International Review of the Red Cross (2024), **106** (926), 565–584.
Selected Articles
doi:10.1017/S1816383124000237

IRRC

Enhanced labour protection for prisoners of war

Christian Via Balole[1,2]* and Raphaël van Steenberghe[3,4]**
[1]Doctoral Student, University of Louvain, Louvain-la-Neuve, Belgium, and Catholic University of Bukavu, Bukavu, Democratic Republic of the Congo
[2]FRESH Fellow, Belgian National Fund for Scientific Research, Brussels
[3]Professor, University of Louvain, Louvain-la-Neuve, Belgium
[4]Research Associate, Belgian National Fund for Scientific Research, Brussels, Belgium
*Email: christian.viabalole@uclouvain.be; via.balole@ucbukavu.ac.cd
**Corresponding author email: raphael.vansteenberghe@uclouvain.be

Abstract

The principle of prohibiting forced labour exists in both treaty and customary international law. However, there are limits to this prohibition, in that certain types of forced labour are actually permitted; this is the case for forced labour performed by prisoners of war (PoWs). This paper examines the legal regime applicable to such labour. It starts by setting out the current rules, following a brief historical review. It then explains the shortcomings of those rules, which are open to abuse and are not focused exclusively on the rights and interests of the PoWs, before proposing two possible ways of improving the situation by means of a

systemic approach. The first is based on international humanitarian law itself, while the second is based on the complementary relationship between that body of law and international human rights law. Such improvements would give PoWs the right to perform any available work while continuing to require them to carry out work exclusively dedicated to running the PoW camp.

Keywords: forced labour, prisoner of war, protection, normalization, complementarity, armed conflict.

Introduction

It is often pointed out that most armed conflicts since the Second World War have been of a non-international nature, as they have involved at least one non-State armed group. This might suggest that the protection of prisoners of war (POWs) has become a side issue, as PoW status applies only to enemy combatants captured while participating in international armed conflicts, which mainly comprise conflicts between States.[1]

Such an interpretation would be a mistake, however. Jurisdictions such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Eritrea–Ethiopia Claims Commission have produced detailed case law on the treatment of PoWs during the conflict in Yugoslavia,[2] which involved international aspects, and the conflict between Ethiopia and Eritrea (1998–2000), respectively.[3] The protection of PoWs has also returned to the fore in the wake of recent international armed conflicts, such as that between Armenia and Azerbaijan in 2020, which resumed in 2022,[4] and the ongoing armed conflict between Ukraine and Russia.[5] Unlike other contemporary international armed conflicts,[6] these have led to the capture of large numbers of combatants by the

1 International armed conflicts also include wars of national liberation (as stipulated in Article 1(4) of Additional Protocol I to the Geneva Conventions), armed conflicts between international organizations and States, and those between international organizations. ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (ICRC Commentary on GC I), paras 245–252, available at: https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949 (all internet references were accessed in February 2024).

2 See ICTY, *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Judgment (Trial Chamber I), 31 March 2003, available at: www.refworld.org/jurisprudence/caselaw/icty/2003/en/40183.

3 See Eritrea-Ethiopia Claims Commission, *Partial Award: Prisoners of War – Ethiopia's Claim 4, between the Federal Democratic Republic of Ethiopia and the State of Eritrea*, The Hague, 1 July 2003, available at: https://pcacases.com/web/sendAttach/752; Eritrea-Ethiopia Claims Commission, *Partial Award: Prisoners of War – Eritrea's Claim 17, between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, The Hague, 1 July 2003, available at: https://pcacases.com/web/sendAttach/751.

4 See Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy), "Military Occupation of Azerbaijan by Armenia", *RULAC*, available at: www.rulac.org/browse/conflicts/military-occupation-of-azerbaijan-by-armenia#collapse2accord.

5 See Geneva Academy, "Military Occupation of Ukraine by Russia", *RULAC*, available at: www.rulac.org/browse/conflicts/military-occupation-of-ukraine#collapse2accord.

