 1949 Convention which so provides, or to determine wherein, in this regard, it differs from its predecessor, the third paragraph of Article 27 of the 1929 Convention. (Perhaps the *Commentary* is referring to Article 7.)

[38] 1 ICRC *Report*, 338. Inasmuch as the third paragraph of Article 49 states that officers ". . .may *in no circumstances* be compelled to work" (emphasis added), there is even less basis for denying them the right to discontinue work for which they have volunteered then there is for noncommissioned officers. U.S. Army *Regs.* 633–50, para. 206a(1), covering commissioned officers, is substantially identical to the provision relating to NCOs quoted in note 36 *supra.*

[39] 1 ICRC *Report* 337–38. During World War II Japan instituted a "no work no eat" policy for officers. I.M.T.F.E. 1176. An ex-prisoner of war has stated that coercion was used to force officers to volunteer to work. *Schacht Statement.* One writer says that under War Ministry orders officers were "guided" to "volunteer." Vizzard, Policy 263.

war, may be required to perform medical functions for the benefit of their fellow prisoners of war; but if so required, they are, under Article 32, entitled to the treatment accorded to retained medical personnel and are exempted from any other work.[40] Under Article 36 this same rule applies to ministers of religion who were not serving as such when captured. Prisoners of war assigned to provide essential services in officer prisoner-of-war camps as orderlies may not, under the second paragraph of Article 44, be required to perform any other work. Finally, the first paragraph of Article 81 specifies that prisoners' representatives may likewise not be required to perform any other work, but this restriction applies only "if the accomplishment of their duties is thereby made more difficult."[41] While these various provisions are not of very great magnitude in the overall prisoner-of-war picture, they can, of course, be of major importance to the particular individuals concerned.

## D. TYPES OF WORK THAT PRISONERS OF WAR MAY BE COMPELLED TO PERFORM

The categories of industries in which prisoners of war may be compelled to work and the types of labor which they may be compelled to perform in those industries have generated much controversy. Long before final agreement was reached thereon at the 1949 Diplomatic Conference, the article of the Convention concerned with this problem had been termed "the most disputed article in the whole Convention, and the most difficult of interpretation."[42] Unfortunately, it appears fairly certain that some of the agreements ultimately reached in this area are destined to magnify, rather than to minimize or eliminate, this problem.[43]

The early attempts to draft rules concerning the categories of labor in which prisoners of war could be employed merely authorized their employment on "public works which have no direct connection with the operations in the theater of war,"[44] or stated that the tasks of prisoners of war "shall have nothing to do with the military operations."[45] The inadequacy of these provisions having been demonstrated

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[40] *See* p. 73 *supra.*

[41] *See* pp. 303–304 *infra.*

[42] 2A *Final Record* 442. Another participant in the 1949 Diplomatic Conference later wrote: "Perhaps no section of the Convention gave rise to more debate and expressions of differences of view than that dealing with 'Labour of Prisoners of War.' At the outset, it appeared that all that could be agreed upon was the fact that the 1929 treatment of the subject was inadequate and ambiguous." Dillon, Genesis 51.

[43] Baxter, Book Review, 50 *A.J.I.L.* 979.

[44] Article 25, Declaration of Brussels; Article 71, Oxford Manual.

[45] Article 6, 1899 *Hague Regulations.* The French (official) version of Article 6 of the 1907 *Hague Regulations* is identical with its predecessor in this regard.

by the events of World War I, an attempt at elaboration was made in drafting the cognate provisions of Article 31 of the 1929 Convention, in which were included not only prohibitions against the employment of prisoners of war on labor having a "direct relation with war operations," but also against their employment on certain specified types of work—"manufacturing and transporting arms or munitions of any kind, or . . . transporting material intended for combatant units."

During World War II these latter provisions proved little more successful than their predecessors in regulating prisoner-of-war labor. The term "direct relations with war operations" once again demonstrated itself to be exceedingly difficult to interpret[46] in a total war in which practically every economic resource of the belligerents is mobilized for military purposes.[47] Each belligerent attempting to comply with the labor provisions of the 1929 Convention found itself required to make a specific determination in all but the very few obvious cases as to whether a particular occupation fell within the ambit of the prohibitions.[48] As could be expected, there were many disputed decisions.

In drafting the proposed new convention aimed at obviating the many difficulties which had arisen during the two world wars, the ICRC attempted a new approach to the prisoner-of-war labor prob-

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[46] "What constituted a direct relation with war operation was a matter of personal opinion or indeed, guess." Dillon, Genesis 52. An anonymous writer for the International Labour Organization found it questionable that the restrictions of the first paragraph of Article 31 of the 1929 Convention concerning work directly connected with war operations were being uniformly interpreted. Anon., Conditions of Employment 186. After the end of World War II the United States Military Tribunal in the *I.G. Farben Case* said (at 8 T.W.C. 1189):

> To attempt a general statement in definition or clarification of the term "direct relation to war operations" would be to enter a field that the writers and students of international law have found highly controversial.

[47] Flory, Nouvelles conception 58; Janner, *Puissance protectrice* 54; Feilchenfeld, *Prisoners of War* 13.

[48] Early in January 1943 the United States adopted the following policy with regard to prisoner-of-war labor:

> Any work outside the combat zones not having a direct relation with war operations and not involving the manufacture of transportation of arms or munitions or the transportation of any material clearly intended for combat units, and not unhealthful, dangerous, degrading, or beyond the particular prisoner's physical capacity, is allowable and desirable.

AG letter of January 1943, subj: War Department Policy with respect to Labor of Prisoners of War, *quoted in* Lewis & Mewha 89. This was obviously so general as to cause many specific problems to arise, and in December 1943 the United States found it necessary to establish a Prisoner of War Employment Review Board (*ibid.*, 113) which was called upon to make a great many decisions in this area. Mason, German Prisoners of War 211. Postwar researchers have collated lists which include literally hundreds of occupations as to which specific decisions were made. Lewis & Mewha 146–47, 166–67, & 203; Tollefson, Enemy Prisoners of War 62 note.

lem. Instead of specifying prohibited areas in broad and general terms, as had been the previous practice, leaving to the belligerents, the Protecting Powers, and the humanitarian organizations the decision as to whether a specific task was or was not prohibited, it decided to list affirmatively and with particularity the categories of labor in which the Detaining Power would be permitted to employ prisoners of war, at least impliedly prohibiting their use in any type of work not specifically listed.[49] The International Red Cross Conference held in Stockholm in 1948, to which this new approach was proposed, accepted the idea of affirmatively specifying the areas in which prisoners of war could be required to work; but, instead of the enumeration of specifics which the ICRC had prepared, the Conference substituted general terms.[50] The ICRC was highly critical of this action.[51] At the 1949 Diplomatic Conference the United Kingdom proposed the substitution of the original ICRC proposal in place of that contained in the draft adopted at Stockholm, and it was this original text, with certain amendments which will be discussed later, which ultimately became Article 50 of the 1949 Convention. While there is considerable merit to the new approach, the actual phraseology of the Article leaves much to be desired.[52] An analysis of the various provisions contained in Article 50 of the 1949 Convention and, to the extent possible, a delimitation of the areas covered, or probably intended to be covered, by each category of work which a prisoner of war may be "compelled" to do,[53] and the problems inherent in each, is in order.

[49] *Draft Revised Conventions* 82–83.

[50] The proposed new Article 42 (now 50) provided that "prisoners of war may be required to do only work which is normally required for the feeding, sheltering, clothing, transportation and health of human beings." Revised Draft Conventions 69. It is of interest that that was substantially the basic policy that had been followed by the United States in interpreting the provisions of Article 31 of the 1929 Convention. McKnight, POW Employment 54.

[51] Remarks and Proposals 51–53.

[52] In its Report to the Plenary Assembly of the 1949 Diplomatic Conference, Committee II (Prisoners of War) characterized this Article as one which "clarifies . . . by a limitative enumeration of the categories of work which prisoners [of war] may be required to do." 2A *Final Record* 566. On the contrary, the expression "military character or purpose," used in subparagraphs (b), (c), and (f) of Article 50 are practically indefinable. As to these subparagraphs, the basic problem, as it existed when the words "war operations" were used, remains unchanged. Pictet, *Commentary* 266. In view of the obvious need for authoritative interpretations of the provisions of this article, it would be helpful if sizable groupings of nations, such as NATO and the Warsaw Pact, agreed upon and announced their interpretations of these provisions, as the Nordic Experts did in other areas. Unfortunately, NATO has apparently decided not to standardize procedures relating to the utilization of prisoner-of-war labor. STANAG No. 2044, para. 10.