6 See Geneva Academy, "International Armed Conflict between India and Pakistan", *RULAC*, available at: www.rulac.org/browse/conflicts/international-armed-conflict-between-pakistan-and-india#collapse3accord;

belligerents. They have also raised significant concerns regarding the protection of PoWs. The principal concerns relate to the humane treatment of those detainees, which is associated with a number of fundamental rights including the right to life, the right not to suffer torture, the right not to undergo inhuman or degrading treatment[7] and the right to due process of law.[8] Those concerns are clearly justified, as evidenced by the various reports listing violations of these fundamental rights.[9] Furthermore, such conflicts – especially that between Ukraine and Russia – have also highlighted the difficulties of applying the protection of PoWs as regards labour. There have been reports of Ukrainian PoWs being required to carry out humiliating or degrading work, such as collecting and loading corpses,[10] or work that contributed directly to the war effort of the Detaining Power, such as loading artillery munitions for the Russian armed forces.[11]

These events raise questions regarding the current rules governing work carried out by PoWs. Those rules date mainly from 1949, when Geneva Convention III relative to the Treatment of Prisoners of War (GC III) was adopted. The main issue is therefore whether the regime set out in GC III should be adapted in light of contemporary concerns regarding detention and the refocusing of work in detention on the interests and rights of detainees. This paper pursues that objective by first explaining the origins and content of the current applicable rules, before highlighting their shortcomings, particularly in light of the general spirit underlying the protection of PoWs. It then proposes enhanced labour protection for PoWs, based on a systemic approach derived either from international humanitarian law (IHL) itself or from the complementary relationship between that branch of law and international human rights law (IHRL).

The origins and content of the rules governing work by prisoners of war

PoWs enjoy a protected status that confers a number of rights on combatants who have been captured. However, it also includes certain obligations that serve the interests of the Detaining Power, and those obligations include that of performing

Geneva Academy, "International Armed Conflict between India and China", *RULAC*, available at: www.rulac.org/browse/conflicts/international-armed-conflict-between-india-and-china#collapse2accord.

7 See Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 13, available at: https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949.

8 *Ibid.*, Arts 84, 99 ff.

9 See Human Rights Watch, "Azerbaijan: Armenian Prisoners of War Badly Mistreated", 2 December 2020, available at: www.hrw.org/news/2020/12/02/azerbaijan-armenian-prisoners-war-badly-mistreated; Office of the UN High Commissioner for Human Rights (UN Human Rights), *Treatment of Prisoners of War and Persons* Hors de Combat *in the Context of the Armed Attack by the Russian Federation against Ukraine (24 February 2022 to 23 February 2023)*, 24 March 2023, available at: www.ohchr.org/sites/default/files/documents/countries/ukraine/2023/23-03-24-Ukraine-thematic-report-POWs-ENG.pdf.

10 UN Human Rights, above note 9, para. 54.

11 *Ibid.*

forced labour. The rules governing PoW labour stem from a long process that has resulted in detailed rules enshrined in both treaty and customary law.

History

PoWs have been put to work "from the days when the Romans first came to appreciate the economic value of prisoners of war as a source of labour".[12] However, States only regulated PoW labour at the end of the nineteenth century, through the 1899 and 1907 Hague Conferences regarding the codification of the laws and customs of war. The 1899[13] and 1907[14] Hague Regulations both include a specific provision on this subject, allowing a Detaining Power to use the labour of PoWs.[15] They could work for the public service, for private persons or on their own account, but this work could not have any connection with operations of war, and prisoners had to receive payment for it.[16] The Regulations did not mention the types of work that PoWs could be required to perform; they merely prohibited work connected with operations of war and "excessive" labour, without defining the term "excessive". The types of work that were prohibited had therefore to be decided on a case-by-case basis, which could lead to abuse. The Regulations did, however, require States wishing to employ PoWs to take account of their rank and aptitude. Officers could not be required to carry out any kind of work, in accordance with military custom.[17]

A number of abuses were committed during the First World War, including the use of PoWs for tasks related to operations of war. In response to the mistreatment of PoWs during this conflict, the States set out more detailed rules on work in the 1929 Geneva Convention, which specifically addressed the protection of PoWs.[18] The rules in the new Convention were in part similar to those of the Hague Regulations. Firstly, the Convention recognized the right of the Detaining Power to employ PoWs as "workmen"[19] as long as their tasks had

12 ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2021 (ICRC Commentary on GC III), para. 2665, available at: https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949.

13 Hague Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 29 July 1899, available at: https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-ii-1899.

14 Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (Hague Regulations), Annexed to Hague Convention (IV) with Respect to the Laws and Customs of War on Land, available at: https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907.