[53] The difficulties experienced in selecting the appropriate verb to be used in the opening sentence of Article 50 were typical of the overall drafting problem. The following terms were contained in or suggested for the various texts, beginning with the original ICRC draft that was submitted to the 1948 Stockholm Confer-

### 1. Camp Administration, Installation, or Maintenance

This indirectly authorized category of prisoner-of-war labor refers to the management and operation of the camps established for the prisoners of war themselves; in other words, broadly speaking, it constitutes their own "housekeeping." Early in World War II the United States divided all prisoner-of-war labor into two classes: class one, that related to their own camps; and class two, all other.[54] This distinction still appears to be a valid one. It has been estimated that the use of prisoners of war in the United States for the maintenance and operation of their own camps, and of other military installations,[55] constituted their major utilization.[56] While this is believed to be somewhat of an overstatement, it can certainly be assumed that a very considerable portion of them will always be engaged in the administration, installation, and maintenance of their own camps. However, it can also be assumed that in any future major international armed conflict demands for prisoner-of-war labor will be so great that shortages will exist, requiring that the administration of prisoner-of-war camps be conducted on an extremely austere basis.

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ence and continuing chronologically through the various drafts, amendments, and discussions, until final approval of the article by the Plenary Assembly: "obliged to" (*Draft Revised Conventions* 82–83): "required to" (Revised Draft Conventions 69); "obliged to" (3 *Final Record* 70); "employed on" (2A *Final Record* 272); "engaged in" (*ibid.*, 470); "obliged to" (*ibid.*, 344); "compelled to" (2B *Final Record* 176); and "compelled to" (Article 50 as adopted).

[54] *POW Circular* No. 1, para. 77. Paragraph 78 of the same Circular contained the following informative enumeration:

> 78. Labor in class one is primarily for the benefit of prisoners. It need not be confined to the prisoner of war camp or to the camp area. Class one labor includes:
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> *a.* That which is necessary for the maintenance or repair of the prisoner of war camp compounds including barracks, roads, walks, sewers, sanitary facilities, water pipes, and fences.
>
> *b.* Labor incident to improving or providing for the comfort or health of prisoners, including work connected with the kitchens, canteens, fuel, garbage disposal, hospitals, and camp dispensaries.
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> *c.* Work within the respective prisoner companies as cooks, cook's helpers, tailors, cobblers, barbers, clerks, and other persons connected with the interior economy of their companies. In apportioning work, consideration will be given by the company commander to the education, occupation, or profession of the prisoner.

[55] The utilization of prisoner-of-war labor for the operation and maintenance of military installations occupied by the armed forces of the Detaining Power does *not* fall within the classification of camp administration referred to in the Convention. While many such uses would probably come within the category of domestic services (cooks, cook's helpers, waiters, kitchen police, etc.), which are authorized, it appears that many others are no longer permitted. Employment of prisoners of war in the Information Bureau maintained by the Detaining Power is specifically authorized by Article 122.

[56] Fairchild & Grossman 190. *See also,* McKnight, POW Employment 57.

### 2. Agriculture

This field of prisoner-of-war utilization, with its collateral field of food processing, combined with camp administration to account for the labor of the great majority of employed prisoners of war during World War II.[57] There are no restrictions imposed by Article 50(a) of the 1949 Convention on the employment of prisoners of war in any aspect of agricultural work,[58] the fact that the product of their labor may eventually be used in the manufacture of a military item or be supplied to and consumed by combat troops being too remote to permit, or to warrant, restrictions.[59]

### 3. Production or Extraction of Raw Materials

This category of compulsory employment, authorized by Article 50(b), includes activities in such industries as mining, logging, quarrying, etc. It is one of the areas in which problems constantly arose during World War II, and in which there were frequent disagreements between belligerents as well as between Detaining Powers and Protecting Powers or humanitarian organizations. Thus, after the conclusion of World War II the ICRC reported that it had been called upon to intervene more frequently with respect to prisoners of war who worked in mines than with respect to any other problem.[60]

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[57] In the spring of 1940 more than 90 percent of the Polish prisoners of war held by the Germans were employed in agriculture; and while that percentage later dropped, it always remained extremely high. Anon., Employment in Germany 317. In the United States, even though more than 50 percent of the man-months worked in industry by prisoners of war were performed in agriculture, the demands for such labor could never be fully met. Lewis & Mewha 125–26. An exception occurred in Canada, where the great majority of the prisoners of war were used in the lumbering industry. Anon., Employment in Canada 337.

[58] Pictet, *Commentary* 266. It is incomprehensible that, despite the experiences of World War II, the enumeration that was originally proposed by the ICRC (*Draft Revised Conventions* 82–83), and was discarded by the 1948 Stockholm Conference (Revised Draft Conventions 69), only to be restored to the Convention by the 1949 Diplomatic Convention at the urging of the United Kingdom delegation (3 *Final Record,* Annex 116, at 70), did not include agriculture as a permitted class. A member of the United States delegation proposed that it be added at the beginning of the list, and his proposal was adopted without discussion or opposition. 2A *Final Record* 470.

[59] An unsuccessful attempt to make this distinction in another context occurred in Vietnam, when the position was taken that herbicides could be used against crops intended for military consumption but not against crops intended for civilian consumption. Bindschedler 36–37. *See also* Levie, Weapons of Warfare 160.

[60] 1 ICRC *Report* 329. For a specific example, see note 21 *supra.* (Unfortunately, few data are available concerning the activities of Protecting Powers in this regard as they rarely publish any details of their wartime activities, even after the concluson of peace. An unofficial report of Swiss activities as a Protecting Power during World War II is contained in Janner, *Puissance protectrice.*) In the *I.G. Farben Case,* 8 TWC at 1187, the Tribunal said:

Inasmuch as the utilization of prisoners of war in this field has been, and continues to be, authorized, the problems which arise usually relate either to the physical ability and aptitude of the particular prisoner of war to participate in heavy, difficult, and specialized labor of this nature, or to working conditions—including safety precautions and equipment—rather than to the fact of the utilization of prisoners of war in the specific industry. The first of these problems has already been discussed[61] and the latter will be discussed in the general analysis of that particular problem.[62]

### 4. Manufacturing Industries (except Metallurgical, Machinery, and Chemical)[63]

In modern days of total warfare and the total mobilization of the economy of belligerent nations, it has become increasingly impossible to state with any degree of positiveness that any particular industry does not have *some* connection with the war effort. Where the degree of such connection is the criterion for determining the permissibility of the use of prisoners of war in a particular industry, as it was prior to the 1949 Convention, problems and disputes are inevitable. In this respect, by authorizing compulsory prisoner-of-war labor in most manufacturing industries and by specifically prohibiting it in the three categories of industries that will be engaged almost exclusively in war work, Article 50 (b) of the new Convention represents a positive and progressive development in the law of war and has probably eliminated many potential disputes.

During World War II the nature of the item manufactured and, to some extent, its intended ultimate destination determined whether or

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The use of prisoners of war in coal mines in the manner and under the conditions disclosed by this record, we find to be a violation of the regulations of the Geneva Convention and, therefore, a war crime

[61] *See* pp. 218–221 *supra.*

[62] *See* pp. 240–244 *supra.*

[63] The source of some of the wording and punctuation of Article 50(b) is somewhat obscure. As submitted by Committee II (Prisoners of War) to the Plenary Assembly of the 1949 Diplomatic Conference, it read:

. . .manufacturing industries, with the exception of iron and steel, machinery and chemical industries and of public works, and building operations which have a military character or purpose.

2A *Final Record* 576 & 585–86. Although this portion of Article 50 was approved by the Plenary Assembly without amendment (2B *Final Record* 290–98), in the Final Act of the Conference (which is, of course, the official, signed version of the Convention), the same provision reads:

. . .manufacturing industries, with the exception of metallurgical, machinery and chemical industries; public works and building operations which have no mlitary character or purpose.

1 *Final Record* 254. These changes in wording and puctuation (made in the English version only) represent both a considerable extension and a clarification and should eliminate many disputes which might otherwise have arisen. However, it would be interesting to ascertain just how they came about.

not the use of prisoners of war in its manufacture was permissible. Thus, in the United States it was determined that prisoners of war could be used in the manufacture of truck parts, as these had a civilian, as well as a military, application; but that they could not be used in the manufacture of tank parts, as these had only a military application.[64] Under the 1949 Convention neither the nature, nor the ultimate destination, nor the intended use of the item being manufactured is material. *All* motor vehicles fall within the category of "machinery," and prisoners of war therefore may not be used in their manufacture. On the other hand, prisoners of war may be used in a food-processing plant or in a clothing factory, even though some, or even all, of the food processed or clothing manufactured may be destined for the armed forces of the Detaining Power.

Two sound bases have been advanced for the decision of the 1949 Diplomatic Conference to prohibit in its entirety the compelling of prisoners of war to work in the metallurgical, machinery, and chemical industries: first, that in any general war these three categories of industries will unquestionably be totally mobilized and will be used exclusively for the armaments industry; and second, that factories engaged in these industries will be key objectives of enemy air (and now of enemy rocket and missile) attacks and would therefore subject the prisoners of war to military action from which they are entitled to be isolated.[65] The 1949 Diplomatic Conference apparently balanced this total, industry-wide prohibition of compulsory labor in the three specified industries against the general authorization to use prisoners of war in every other type of manufacturing without requiring the application of any test to determine its relationship to the war effort of the Detaining Power.