15 Hague Regulations, above note 14, Art. 6.

16 *Ibid.*

17 See Hugues Marquis, "La Convention et les prisonniers de guerre des armées étrangères", *Histoire, Économie et Société*, No. 2008/3, 2008, p. 68, available at: www.cairn.info/revue-histoire-economie-et-societe-2008-3-page-65.htm.

18 Georges Werner, "Un commentaire du Code des prisonniers de guerre", *Revue Internationale de la Croix-Rouge*, Vol. 14, No. 159, 1932, available at: https://international-review.icrc.org/sites/default/files/S1026881200183953a.pdf.

19 Convention relative to the Treatment of Prisoners of War, 27 July 1929 (1929 Geneva Convention), Art. 27(1), available at: https://ihl-databases.icrc.org/en/ihl-treaties/gc-pow-1929.

no direct connection with operations of war.[20] Secondly, it allowed for PoWs to work for private individuals,[21] but still did not list the types of work that they could be required to undertake. Article 31 concerning authorized work was formulated purely in the negative, giving an indicative list of tasks on which PoWs could not be employed. Tacitly, this was equivalent to stating that all types of work were permitted that were not prohibited. Furthermore, the 1929 Convention defined prohibited work only in general terms, leaving room for case-by-case decisions. Thirdly, it set out a specific regime regarding officers, conferring upon them the right to work. In addition, however, the 1929 Convention did introduce a series of new points. In particular, Article 32 stipulated that the Detaining Power must not employ PoWs on unhealthy or dangerous work. Furthermore, unlike the Hague Regulations, which made no explicit reference to non-commissioned officers, the 1929 Convention stipulated that such officers could only be compelled to undertake supervisory work but had a right to work if they so wished.[22]

The Second World War saw flagrant violations of the labour regulations established by the 1929 Convention, in particular Articles 31 and 32, which prohibited work directly related to war operations and unhealthy or dangerous work.[23] This is one of the reasons that prompted States to further flesh out the legal regime governing PoW labour in GC III.

Contemporary rules

The rules embodied in GC III are partly based on those of previous treaties, such as the right of the detaining State to require PoWs to work[24] subject to the limits already recognized by the 1929 Convention, the possibility for PoWs to work for private individuals,[25] and specific legal regimes for officers, who may not be compelled to do any work,[26] as well as for non-commissioned officers, who may only be required to work in a supervisory capacity.[27] GC III hence fragments the work of PoWs, both *ratione personae*, in that the rules concerning work do not apply uniformly to all prisoners, and *ratione materiae*, in that the nature of the work they may perform varies.

However, the rules of GC III differ from earlier rules in a number of respects. One of the main differences is that GC III explicitly sets out the objectives of forced labour. Article 49(1) specifies that "[t]he Detaining Power may utilize the labour of prisoners of war who are physically fit, … *with a view particularly to maintaining them in a good state of physical and mental*

20 *Ibid.*, Art. 31.
21 *Ibid.*, Art. 28.
22 *Ibid.*, Art. 27(2–3).
23 ICRC Commentary on GC III, above note 12, para. 2667.
24 GC III, Art. 49.
25 *Ibid.*, Art. 57.
26 Eritrea-Ethiopia Claims Commission, *Partial Award: Prisoners of War – Ethiopia's Claim 4*, 1 July 2003, para. 127, available at: https://legal.un.org/riaa/vol_26.shtml.
27 GC III, Art. 49(2).

health".[28] According to the case law, it follows from this provision that PoWs undertake forced labour in their own interests.[29] These interests comprise a number of aspects. Work can be an effective means of breaking the monotony and boredom of what may be long periods of imprisonment. As the International Committee of the Red Cross (ICRC) rightly points out, PoWs "lose a sense of time, and the absence of any meaningful activity, coupled with isolation and uncertainty about the future, could lead to depression or other physical and mental health problems".[30] Work also allows PoWs to earn money, as it is remunerated,[31] enabling them to buy items to improve their living conditions in the camp.[32] Finally, work gives PoWs the opportunity to acquire or maintain vocational skills that could be useful when they return to normal life at the end of hostilities.[33] However, the adverb "particularly" in Article 49(1), qualifying the main objective of forced labour, suggests that work is not intended only to serve the PoWs' interests; GC III also takes account of the economic interests of the Detaining Power,[34] as indicated by the list of authorized types of forced labour.