It should be borne in mind that the prohibition under discussion is directed only against *compelling* prisoners of war to work in the specified industries. (As we shall see, by inverted phraseology, subparagraphs (b), (c), and (f) of Article 50 also prohibit the Detaining Power from compelling them to do certain other types of work where such work has "military character of purpose.") The question then arises as to whether they may volunteer for employment in the pro-

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[64] Lewis & Mewha 77. After World War II one of the judges of a United States Military Tribunal sitting at Nuremberg held:

> . . .as a matter of law that it is illegal to use prisoners of war in armanent factories and factories engaged in the manufacture of airplanes for use in the war effort.

The *Milch Case*, 2 TWC at 867. The decision in this regard would probably have been otherwise had the defense been able to show that the airplanes were intended exclusively for civilian use. Under Article 50(b) it would be illegal to use prisoners of war on this type of work without regard to the intended use of the airplanes, as they fall within the proscribed category of "machinery."

[65] Pictet, *Commentary* 268–69.

hibited industries. Based upon the discussions at the 1949 Diplomatic Conference,[66] it clearly appears that the prohibitions contained in the various provisions of Article 50 are not, and were not intended to be, absolute in character and that a prisoner of war may volunteer to engage in the prohibited employments, just as he is affirmatively authorized by Article 52 to volunteer for labor which is "of an unhealthy or dangerous nature." The problem will, of course, arise of assuring that the prisoner of war is a true volunteer and that neither mental coercion nor physical force has been used to "persuade" him to volunteer to work in the otherwise prohibited field of labor.[67] However, the fact that this particular problem is difficult of solution (and that the possibility undoubtedly exists that some prisoners of war will be coerced into "volunteering") cannot be permitted to justify an incorrect interpretation of these provisions of the Convention, as to which the indisputable understanding of the 1949 Diplomatic Conference is clearly evidenced in the *travaux préparatoires*.

### 5. Public Works and Building Operations Which Have No Military Character or Purpose

With respect to this provision of Article 50(b), it is first necessary to determine the meaning to be ascribed to the term "military character or purpose." This is no easy task.[68] Because the term defies defini-

[66] As indicated in note 53 *supra*, the decision to use the words "compelled to" in the first sentence of Article 50 was reached only after the consideration and rejection of numerous alternatives. Words such as "prisoners may only be employed in" were strongly urged because they would preclude the Detaining Power from using pressure to induce prisoners of war to "volunteer" as they still could not be "employed" to do an unlisted class of work (2A *Final Record* 343); and words such as "prisoners of war may be obliged to do only" (or "compelled to do only") were just as strongly urged on the very ground that the alternative proposal would preclude volunteering (*ibid.*, 342). The proponents of the latter position were successful in having their phraseology accepted. *Ibid.*, 344; 2B *Final Record* 176.

[67] The ICRC appears to be inconsistent in asserting that the prohibition against work by prisoners of war in these industries is absolute (Pictet, *Commentary* 268), but that prisoners of war may volunteer to handle stores which are military in character or purpose (*ibid.*, 278), work which the Detaining Power is likewise prohibited from compelling prisoners of war to do. The statement that the absolute prohibition of Article 7 against the voluntary renunciation of rights by prisoners of war was necessary "because it is difficult, if not impossible, to prove the existence of duress or pressure" (*ibid.*, 89) is, of course, equally applicable to all *of* the prohibitions of Article 50 and 52, but the Diplomatic Conference obviously elected to take a calculated risk in this regard insofar as prisoner-of-war labor is concerned.

[68] In his post-Conference article, General Dillon showed considerable restraint when he said mei ly that many delegations believed that the phrase "will create some difficulty in future interpretations." Dillon, Genesis 52–53. He had been much more vehement at the Diplomatic Conference. 2A *Final Record* 342–43. As we shall see, the same problems are presented with respect to Article 50(c) (*see* pp. 235–236 and (f) (*see* p. 237).

tion in the ordinary sense of that word, it will be necessary to define by example. Moreover, the discussions which occurred at the 1949 Diplomatic Conference unfortunately provide little that is helpful on this problem.

A structure such as a fortification clearly has, solely and exclusively, a "military character." Conversely, a structure such as a bowling alley clearly has, solely and exclusively, a civilian character. The fortification is intended for use in military operations; hence it has not only a "military character" but also a "military purpose." The bowling alley is intended for exercise and entertainment; hence it does not have a "military purpose," even if some or all of the individuals using it will be members of the armed forces.[69]

These examples have been comparatively black and white—at least insofar as it is possible to have black and white examples in this field. Unfortunately, as is not unusual, there is also a large gray area. This is particularly true of the term "military purpose." A structure will usually be clearly military or clearly civilian in character; but whether its "purpose" is military or civilian will not always be so easy of determination. A sewer is obviously civilian in character; and the fact that it is to connect a military training installation and the municipal sewage disposal plant does not give it a military purpose. On the other hand, a road is likewise civilian in character; but a road leading only from a military airfield to a bomb dump would certainly have a military purpose. Similarly, a theater is civilian in character; but if it is a part of a military training installation and is to be used exclusively, or primarily, for the showing of military training films, then it, too, would have a military purpose. However, a theater which is intended solely for entertainment purposes, like the bowling alley, retains its civilian purpose, even though the audience will be largely military.

To summarize, if the public works or building operations clearly have a military character, prisoners of war may not be compelled to work thereon; if they do not have a military character, but are being undertaken exclusively or primarily for a military use, then they will usually have a military purpose, and, again, prisoners of war may not be compelled to work thereon; while if they do not have a military character and are not being built exclusively or primarily for a military use, then they have neither military character nor purpose, and

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[69] The test is whether it is intended for military use and not whether it is intended for use by the military. A bowling alley or a tennis court or a clubhouse might be intended, perhaps exclusively, for use by the military, but such structures certainly have no military use *per se* and, therefore, they do not have a "military purpose."

prisoners of war may be compelled to work thereon, even though there may be some incidental military use.[70]

Having determined, insofar as it is possible to do so, the meaning of the term "military character or purpose," let us apply it to some of the problems which have heretofore arisen. Although the use of compulsory prisoner-of-war labor in the construction of fortifications had long been considered improper,[71] after World War II a United States Military Tribunal sitting in Nuremberg, found "uncertainty" in the law and held such labor not obviously illegal where it was ordered by superior authority and was not required to be performed in dangerous areas.[72] Under the 1949 Convention such a decision would be clearly untenable. A fortification is military both in character and in purpose and the use of compulsory prisoner-of-war labor in its construction would be prohibited, no matter what the circumstances or location might be. The same is true of other construction of a uniquely military character such as ammunition dumps, firing ranges, tank obstacles, etc. On the other hand, brush clearance and the construction of firebreaks in wooded areas far from the combat zone, the digging of drainage ditches,[73] the building of local air-raid shelters,[74] and the clearing of bomb rubble from city streets[75] are typical of the types of

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[70] The foregoing is substantially the position taken by the United States in U.S. Army *Regs.* 633–50, para. 208b(1), which reads:

> (1) *Military character or purpose.* . . .The term "military character" applies to those items or to those types of construction which are used exclusively by members of the Armed Forces for operational purposes (e.g., arms, helmets, gun emplacements, and confidence courses) as contrasted to items or structures which may be usd by either civilian or military personnel (*e.g.*, food, soap, buildings, public roads, and railroads). The term "military purpose" applies to activities which are intended primarily or exclusively for military operations as contrasted with activities intended primarily or exclusively for other purposes. . . .

It differs from the ICRC position which is that "[e]verything which is commanded and regulated by the military authority is of a military character, in contrast to what is commanded and regulated by the civil authorities." Pictet, *Commentary* 267. However, the latter statement is somewhat leavened by a fairly broad interpretation of the term "military purpose" on the basis that in wartime "anything may have an incidental military purpose" and that "an excessively restrictive interpretation of the letter of the Convention. . .would ultimately lead only to continuing and recurring infringements of the present provision." *Ibid.*, 268.

[71] Flory, *Prisoners of War* 74.

[72] The *High Command Case* (*U.S. v. Von Leeb*), at 11 T.W.C. 534. No such uncertainty existed in the minds of the members of the Tribunal with respect to the use of prisoners of war in the construction of combat-zone field fortifications. *Ibid.*, 538.

[73] Lewis & Mewha 89–90.

[74] *German Regulations* No. 39, para 738.

[75] Pictet, *Commentary* 267–68, where a distinction is justifiably drawn between clearing debris from city streets and clearing it from an important defile used only for military purposes.

public works and building operations which have neither military character nor military purpose.[76]

If the foregoing discussion has added but little light to the problem, it is hoped that it has at least focused attention on an area which can be expected to produce considerable controversy; and here, too, the problem will be further complicated by the question of volunteering.

### 6. Transportation and Handling of Stores Which Are Not Military in Character or Purpose

Article 31 of the 1929 Convention prohibited the use of prisoners of war in the transport of arms or munitions of any kind, or on the transport of material destined for combatant units."[77] The cognate provisions of Article 50(c) of the 1949 Convention clarify this in some respects and obscure it in others.