Unlike earlier instruments, GC III lists the different types of forced labour that may be undertaken. It distinguishes between three main categories. The first consists of tasks that the Detaining Power may require PoWs to perform without any restriction. These are work connected with camp administration, installation or maintenance,[35] as well as forced labour in the areas of agriculture, commercial business, and arts and crafts.[36] The second category comprises work that the Detaining Power may compel PoWs to carry out, but subject to certain restrictions. This includes work in "industries connected with the production or extraction of raw materials, and manufacturing industries, *with the exception of metallurgical, machinery and chemical industries*".[37] It is assumed that in the case of the last three, work would directly contribute to the Detaining Power's war effort. The other types of work that are authorized subject to restrictions include public works and building operations, transport and handling of stores, and public utility services,[38] provided that the operations, stores or services in question have "no military character or purpose".[39] The third category

28 Emphasis added.
29 ICTY, *Naletilić*, above note 2, para. 254.
30 ICRC Commentary on GC III, above note 12, para. 2675.
31 GC III, Art. 54.
32 ICRC Commentary on GC III, above note 12, para. 2676. See also Catherine Maia, Robert Kolb and Damien Scalia, *La protection des prisonniers de guerre en droit international humanitaire*, 1st ed., Bruylant, Brussels, 2015, pp. 323–324.
33 *Ibid.*
34 ICRC Commentary on GC III, above note 12, para. 2655.
35 GC III, Art. 50(1).
36 *Ibid.*, Art. 50(a), (d–e).
37 *Ibid.*, Art. 50(b) (emphasis added)
38 *Ibid.*, Art. 50(b–c), (f).
39 ICTY, *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Judgment (Trial Chamber III), 29 May 2013, para. 159, available at: https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-04-74/JUD251R2000462232.pdf. According to the jurisprudence, work that serves a military purpose "cannot, in any event, be made compulsory for prisoners of war": *ibid.*, para. 159.

comprises forced labour that is prohibited: work of an unhealthy or dangerous nature.[40]

However, even if work is prohibited because it does not respect the restrictions of GC III or is subject to an absolute prohibition, PoWs may agree to carry it out. The Convention makes express provision for this as regards labour which is of an unhealthy or dangerous nature,[41] and practice as well as legal scholarship appear to permit it with respect to other prohibited types of labour.[42] It is admitted that legitimate consent does not violate Article 7 of GC III,[43] which provides that PoWs may not renounce the rights that the Convention grants them.[44] However, as the Commentary to GC III points out, "[c]onsidering the vulnerable and highly constrained situation of prisoners of war in the hands of a Detaining Power, caution must be exercised when considering the authenticity of the prisoner's consent".[45] This caution is essential, and consent may be presumed to be absent where circumstances make it impossible for PoWs to express their consent freely.[46] According to the case law, such circumstances must be identified by applying certain criteria that indicate whether work was indeed carried out with the consent of the PoW concerned. Those criteria include the following:

> a) the work being substantially uncompensated; b) the vulnerable position of the prisoners; c) allegations that detainees who are unable or unwilling to work are either forced to do so or put in solitary confinement; d) longer-term consequences of the labour; (e) the fact and the conditions of detention; (f) the physical consequences of the work on the health of prisoners.[47]

This is not an exhaustive list, however. The ICTY has stated that "the determination of whether protected persons laboured involuntary [*sic*] is a factual question, which has to be considered in light of all factual circumstances on a case-by-case basis".[48] The ICTY has also stated that

40 This is the case for the removal of mines or similar devices (GC III, Art. 52(2–3)). However, case law indicates that other work may not be permitted, setting out three specific situations: "(1) work which is not dangerous in itself but which may be dangerous by reason of the general conditions in which it is carried out: this situation is intended to cover particularly work done 'in the vicinity either of key military objectives … or of the battlefield', (2) work which by its very nature is dangerous or unhealthy, and (3) work which is not in itself dangerous but which may be or may become so if it is done in inadequate technical conditions". ICTY, *Naletilić*, above note 2, para. 257.

41 GC III, Art. 52(1).

42 ICTY, *Naletilić*, above note 2, para. 258. See the practice and doctrine mentioned by the ICRC in ICRC Commentary on GC III, above note 12, para. 2715 fn. 35.

43 Under this provision, "[p]risoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention".

44 Camille Jacquot (ed.), *Le statut des détenus de Guantanamo capturés en Afghanistan au regard du droit international humanitaire et du droit international des droits de l'homme: Quelle protection dans le cadre de la "guerre contre le terrorisme"?*, Geneva, 2011, p. 69.