The former provision created problems in the determination of the point of time at which material became "destined" for a combatant unit and of the nature of a "combatant unit." These problems have now been eliminated, the ultimate destination of the material transported or handled no longer being decisive. However, creating new difficulties is the fact that the problem of the application of the amorphous term "military in character or purpose" is presented once again. Apparently, a prisoner of war may now be compelled to work in a factory manufacturing military uniforms, or gas masks, or camouflage netting, as these items are neither made by the three prohibited manufacturing industries, nor is their military character or purpose material; but once manufactured, a prisoner of war may not be compelled to load them on a truck or freight car, as they probably have a military character and they certainly have a military purpose. Conversely, prisoners of war may not be compelled to work in a factory making barbed wire, inasmuch as such a factory is in the prohibited metallurgical industry; but they may be compelled to handle and transport it where it is destined for use on farms or ranches, as it would

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[76] *See* U.S. Army *Regs.* 633–50, para. 208b(1)(a).

[77] For clear violations of this provision during World War II by the Germans, *see* Maughan, *Tobruk* 761–62; and by the Japanese, see I.M.T.F.E. 1082–83 and Vizzard, Policy 259, 263. *See also, In re Student.* (Student, a German airborne commander, was charged with responsibility for compelling newly captured British prisoners of war to unload arms and ammunition from German planes during the course of the attack on Crete by German parachutists. He was found guilty by a British Military Court, but the findings and sentence were not confirmed by the convening authority. It is impossible to say whether or not this was because of the acceptance of Student's contention that the temporary detailing of prisoners of war to work in the combat zone is unavoidable in airborne operations. The note of the United Nations War Crimes Commission (4 LRTWC 118) indicates the belief that the act was a clear breach of international law.)

then have neither military character nor purpose.[78] Surely, the 1949 Diplomatic Conference did not knowingly intend any such inconsistent results; but it is difficult to justify any other conclusions logically.

Just as was determined with respect to public works and building operations, it is extremely doubtful that the ultimate intended use of the stores is, alone, sufficient to give them a military character or purpose. Thus, as has been seen, agriculture and food processing are authorized categories of compulsory labor for prisoners of war without any restrictions. The food grown and processed obviously has no military character; and the fact that it will ultimately be consumed by members of the armed forces of the Detaining Power, even in a combat zone, does not give it a military purpose. Accordingly, prisoners of war may be compelled to handle and transport such stores. The same reasoning would apply to blankets and sleeping bags, to tents and tarpaulins, to socks and soap.

In this general category, again, the prohibition is only against compulsion, and prisoners of war who volunteer may be assigned to the work of transporting and handling stores, even though they have a military character or purpose. And, once again, the problem will arise of assuring that these prisoners of war have actually volunteered for the work to which they are assigned.

**7. Commercial Business, and Arts and Crafts**

It is extremely doubtful whether very many prisoners of war will be given the opportunity to engage in a commercial business, despite the fact that it is specifically listed in Article 50(d), along with arts and crafts. The prisoner-of-war barbers, tailors, shoemakers, cabinetmakers, etc.—all potential commercial entrepreneurs—will usually be required to ply their trades within the prisoner-of-war camp, for the benefit of their fellow prisoners of war as a part of the camp activities and administration. However, it is conceivable that in some locales they might be permitted to set up their own shops or to engage in their trades as employees of civilian shops owned by citizens of the Detaining Power.

That prisoners of war will be permitted to engage in the arts and crafts is much more likely. No prisoner-of-war camp has ever lacked artists, both professional and amateur, who produce paintings, wood carvings, metal objects, etc., that find a ready market, usually through the camp canteen, among the military and civilian population of the Detaining Power.[79] However, normally this category of work will be

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[78] *See* U.S. Army *Regs.* 633–50, para. 208b(1)(b) which states that "[i]f the stores in question are military in character, PW may not be compelled to engage in the transport or handling thereof. If the items are not military in character, then the purpose for which they are to be used is the determining factor."

[79] *See e.g.*, notes II-70 and II-460 *supra.*

done during free time as a remunerative type of hobby, rather than as assigned labor.[80]

### 8. Domestic Service

The specific inclusion of this category of labor in Article 50(e) merely permits the continuation of a practice that has been rather generally followed and that has rarely caused any difficulty, inasmuch as domestic services have never been construed as having a "direct relation with operations of war," even when such services are rendered to members of the armed forces of the Detaining Power. Prisoners of war have very generally been required to work in laundries and bakeries of the armed forces of the Detaining Power and have been used in their messhalls as cooks, kitchen police, waiters, etc. As long as the domestic services are not required to be performed in an area where the prisoner of war will be exposed to the fire of the combat zone, which is specifically prohibited by the first paragraph of Article 23, the type of establishment in which he is compelled to perform the domestic services, and whether military or civilian, is not material.[81]

### 9. Public Utility Services Having No Military Character or Purpose

Article 50(f) is the third and final usage of the term "military character or purpose" in connection with prisoner-of-war labor. Its use here is particularly inept, inasmuch as it is difficult to imagine how public utility services such as gas, electricity, water, telephone, telegraph, etc., can under any circumstances be deemed to have a military character.[82] With respect to military purpose, the conclusions previously reached are equally applicable here. If the utility services are intended exclusively, or primarily, for military use,[83] they will have a military purpose and the Detaining Power is prohibited from compelling prisoners of war to work on them. Normally, however, the same public utility services will be used to support both military and civilian activities and personnel and should not be considered as having a military purpose.

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[80] The right of the Detaining Power to assign prisoners of war to these occupations (commercial business, arts and crafts) is, of course, unrestricted.

[81] Concerning the problem as to whether domestic service is "humiliating," see note 90 *infra*.

[82] In Pictet, *Commentary* 268, the statement is made that these public utility services have a military character "in sectors where they are under military administration." The present author finds it impossible to agree that the nature of the administration of these public utilities should determine their inherent character. If this were so, then public utility services administered by the military authorities in an occupied area, as is normally the case, would be military in character, even though it was originally constructed for, and is then being used almost exclusively by, the civilian population of the occupied territory.

[83] As, for example, where mobile generators are connected solely to military installations or equipment.

### 10. Limitations with Respect to Unhealthy, Dangerous, or Humiliating Work

Article 52 of the 1949 Convention contains special provisions with respect to labor which is unhealthy, dangerous, or humiliating. These terms are not defined and it may be anticipated that their application will cause some difficulties and controversies. Nevertheless, the importance of these provisions cannot be gainsaid.

Under the first paragraph of Article 52 a prisoner of war may not be *employed on* unhealthy or dangerous work, "unless he be a volunteer." Under the second paragraph of Article 52 a prisoner of war may not be *assigned to* labor which would be considered humiliating for a member of the armed forces of the Detaining Power. No differences can be perceived to have resulted from the use of the verb "employed on" in the first instance and the verb "assigned to" in the second. Accordingly, it is believed that the omission of the clause "unless he be a volunteer" in the case of "humiliating" labor would preclude a Detaining Power from permitting prisoners of war to volunteer for labor which is considered to be humiliating by the members of its own armed forces. (Perhaps the draftsmen believed that there would be no volunteers for work of a humiliating nature and that such a clause would be mere surplusage.)

Article 32 of the 1929 Convention forbade "unhealthy or dangerous work." After World War II this provision was stated to be declaratory of the customary international law of war.[84] In construing this provision, the United States applied three separate criteria: first, the inherent nature of the job (mining, quarrying, logging, etc.); second, the conditions under which it was to be performed (under a tropical sun, in a tropical rain, in a millpond in freezing weather, etc.); and, third, the individual capacity of the prisoner of war.[85] These criteria would be equally relevant in applying the substantially similar provisions of Article 52 of the 1949 Convention.[86]

There are numerous tables of experience factors available for determining whether a particular job is unhealthy or dangerous and is,

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[84] *U.S. v. von Leeb* (the *High Command Case*, 11 TWC 537.)

[85] Lewis & Mewha 112; McKnight, POW Employment 55. The latter continues with the following statement: "The particular task is considered, not the industry as a whole. The specific conditions attending each job are decisive. For example, an otherwise dangerous task may be made safe by the use of a proper appliance, and an otherwise safe job rendered dangerous by the circumstances in which the work is required to be done. Work which is dangerous for the untrained may be safe for those whose training and experience have made them adept in it." (The third criterion mentioned in the text, individual capacity, has already been discussed. *See* pp. 218–221 *supra*.)

[86] In determining whether an industry was of a nature to require special study before prisoners of war were assigned to work in it, the Judge Advocate General of the United States Army rendered the following opinion (SPJGW 1943/10908, 11 August 1943.):

therefore, one upon which prisoners of war may not be employed. Nevertheless, there will very probably be borderline cases in which disputes may well arise as to the utilization of nonvolunteer prisoners of war. However, there will unquestionably be more jobs to be filled in clearly permissible categories than there will be prisoners of war available to fill them. Accordingly, the Detaining Power that is attempting to handle prisoners of war strictly in accordance with the provisions of the Convention can easily avoid disputes in this area by not using prisoners of war on labor of a controversial character.

The last paragraph of Article 52 specifies that "[t]he removal of mines or similar devices shall be considered as dangerous labour." By this simple and unambiguous statement, the 1949 Diplomatic Conference, after one of its most heated and lengthy discussions.[87] made it completely clear that the employment of prisoners of war on mine removal is prohibited unless they are volunteers. The compulsory use of prisoners of war on this type of work was one of the most bothersome problems of prisoner-of-war utilization of World War II, particularly after the termination of hostilities.[88] This problem should not arise in any future major international armed conflict, except in the context of whether or not the prisoners of war so engaged are true volunteers.