45 ICRC Commentary on GC III, above note 12, para. 2716.

46 ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case Nos IT-96-23, IT-96-23/1-A, Judgment (Appeals Chamber I), 12 June 2002, para. 120, available at: www.icty.org/x/cases/kunarac/acjug/en/.

47 ICTY, *Naletilić*, above note 2, para. 259.

48 ICTY, *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9, Judgment (Trial Chamber II), 17 October 2003, para. 87, available at: www.refworld.org/jurisprudence/caselaw/icty/2003/en/40195.

> [i]n order to establish the *mens rea* requirement for the crime of unlawful labour, the Prosecution must prove that the perpetrator had the intent that the victim would be performing prohibited work. The intent can be demonstrated by direct explicit evidence, or, in the absence of such evidence, can be inferred from the circumstances in which the labour was performed.[49]

The detailed rules set out in GC III are supplemented by rules of customary law, of which the ICRC Customary Law Study has established both the existence and content. These rules, which are deemed applicable during both international and non-international armed conflicts, include a prohibition formulated in broad terms: "Uncompensated or *abusive* forced labour is prohibited."[50] The Customary Law Study reiterates the types of work that a PoW may be compelled to carry out under GC III, and adds two further prohibitions: deportation to slave labour[51] and compelling persons to serve in the forces of a hostile power.[52]

Towards a relaxation of the rules compelling prisoners of war to work

While current rules regarding PoW forced labour are more detailed than those that applied previously, they are still not satisfactory, primarily because of the importance given to the interests of the Detaining Power. They need to be modified so as to focus on the interests and rights of PoWs.

Why the current rules are unsatisfactory

To address this issue, one must first examine the difficulties inherent in pursuing the Detaining Power's economic interests via forced labour, before refuting the argument that such work is absolutely necessary to serve the PoWs' interests.

Forced labour and the economic interests of the Detaining Power

Most types of forced labour authorized by GC III serve the economic interests of the Detaining Power.[53] Pursuing such interests via PoWs' forced labour is somewhat questionable. First of all, it is clear that those economic interests must be weighed against other international obligations, and that they do not allow the Detaining Power to contravene such obligations. In this respect, one major concern is that, although the work is authorized, it may contribute directly to the Detaining Power's war effort. This concern applies firstly to work that is authorized without

49 ICTY, *Naletilić*, above note 2, para. 260.
50 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 95, available at: https://ihl-databases.icrc.org/en/customary-ihl/v1 (emphasis added).
51 *Ibid.*
52 *Ibid.*
53 C. Maia, R. Kolb and D. Scalia, above note 32, p. 329.

restriction, such as agricultural work. As the ICRC notes, "[i]t could be argued that participating in agricultural activities can have some direct military value, as the food produced, for example, may be used for both civilians and military personnel".[54] The ICTY has recognized that "prisoners of war may always be compelled to perform work in relation to agriculture, … regardless of whether the produce of their labour is intended for soldiers in the frontline".[55] There is also a clear risk that PoWs will contribute directly to the Detaining Power's war effort by performing authorized work of the types that are subject to restrictions, when those restrictions are vague. Such work is authorized as long as it has no military character or purpose, but while the concept of "military character" is clear, as "everything which is commanded and regulated by the military authority is of military character, in contrast to what is commanded and regulated by the civil authorities",[56] the concept of "military purpose" is more ambiguous. That concept depends on the main or sole purpose of the work that PoWs are required to perform, which must not be military in nature.[57] It is hence accepted that "prisoners of war may be employed on all work which, in the categories under consideration, normally serves to support civilian life, even if the military authorities incidentally benefit from it".[58] These restrictions will clearly need to be examined on a case-by-case basis when the forced labour is carried out, and are open to broad interpretation by belligerents. This is evidenced by the experiences of the First[59] and Second[60] World Wars, when PoWs were compelled to carry out work that played an important role in the war economy of the Detaining Power, "numerous abuses [having been] committed regarding the tasks that were assigned to them".[61] Furthermore, work that was not carried out mainly or exclusively for military purposes, such as the renovation of a bridge, could rapidly prove decisive to the military operations of the Detaining Power. The 1929 Geneva Convention would therefore appear to have not completely eliminated the risk of forced labour directly contributing to the military action of the Detaining Power. And yet, as the historical development of the PoW labour regime shows, prohibiting such a contribution is one of the central tenets of that regime. As mentioned above, the 1899 and 1907 Hague Regulations and the 1929 Geneva Convention stipulated that work carried out by PoWs must have no direct link with military operations. However, during both World Wars, the