The application of the prohibition against the assignment of prisoners of war to work considered humiliating for members of the armed forces of the Detaining Power should cause few difficulties.[89] Certainly, the existence or nonexistence of a custom or rule in this regard in the armed forces of the Detaining Power should rarely be a matter

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. . .If in particular industries the frequency of disabling injuries per million man-hours is:

*a.* Below 28.0—prisoner-of-war labor is generally available therein;

*b.* Between 28.0 and 35.0—the industry should be specifically studied, from the point of view of hazard, before assigning prisoner-of-war labor therein;

*c.* Over 35.0—prisoner-of-war is unavailable, except for the particular work therein which is not dangerous.

It must be borne in mind that, as indicated in the quoted statement, even in an industry in which prisoners of war may be employed, such as one involving the production or extraction of raw materials, a particular industry or a particular job may fall within the ban of being of an "unhealthy or dangerous nature." Fairchild & Grossman 193–94.

[87] For the history and background of this problem and for the debate thereon at the 1949 Diplomatic Conference, see: 1 ICRC *Report* 334; 3 *Final Record* 70–71; 2A *Final Record* 272–73, 443–44, & 345; 2B *Final Record* 290–95 & 298–99; Pictet, *Commentary* 277–78.

[88] 1 ICRC *Report* 333–34.

[89] In Pictet, *Commentary* 277, the following comment appears: "This rule has the advantage of being clear and easy to apply. The reference is to objective rules enforced by that [Detaining] Power and not the personal feelings of any individual member of the armed forces. The essential thing is that the prisoner concerned may not be the laughing-stock of those around him."

of controversy.[90] It is probable that, in the main, problems in this area will arise because the standard adopted is that applied in the armed forces of the Detaining Power rather than that applied in the armed forces of the Power of Origin. While this decision was indubitably the only one which the 1949 Diplomatic Conference could logically have reached, it is not unlikely that prisoners of war will find this difficult to understand and that there will be tasks which they will consider to be humiliating, even though the members of the armed forces of the Detaining Power do not, particularly where the prisoners of war come from a nation having a very high standard of living and are held by a Detaining Power which has a considerably lower living standard.

## E. CONDITIONS OF EMPLOYMENT

We have so far considered the two aspects of prisoner-of-war labor that are peculiar to that status: (1) who may be compelled to work; and (2) the fields of work in which they may be employed. Our discussion now enters the areas in which most nations have laws governing the general conditions of employment of their own civilian citizens—laws which, as we shall see, are often made applicable to the employment of prisoners of war.

### 1. General Working Conditions

The first paragraph of Article 51 of the Convention constitutes a fairly broad code of working conditions. It provides:

> Prisoners of war must be granted suitable working conditions, especially as regards accommodation, food, clothing and equipment; such conditions shall not be inferior to those enjoyed by nationals of the Detaining Power employed in similar work; account shall also be taken of climatic conditions.

These provisions, several of which derive directly from adverse experiences of World War II, are for the most part so elementary as to require little exploratory discussion. However, one major change in basic philosophy is worthy of note. The 1929 Convention provided, in Articles 10 (accommodations) and 11 (food and clothing), that the

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[90] Although prohibitions against the use of prisoners of war on humiliating work were contained in Article 25 of the Declaration of Brussels and in Article 71 of the Oxford Manual, there was no similar provision in the 1899 or 1907 Hague Regulations, nor in the 1929 Convention. Nevertheless, during World War II the United States recognized the prohibition against the employment of prisoners of war on degrading or menial work as a "well settled rule of the customary law of nations" (McKnight, POW Employment 54), and even prohibited their employment as orderlies for other than their own officers. Lewis & Mewha 113. While this latter type of work is prohibited for personnel of the United States Army, it is believed that the prohibition is based upon policy rather than upon the "humiliating" nature of an orderly's functions. Apparently this is settled policy for the United States as the same rule was included in U.S. Army *Regs.* 633-50, para. 209c(2), issued in 1963.

minimum standards for prisoners of war in these areas should be those of "troops at base camps of the Detaining Power."[91] These standards were equally applicable to working prisoners of war. The first paragraph of Article 25 of the 1949 Convention contains an analogous provision with respect to accommodations for prisoners of war generally[92]—but the provisions of the first paragraph of Article 51 quoted above make it abundantly clear that, as to lodging, food, clothing, and equipment of working prisoners of war, the minimum standard is no longer that of base troops of the Detaining Power, but is that of "nationals of the Detaining Power employed in similar work." Moreover, Article 26, which is concerned with prisoner-of-war food generally, contains, in its second paragraph, a specific provision under which working prisoners of war must be supplied "with such additional rations as are necessary for the labor on which they are employed";[93] and Article 27, which is concerned with prisoner-of-war clothing generally, contains, in its second paragraph, a specific provision under which working prisoners of war "shall receive appropriate clothing, whenever the nature of the work demands." While all of these provisions of Articles 25, 26, 27, and 51 of the Convention actually represent a continuation of adherence to local national standards for working prisoners of war, it would appear that the national standards now applicable (civilian nationals in similar work) will be higher than those which were applicable under the 1929 Convention (troops at base camps) inasmuch as workers in many industries are frequently a favored class under wartime conditions.[94]

With regard to a somewhat similar provision contained in the second paragraph of Article 51, less optimism appears to be warranted. This paragraph, making applicable to working prisoners of war "the national legislation concerning the protection of labor and, more par-

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[91] *See* pp. 124–131 *supra*

[92] *See* p. 124 *supra.*

[93] *See* p. 129 *supra.* During World War II, prisoners-of-war labor in the Soviet Union was fed "in accord with the output of work." Olson, Soviet Policy 48. If the basic food requirements of Article 26 and 51 are met, there appears to be no prohibition against the issuance of additional items of food as an incentive bonus. The difficulty is that under this system the basic premise rarely exists. Thus, the same author states that in the Soviet Union work quotas were established and "food. . .received was in proportion to quotas filled." *Ibid.*, 46.

[94] It has been asserted that not only must the living conditions of working prisoners of war not be inferior to those of local civilian workers, but also that this provision may not "prevent the application of the other provisions of the Convention if, for instance, the standard of living of citizens of the Detaining Power is lower than the minimum standard required for the maintenance of prisoners of war." Pictet, *Commentary* 271. While the draftsmen of the Convention may well have intended to establish two separate standards in this area, it is difficult to believe that any belligerent will provide prisoners of war with a higher standard of living than that to which its own civilian citizens have been reduced as a result of a rigid war economy.

ticularly, the regulations for the safety of workers," was the result of a proposal made by a delegate of the Soviet Union at the 1949 Diplomatic Conference, which received the immediate support of the United States and others.[95] This support was undoubtedly premised on the assumption that, if adopted, the proposal would increase the protections afforded to working prisoners of war.[96] Second thoughts indicate that this provision may constitute a basis for reducing the protection which it was intended to afford prisoners of war engaged in dangerous employments. The ICRC has deemed it necessary to point out that national standards may not here be applied in such a manner as to reduce the minimum standards established by the Convention.[97] It now appears unfortunate that the Diplomatic Conference adopted the Soviet proposal rather than the suggestion of the representative of the International Labor Organization that it be guided by the internationally accepted standards of safety for workers contained in international labor conventions then already in being.[98] Moreover, the safety laws and regulations are not the only safety measures which are tied to national standards. The third paragraph of Article 51 requires that prisoners of war receive training and protective equipment appropriate to the work in which they are to be employed "similar to those accorded to the nationals of the Detaining Power."[99] This same paragraph likewise provides that prisoners of war "may be submitted to the normal risks run by these civilian workers." Inasmuch as the test as to what are "normal risks" is based upon the national standards of the Detaining Power, this provision, too, would appear to be a potential breeding ground for disagreement and dispute—particularly as the "normal risks" which civilian nationals of the Detaining Power may be called upon to undergo under the pressures of a wartime

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[95] 2A *Final Record* 273–75 & 446–47.

[96] It should be noted that the International Labour Organization proposed an additional article which would have allowed Detaining Powers to employ women prisoners of war only in accordance with the principles applicable for employed women nationals. Diplomatic Conference Documents, Memorandum by the International Labour Organization, Document No. 7, para. 9. This proposal was opposed by the United Kingdom (*ibid.*, Observation 11) and the United States (*ibid.*, Observations 13–14) on the ground that the national standard might be unsatisfactory, or even nonexistent. The proposal was not discussed at the 1949 Diplomatic Conference.

[97] Pictet, *Commentary* 271–72.

[98] 2A *Final Record* 275.

[99] It could be argued that a proper construction of the grammer of this provision makes only the protective equipment, and not the training, subject to national standards. However, this is debatable, and, even if true, it would merely result in the application of an international standard in the very area where the national standard would probably be acceptable.

economy will probably bear little relationship to the risks permitted under normal conditions.[100]

The reference to the climatic conditions under which labor is performed, contained in the first paragraph of Article 51 quoted above, is one of the provisions deriving from the experiences of World War II.[101] The second paragraph of Article 9 of the 1929 Convention provided generally that prisoners of war captured "where the climate is injurious for persons coming from temperate climates, shall be transported, as soon as possible, to a more favorable climate."[102] It is well known that in a large number of cases this was not done. The second paragraph of Article 22 of the 1949 Convention contains a somewhat similar general provision concerning physical transfers; but it was recognized that, despite the best of intentions, belligerents will not always be in a position to arrange for the physical transfer of prisoners of war from the land areas in which they are captured to one with a climate comparable to that of their homeland. Accordingly, the 1949 Diplomatic Conference wrote into the Convention the quoted additional admonition with respect to climatic conditions and prisoner-of-war labor. It follows that, where a Detaining Power cannot (at least for the time being) transport prisoners of war out of an area of an unhealthy climate—whether tropical or arctic—it must, if it desires to utilize the labor of the prisoners of war in that area even temporarily, make due allowances for the climate, giving them proper clothing,[103] the necessary protection from the elements, appropriate working periods, etc.

Article 51 of the 1949 Convention concludes these provisions with a prohibition against the rendering of working conditions more arduous as a disciplinary measure.[104] In other words, the standards for working conditions, be they international or national, established by

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[100] It must be noted, however, that the "normal risks" provision of the third paragraph of Article 51 is specifically made subject to the restrictive provisions of Article 52, concerning which *see* pp. 238–240 *supra*.

[101] The I.M.T.F.E. (at 1002) mentioned "forced labor in tropical heat without protection from the sun" as one of the atrocities committed against prisoners of war by the Japanese. Concerning the violations of international law involved in the construction of the Burma-Siam railroad, see I.M.T.F.E. 1049–57; Bergamini, *Japan's Imperial Conspiracy* 968–69 & 971. The motion picture "The Bridge on the River Kwai" graphically portrayed the problem.

[102] *See* pp. 121–123 *supra*.

[103] Article 27 specifically provides that in issuing clothing to prisoners of war, without regard to the work at which they are employed, the Detaining Power ". . .shall make allowance for the climate of the region where the prisoners are detained." The requirements in this regard of the first paragraph of Article 51 are probably more extensive. Pictet, *Commentary* 271.

[104] Article 89 contains an enumeration of the punishments which may be administered to a prisoner of war as a disciplinary measure for minor violations of applicable rules and regulations.

the Convention, may not be disregarded in the administration of disciplinary punishment to a prisoner of war, and it is completely immaterial whether the act for which he is being punished occurred in connection with, or entirely apart from, his work. Thus, a Detaining Power may not lower safety standards, disregard requirements for protective equipment, lengthen working hours, withhold required extra rations, etc., as punishment for misbehavior. On the other hand, "fatigue details" of not more than two hours a day, or a monetary fine, or the withdrawal of extra privileges, all of which are authorized as disciplinary punishment by Article 89, undoubtedly could be imposed, as they obviously do not fall within the ambit of the prohibition; and the extra rations to which prisoners of war are entitled under Article 26, when they are engaged in heavy manual labor, could undoubtedly be withheld from a prisoner of war who refuses to work, inasmuch as he would no longer meet the requirement for entitlement to such extra rations.

**2. Labor Detachments**

In the usual arrangement contemplated by the Convention for the utilization of the labor of prisoners of war, each working day the prisoners of war go from their camp to their place of employment, returning to the camp upon the completion of their working period. However, another arrangement is authorized by the Convention—the so-called labor detachment. Thus, where the place at which the work is to be accomplished is too far from any prisoner-of-war camp to permit the daily round trip, a labor detachment may be established. These labor detachments, which were widely used during World War II,[105] are merely miniature prisoner-of-war camps, established in order to meet more conveniently a specific labor requirement. Article 56 of the 1949 Convention requires that they be organized and administered in the same manner as, and as a part of, a prisoner-of-war camp. Prisoners of war making up a labor detachment are entitled to all the rights, privileges, and protections which are available under the Convention to prisoners of war assigned to, and living in, a regular prisoner-of-war camp.[106] However, the fact that local conditions ren-

[105] At the 1949 Diplomatic Conference the representative of the ICRC (Welhelm) stated that experience had indicated that the majority of all prisoners of war were maintained in labor detachments. 2A *Final Record* 276. This is confirmed by the series of articles which appeared in the *International Labour Review* during the course of World War II. *See* Anon., Conditions of Employment 187; Anon., Employment in Germany 318; Anon., Employment in Great Britain 191; McKnight, POW Employment 49; and Anon., Employment in Canada 336.

[106] In addition to the requirements of the second paragraph of Article 56 for the observance of the provisions of the Convention in labor detachments, specific provisions as to these detachments are contained in Article 33(a) (medical services), 35 (spiritual services), and 79 and 81 (prisoners' representatives), among others.

der it impossible to make a labor detachment an exact replica of the prisoner-of-war camp of which it is a satellite does not necessarily indicate a violation of the Convention. As long as the provisions of the Convention are observed with respect to the particular labor detachment, it must be considered to be properly constituted and operated.[107]

One other point with respect to labor detachments is worthy of note. While Article 39 requires that prisoner-of-war camps be under the "immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power,"[108] there is no such requirement as to labor detachments. Although Article 56 provides that each labor detachment is under the authority of the commander of the prisoner-of-war camp to which it is administratively attached, and this camp commander will, of course, be a commissioned officer, there does not appear to be any prohibition against the assignment of a noncommissioned officer as the commander of the labor detachment in place. In view of the large number of labor detachments which will probably be established by each belligerent, it is safe to assume that the great majority of them will be under the immediate command of noncommissioned officers.

A situation under which the utilization of prisoner-of-war labor will usually, although not necessarily, require the establishment of labor detachments is where their services are being used by private individuals or business organizations. This is the method by which most of the many prisoners of war engaged in agriculture (and employed in large private industrial concerns) will probably be administered. During World War II, prisoners of war performing labor under these circumstances were frequently denied the basic living standards guaranteed to them by the provisions of the 1929 Convention.[109] The first paragraph of Article 57 of the 1949 Convention specifically provides not only that the treatment of prisoners of war working for private persons "shall not be inferior to that which is provided for by the present Convention," but also that the Detaining Power, its military authorities, and the commander of the prisoner-of-war camp to which the labor detachment is attached, all continue

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[107] For example, Article 25 requires that billets provided for prisoners of war must be adequately heated. The fact that the parent prisoner-of-war camp has central heating, while the billets occupied by the prisoners of war assigned to a satellite labor detachment have separate, but adequate heating facilities, does not constitute a violation of the Convention.

[108] *See* pp. 163–164 *supra*.

[109] The third paragraph of Article 56 requires the prisoner-of-war camp commander to maintain records of the labor detachments dependent on his camp and to make these available to the Protecting Power and to the ICRC. This is to ensure that there are no "lost" labor detachments, the members of which are completely denied the benefits of the Convention, as occurred during World War II.

to be responsible for their maintenance, care, and treatment;[110] and the second paragraph of Article 57 specifically provides that these prisoners of war have the right to communicate with the prisoners' representative in the prisoner-of-war camp.[111] It remains to be seen whether the changes made in the provisions relating to the maintenance of labor detachments will accomplish their purpose of procuring for prisoners of war in labor detachments the same treatment to which they are entitled in the prisoner-of-war camp itself.[112]

One problem which may arise in the use of prisoner-of-war labor in labor detachments by private persons is that of guarding the prisoners of war. Frequently, the Detaining Power will provide military personnel for this purpose. When it does so, the problems presented are no different from those which arise at the prisoner-of-war camp itself. If paroles have been given to and accepted by the prisoners of war concerned, there are likewise no problems peculiar to the situation.[113] But suppose that civilian guards are used. What authority do they have to compel a prisoner of war to work if he refuses to do so? Or to prevent a prisoner of war from escaping? And to what extent may they use force on a prisoner of war?

If a prisoner of war assigned to work for a private employer refuses to do so, the proper action to take would unquestionably be to notify the military commander of the prisoner-of-war camp to which the labor detachment is attached. The latter is in a position to have

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[110] The unique references to "military authorities" contained in Article 56 and 57 were undoubtedly included in order to make it beyond dispute that, like the camp commander, the appropriate military authorities of the Detaining Power were not relieved from responsibility when the prisoner-of-war labor detachments are maintained by and at the sites selected by the civilian "employer" for whom the members of the detachments are working.

[111] Concerning the prisoners' representative in labor detachments, *see* pp. 298 and 300–301 *infra*. The latter provision cited in the text was included in order to enable the members of the labor detachments to register complaints concerning their treatment should they believe that it is in any respect below Convention standards. Of course, complaints may also be made to the representatives of the Protecting Power, who may visit these labor detachments whenever they so desire (Articles 56 and 126), but these latter are not always readily available, while the prisoners' representatives are. During World War II both the United Kingdom and the United States provided for inspections by their own military authorities of the treatment of prisoners of war who were members of labor detachments working for private persons. Anon., Employment in Great Britain 192; Mason, German Prisoners of War 213.