54 ICRC Commentary on GC III, above note 12, para. 2701.
55 ICTY, *Naletilić*, above note 2, para. 256.
56 *Ibid*., para. 256.
57 ICTY, *Prlić*, above note 39, para. 159.
58 ICRC Commentary on GC III, above note 12, para. 2709. This is a more flexible definition of military character, which makes the ultimate purpose of the activity in question the determining factor: see ICTY, *Prlić*, above note 39, para. 159. As we see, such an interpretation is broad but realistic: see C. Maia, R. Kolb and D. Scalia, above note 32, p. 330.
59 Elodie Rivalin (ed.), "Des 'Boches' à Lyon et dans le Rhône entre 1915 et 1920: Le travail des prisonniers de guerre allemands entre économie de guerre et cohabitation avec l'ennemi", master's thesis, Université de Lyon, 2016, p. 7, available at: https://dumas.ccsd.cnrs.fr/MEM-UNIV-BDL/dumas-01354310.
60 Joseph Billig, "Le rôle des prisonniers de guerre dans l'économie du IIIe Reich", *Revue d'Histoire de la Deuxième Guerre Mondiale*, Vol. 10, No. 37, 1960, p. 53, available at: www.jstor.org/stable/25731981.
61 C. Maia, R. Kolb and D. Scalia, above note 32, p. 321 (authors' translation).

belligerents had difficulty agreeing on the scope of this rule, as most work could be seen as a contribution to the national war effort.[62] In 1949, the question of contributions to the national war effort provoked particularly intense and prolonged discussions,[63] which led to the unsatisfactory solution of a list of authorized and prohibited types of work.

Forced labour carried out to serve the economic interests of the Detaining Power also raises the question of the more general spirit underlying the protection regime for PoWs. Captured combatants are interned solely to prevent them from returning to combat; their detention is hence justified only by security considerations, and not by any matters related to criminal prosecution.[64] In other words, PoWs are seen as "heroes and good men, who have the misfortune to be detained by the enemy for having performed their patriotic duty to their country".[65] In fighting in accordance with IHL, combatants do not commit any criminal offence for which they should be penalized, even if, during the course of the fighting, they have killed, injured or captured members of the armed forces of the Detaining Power. Being forced to work for the economic interests of the Detaining Power could equate to a form of sanction or, at least, to a form of compensation for the prisoner's earlier participation in hostilities. This would be completely at odds with the purely security-related justification for their detention.

Finally, it is questionable whether the prerogative upon PoW forced labour for the economic interest of the Detaining Power is meaningful. Since such labour cannot be used by States to wage war, there is no reason why PoWs, who are detained for reasons related to the war, should be forced to work.

Forced labour and the interests of prisoners of war

The rules governing PoW labour should therefore be enhanced by focusing purely on PoWs' interests, in accordance with the objective explicitly mentioned in Article 49(1) of GC III. However, the first step is to understand what those interests really are. They do not require that work be made compulsory, as Article 49 may seem to suggest. Firstly, maintaining PoWs in a good state of physical and mental health can also be achieved, at least in part, by exercising certain rights that the Convention confers upon them. Article 38, for instance, stipulates that

> the Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits, sports and games amongst prisoners, and shall take the measures necessary to ensure the exercise thereof by providing them with adequate premises and necessary equipment. Prisoners shall have

62 ICRC Commentary on GC III, above note 12, para. 2695.

63 According to the UK representative at the 1949 Diplomatic Conference, Article 50 of GC III, which lists authorized work, "had been the most disputed article in the whole Convention, and the most difficult of interpretation" (quoted in ICRC Commentary on GC III, above note 12, para. 2697).

64 See Jerôme de Hemptinne and Jean d'Aspremont, *Droit international humanitaire: Thèmes choisis*, Pedone, Paris, 2012, p. 324.