[112] It should be mentioned that even though prisoners of war may be members of a labor detachment working for a private individual, that is merely a contractual relationship between the Detaining Power and the private individual as a purchaser of labor services. It does not affect the status of the prisoners of war and there is no contractual relationship between the private individual and the prisoners of war. *But see* note II-363 *supra*.

[113] Concerning parole. see pp. 398–402 *infra*.

an independent investigation made and to impose disciplinary punishment or to have charges preferred, as he deems appropriate.

If a prisoner of war assigned to work for a private employer who is not provided with military guards attempts to escape, the authority of the civilian guards is extremely limited. That they may use reasonable force, short of firearms, seems fairly clear. That they may use firearms to prevent escapes is highly questionable.[114] Detaining Powers would be well advised not to assign any prisoner of war to this type of labor, where he is to be completely unguarded or guarded only by civilians, unless the prisoner of war has accepted parole, or unless the Detaining Power has evaluated the likelihood of attempted escape by the particular prisoners of war and has determined to take a calculated risk in their cases.

### 3. Working Hours, Holidays, and Vacations

Article 53 of the 1949 Convention covers all aspects of the time periods of prisoner-of-war labor. As to the duration of daily work, the first paragraph of Article 53 provides that (1) this must not be excessive; (2) it must not exceed the work hours for civilians in the same district; and (3) travel time to and from the job must be included in the computation of the workday; and the second paragraph of Article 53 provides that (4) a rest of at least one hour (longer, if civilian nationals receive more) must be allowed in the middle of the day.

The prohibition against daily labor which is "excessive" in duration is the same prohibition which had been included in Article 30 of the 1929 Convention. Here again, we have the application of a national standard, and in an area in which such a standard had proved to be disadvantageous to prisoners of war during World War II.[115] The Greek Government had proposed the establishment of an international standard—a maximum of 8 hours a day for all work except agriculture, where a maximum of 10 hours would have been authorized.[116]

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[114] In Pictet, *Commentary* 296, the argument is made, and with considerable merit, that escape is an act of war and that only military personnel of the Detaining Power are authorized to respond to this act of war with another act of war—the use of weapons against a prisoner of war. This theory finds support in the safeguards surrounding the use of weapons against prisoners of war, especially those involved in escapes, found in Article 42 of the Convention. *See* pp. 403–404 *infra.*

[115] 2A *Final Record* 275.

[116] Diplomatic Conference Documents, Memorandum by the Greek Government, Document No. 11, at 9.

This proposal was overwhelmingly rejected.[117] As has already been pointed out with regard to other problems, where a national rather than an international standard has been adopted, very few nations at war could afford to grant to prisoners of war more favorable working conditions than those accorded to their own civilian citizens.[118] With respect to hours of daily work, it must be noted, too, that the limitations contained in the Article cannot be circumvented by the adoption of piecework, or some other task system, in lieu of a stated number of working hours, the third paragraph of Article 53 of the Convention specifically prohibiting the rendering of the length of the working day excessive by the use of this method.[119]

The provision for a midday rest of a minimum of one hour, contained in the second paragraph of Article 53, is new[120] and is subject to the national standard only if the latter is more favorable to the prisoner of war than the international standard established by the Convention. In other words, it may be necessary for the Detaining Power to increase the midday rest period given to prisoners of war if its own civilian workers receive a rest period in excess of one hour, but it may not, under any circumstances, be shortened to less than one hour.

The second paragraph of Article 53 further provides that prisoners

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[117] 2B *Final Record* 300. It is, of course, impossible to identify the specific point at which further work becomes "excessive." It has been suggested that the normal ILO limits of 8 hours a day and 48 hours a week should be applied. Pictet, *Commentary* 280. However, this is exactly what the 1949 Diplomatic Conference refused to approve. During World War II the maximum daily hours of work for prisoners of war in the United States was 10, including travel time. Lewis & Mewha 79.

[118] The 1947 Conference of Government Experts had originally considered setting maximum working hours, but had finally decided against so doing because it would be "discrimination in favor of PW, which would not be acceptable to the civilian population of the DP." 1947 GE Report 176. As stated in Anon., Conditions of Employment 194: "The prisoner [of war] cannot expect better treatment than the civilian workers of the detaining Power. . . .His fate depends upon the extent to which the standards of the country where he is imprisoned have been lowered through the exigencies of the war."

[119] During World War II many Detaining Powers used the piece or taskwork method of controlling prisoner-of-war labor. Pictet, *Commentary* 282; Anon., Employment in Canada 337. (In the United States the piecework system was used, but to control pay rather than work hours. Lewis & Mewha 120–21. As long as the pay does not drop below the minimum prescribed in Article 62, there would appear to be no objection to this procedure.) Even when a Detaining Power was faithfully attempting to comply with the worktime provisions of Article 30 of the 1929 Convention, prisoners of war were sometimes, out of necessity, kept overtime and usually received extra work pay for this. Anon., Conditions of Employment 183. This may present a problem for the future, inasmuch as ultimate settlement of prisoner-of-war accounts are now to be made by the Power of Origin, not by the Detaining Power which benefited from the overtime. *See* p. 205 *supra*.

[120] This is the only provision with respect to daily hours of work which was not contained in almost identical words in Article 30 of the 1929 Convention.

of war shall be entitled to a 24-hour rest every week, preferably on Sunday, "or the day of rest in their country of origin." Except for the quoted phrase, which was added at the request of Israel but which should be of equal importance to the pious Moslem, a similar provision was contained in Article 30 of the 1929 Convention. This provision is not subject to national standards, whether the national standard is more liberal or more restrictive.[121] And finally, Article 53 grants to every prisoner of war who has worked for one year "a rest of eight consecutive days" with pay. This provision is new and is of a nature to create minor problems, as, for example, whether normal days of rest are excluded from the computation of the eight days, what activity is permitted to the prisoner of war during his "vacation," and what he may be required to do during this period. However, despite these administrative problems, the provision should prove a great boon to every individual who undergoes a lengthy period of detention as a prisoner of war.

**4. Compensation and Other Monetary Benefits**

We have already had occasion to review the problem of "working pay"—the compensation to which a prisoner of war is entitled under the provisions of the 1949 Convention for the work performed by him in his capacity as a prisoner of war.[122] However, there is one other aspect of the compensation problem which it is appropriate to consider at this point—compensation for disabilities sustained by prisoners of war as a result of work-connected accidents or disease. What is the lot of the prisoner of war who is the victim of an industrial accident or contracts an industrial disease and is thereby incapacitated, either temporarily or permanently? Does he receive any type of compensation, and if so, what, when, from whom,, and how?

The 1899 and 1907 Hague Regulations were silent on this problem. The multilateral prisoner-of-war agreement negotiated at Copenhagen in 1917, the Final Act of the Conference of Copenhagen, adopted a Russian proposal which placed upon the Detaining Power the same

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[121] Nor was it subject to national standards in Article 30 of the 1929 Convention, but the Germans refused to accord prisoners of war a weekly day of rest on the ground that the civilian population did not receive it. Janner, *Puissance protectrice* 54. German employers devised the system of "shadow gangs," termed the "clearest cases of violations" of the Sunday rest provision that occurred during World War II. 1 ICRC *Report* 329. A small number of German workers would work on Sunday with a large number of prisoners of war—but, while the prisoners of war were compelled to work every Sunday, the German workers rotated and were called to such work only at long intervials. The German military authorities forbade this practice in 1941 (*German Regulations* No. 5, para. 9), but a directive issued in 1944 (*German Regulations* No. 44, para. 822) indicates that a major relaxation of the earlier order had occurred. *See also* Anon., Employment in Germany 323. The Russians, not bound by the 1929 Convention, gave Sunday off in theory but not in practice. Anon., *POW in Russia* 8.

[122] *See* pp. 201–205 *supra*.

responsibility in this regard that it had toward its own citizens; but the 1917 Agreement between Great Britain and Germany provided merely that the Detaining Power should provide the injured prisoner of war with a certificate as to his occupational injury.[123] The procedure adopted at Copenhagen was subsequently incorporated into Article 27 of the 1929 Convention, and in 1940, after some abortive negotiations with the British, Germany enacted a law implementing this procedure.[124] The United States subsequently established this same policy,[125] but the United Kingdom considered that it was required only to furnish the injured prisoner of war all required medical and other care.[126]

Inasmuch as no payments were ever made to injured prisoners of war by the former Detaining Powers after their repatriation,[127] it is not surprising that in redrafting the pertinent provisions in formulating the policies for the 1949 Convention, the procedure specified in the 1929 Convention was replaced with one more nearly resembling that which had been adopted in the 1917 bilateral agreement between Great Britain and Germany.[128] The procedure so established is contained in the overlapping provisions of Articles 54 and 68.[129] When a prisoner of war sustains an injury as a result of a work-connected accident, or incurs an industrial disease, the Detaining Power has the obligation of providing him with all required care—medical, hospital, and general maintenance—during the period of his disability and

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[123] Flory, *Prisoners of War* 79–80. The French (and the Swiss) had still a different approach: upon repatriation, prisoners of war who had suffered industrial accidents were to be treated as wounded combatants. Rosenberg, International Law concerning Accidents to War Prisoners Employed by Private Enterprises, 36 *A.J.I.L.* at 295 & 296.

[124] Lauterpacht, Problem 373. Lauterpacht labels the negotiations as "elaborate" and as "concerning the relatively trivial question of the interpretation of of Article 27."

[125] *POW Circular No. 1*, paras. 91 & 92; McKnight, POW Employment 63. For a postwar decision increasing the rate of disability compensation, see JAGA 1950/2239, 13 July 1950.

[126] Lauterpacht, Problem 373 n.2.

[127] Lewis & Mewha 156.

[128] In the *British Manual* para. 185, note 1, the statement is made that during the World War II negotiations the United Kingdom "considered that its domestic workmen's compensation legislation was too complex and so bound up with the conditions of free civilian workmen as to make it impracticable to apply it to prisoners of war." That position has become no less valid with the passing of the years since the end of that war.

[129] This redundancy was discussed at some length at the 1949 Diplomatic Conference, with the Soviet Union taking the position that there was unnecessary duplication and the United Kingdom taking the position that Article 68 added something to Article 54. 2A *Final Record* 550–51. While Article 68 does contain data regarding the contents of the certificate to be furnished by the Detaining Power, there does not appear to be any reason why this could not have been merged into Article 54.

his continuation in the status of a prisoner of war.[130] The only other obligation of the Detaining Power is to provide the prisoner of war with a statement, properly certified, "showing the nature of the injury or disability, the circumstances in which it arose and particulars of medical or hospital treatment." Also, a copy of this statement must be sent to the Central Prisoners of War Agency, thus ensuring its permanent availability.

If a prisoner of war desires to make a claim for compensation while still in the prisoner-of-war status, he may do so, but his claim will be addressed to his Power of Origin, not to the Detaining Power. transmittal being through the medium of the Protecting Power.[131] The Convention makes no provision for the procedure to be followed beyond this point, probably for the reason that the problem is then a domestic one, involving solely the relations between the Power of Origin and a member of its own armed forces, which would obviously be inappropriate for inclusion in an international convention. It may well be that, in the long run, the present policy, by transferring ultimate liability to the Power of Origin, will prove of more value to the disabled prisoner of war than the apparently more generous policy contained in the 1929 Convention.[132]

It must be pointed out, however, that in one respect the procedure thus adopted by the 1949 Convention contains an obvious injustice: there is no provision entitling the prisoner of war who suffers a work-connected disability to continue to receive credits for working pay. While it is acceptable, and perhaps even preferable, to place ultimate responsibility on the Power of Origin for compensating the prisoner of war for his industrially caused disability, no reason can be perceived for relieving the Detaining Power not only of this liability, but even of that of the continued payment to the disabled prisoner of war

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[130] Articles 40 and 95 of the Fourth (Civilians) Convention place upon the Detaining Power the responsibility of providing "compensation for occupational accidents and diseases." The variation between these provisions and those of Article 54 of the Prisoner-of-War Convention was noted by the Coordination Committee of the 1949 Diplomatic Conference (2B *Final Record* 149), but Committee II (Prisoners of War) determined that such a provision was not necessary for prisoners of war. 2A *Final Record* 402.

[131] It has been suggested that "since under Article 51, paragraph 2, he [the prisoner of war] is covered by the national legislation [of the Detaining Power] concerning the protection of labour," a prisoner of war disabled in an industrial accident or by an industrial disease would, while still a prisoner of war, be entitled to benefit from local workmen's compensation laws. Pictet, *Commentary* 287. Is is believed that the application of this general provision of the Convention has been restricted in this area by the specific provisions of Article 54 and 68.

[132] *See* Anon., Conditions of Employment 182.

of the pittance which constitutes working pay.[133] The French delegate at the 1949 Diplomatic Conference raised the point and suggested that disabled prisoners of war should receive the Detaining Power's national rate of disability compensation as long as they remained disabled and prisoners of war.[134] Perhaps he was seeking too much—but, in any event, no action was taken on his suggestion and the prisoner of war disabled in an industrial accident or by an industrial disease will be at the mercy of the Detaining Power in this regard.[135]

**5. Grievance Procedures**

In general, any prisoner of war who believes that the right guaranteed to him by the various provisions of the 1949 Convention are, in any manner whatsoever, being violated in connection with his utilization as a source of labor, would have the right to avail himself of any of the channels of complaint established by the Convention: the representatives of the Protecting Power, the prisoners' representative, or, perhaps, the representatives of the International Committee of the Red Cross.[136] Nevertheless, the 1949 Diplomatic Conference felt it advisable to include in the second paragraph of Article 50, following the listing of the classes of authorized labor, a specific provision permitting prisoners of war to exercise their right of complaint should they consider that a particular work assignment is in a prohibited area.[137] It is somewhat difficult to perceive the necessity for this provision, or that it adds anything to the general protection otherwise accorded to the prisoner of war by the appropriate provisions of the Convention. In fact, the danger always exists that by specific provisions such as this the draftsmen may have unwittingly diluted the effect of the general protective provisions of this nature in areas where no specific provisions have been included.

**6. Special Agreements**

It would not be appropriate to leave the discussion of the utilization of prisoner-of-war labor without at least passing reference to the possibility of special agreements in this field between the opposing belligerents. Strangely enough, despite the fact that prisoner-of-war labor has been the subject of many special agreements, or of attempts to

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[133] During World War II the United States paid prisoners of war injured in industrial accidents one-half (40 cents) of the regular work payments during the period of disability. Tollefson, Enemy Prisoners of War 61; Rich, Brief History 433.

[134] 2A *Final Record* 275–76.

[135] It should be noted that under Article 114 prisoners of war who are injured in accidents are eligible for early repatriation under the provisions of Article 109–117, inclusive, of the Convention. *See* p. 412 *infra.*

[136] For a discussion of complaints by prisoners of war, *see* pp. 285 and 301–302 *infra.*

[137] For examples of prisoner-of-war complaints on this subject during World War II, *see* text in connection with note H-275 *supra.*

negotiate special agreements, between opposing belligerents during both World War I and World War II,[138] and despite numerous specific references elsewhere in the 1949 Convention to the possibility of special agreements, nowhere in the articles of the 1949 Convention concerned with prisoner-of-war labor is there any reference made to this subject. Nevertheless, such agreements, provided they do not adversely affect the rights elsewhere in the Convention guaranteed to prisoners of war, may be negotiated under the provisions of the first paragraph of Article 6 of the Convention, as well as under the inherent sovereign powers of the belligerents.[139]

## F. CONCLUSIONS

Utilization of prisoner-of-war labor means increased availability of manpower and a reduction in disciplinary problems for the Detaining Power, and an active occupation, better health and morale, and, perhaps, additional purchasing power for the prisoners of war. It is obvious that both sides have much to gain if all of the belligerents comply with the labor provisions of the 1949 Convention.

On the whole, it is believed that these labor provisions represent an improvement in the protection to be accorded prisoners of war in any future major international armed conflict. True, they contain ambiguities and compromises which can serve any belligerent which is so minded as a basis for justifying the establishment of policies which are contrary to the best interests of the prisoners of war detained by it and which are probably contrary to the intent of the drafters. However, if the Convention is to be at all meaningful, it is necessary to start from the premise that the nations which are Parties to it will, to the maximum extent of their capabilities, implement it as the humanitarian charter which it was intended to be. And in any event, two factors are always present which tend to call forth this type of implementation: the presence of the Protecting Power and the doctrine of reciprocity.[140] Information as to the manner of interpreting and implementing the provisions of the Convention by a belligerent is made known to the other side through the activities of the Protecting Power and thus can become public knowledge, with the resulting effect, good or bad, on world public opinion.[141] Policies which, while perhaps complying with a strict interpretation of the provisions of the Conven-

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[138] *See, e.g.*, the World War I agreements listed in note I-39 *supra;* and the World War II agreements discussed in Lauterpacht, Problem 373.

[139] Concerning special agreements between belligerents, *see* pp. 84–86 *supra.* By becoming Parties to the Convention they have given up their sovereign right to enter into special agreements adversely affecting the rights guaranteed to prisoners of war by the Convention.

[140] The activities of humanitarian organizations such as the ICRC are likewise a major deterrent to the improper application of the Convention.

[141] Concerning the effect of world public opinion, *see* p. 33 *supra.*

tion, are obviously overly restrictive in an area where a more humanitarian attitude appears justified, and could easily be employed, will undoubtedly result in the adoption of an equally or even more restrictive policy by the opposing belligerent. Such retorsion can easily lead to charges of reprisals, which are outlawed, and thus create a situation which, whether or not justified, can result only in harm to all of the prisoners of war held by both sides. While there were nations which, during World War II, appeared to be disinterested in the effect that their treatment of prisoners of war was having on the treatment being received by their own personnel detained by the enemy, it is to be hoped that in any future international armed conflict, even one which represents the ". . . destruction of an ideology . . .,"[142] at the very least, concern for the fate of its own personnel will cause each belligerent to comply fully with the labor provisions of the 1949 Convention.

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[142] Statement of German General Keitel, quoted in *I.M.T.* 475.