65 C. Maia, R. Kolb and D. Scalia, above note 32, p. 7 (authors' translation).

> opportunities for taking physical exercise, including sports and games, and for being out of doors.[66]

This provision is essential to PoWs' well-being, as it makes it possible to "break the monotony of confinement"[67] and "promotes prisoners' well-being by ensuring they have the means at their disposal to alleviate the hardships caused by their internment".[68]

Furthermore, the objective of having sufficient financial means to ensure decent conditions of detention is contained in the obligation set out in Article 15 of GC III, which provides that "[t]he Power detaining prisoners of war shall be bound to provide free of charge for their maintenance and for the medical attention required by their state of health".[69] This obligation presupposes the existence of financial resources, and this in turn implies that "holding prisoners is a severe drain on the finances of the State, which are focused primarily on the war effort".[70] However, even if the detaining State lacks financial resources, it is acknowledged in international case law that "the legal standards … are absolute, not relative. … [A] detaining power … cannot plead a lack of resources as legal justification for exposing individuals to conditions of detention that are inhumane."[71] Moreover, such an obligation is unconditional,[72] in that "[n]o additional elements need to be fulfilled for the prisoners to benefit".[73] The Commentary to GC III maintains that "[t]his obligation represents one of the most important aspects of the protection afforded to prisoners of war under the Third Convention".[74] If the Detaining Power is unable to provide decent conditions of detention, it must either release the PoWs or transfer them to a State that is willing and able to detain them in accordance with GC III.[75] Articles 15 and 38 of the Convention indicate that the mental, physical and material well-being of PoWs is already taken into account, which reduces the need to impose forced labour upon prisoners in order to ensure their well-being.

It is possible to achieve the benefits to PoWs that work is intended to confer without resorting to forced labour, and to do so independently of obligations incumbent on the Detaining Power that would make it possible to achieve those benefits in part. One simply needs to give prisoners the freedom to undertake

66 GC III, Art. 38.
67 C. Maia, R. Kolb and D. Scalia, above note 32, p. 315 (authors' translation); Christophe Woehrle, "Les prisonniers de guerre français dans l'industrie de guerre du Reich (1940–1945)", *Guerres Mondiales et Conflits Contemporains*, Vol. 2, No. 270, 2018, p. 129.
68 ICRC Commentary on GC III, above note 12, para. 2446.
69 GC III, Art. 15.
70 C. Maia, R. Kolb and D. Scalia, above note 32, p. 147 (authors' translation). See also Robert Remacle and Pauline Warnotte, *La psychologie du combattant et le respect du droit des conflits armés: Étude des facteurs pouvant influencer le comportement du combattant au regard du droit international humanitaire*, Presses Universitaires de Namur, Namur, 2018, p. 69.
71 ICTY, *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgment (Trial Chamber I), 16 November 1998, para. 1117, available at: www.icty.org/x/cases/mucic/tjug/en/.
72 C. Maia, R. Kolb and D. Scalia, above note 32, p. 147.
73 ICRC Commentary on GC III, above note 12, para. 1716.
74 *Ibid.*, para. 1710.
75 *Ibid.*, para. 1721.

such work if they wish to benefit from the physical, psychological or material advantages it confers. Officers and persons of equivalent status are not obliged to work, but there is no indication that this degrades their conditions of detention, even though they experience the same deprivation of liberty as other PoWs. This is also illustrated by the labour regime for civilian internees in international armed conflicts, which does not require them to work,[76] even though their deprivation of liberty might be similar to that of PoWs.

Lastly, those protection objectives regarding PoWs which could be pursued via forced labour are sometimes entirely negated. That is the case if PoWs refuse to work; this renders those prisoners liable to disciplinary action for failing to obey the orders of the detaining State,[77] and they run the risk of disciplinary sanctions[78] that could degrade their conditions of detention.[79] For instance, PoWs under arrest can be subject to close confinement, which "consists of uninterrupted detention in a room, barrack or cell".[80] This may have adverse effects on their mental health. In such cases, the interests of the Detaining Power are clearly taking precedence over those of the prisoners.

Adapting the rules via a systemic approach

There are two possible paths to remedying the shortcomings of the current rules governing PoW forced labour. Both take a systemic approach that examines the relevant IHL rules in light of the general context to which they belong. The first path is based on IHL, while the second is based on IHRL.

International humanitarian law

The general context of the first path is that of IHL itself, and more specifically the elements mentioned above: (i) the other provisions of GC III that show that PoWs' mental, physical and material well-being can be ensured, at least in part, by means other than forced labour; (ii) the basic principle underlying the prohibition of certain types of forced labour, which is to prevent PoWs contributing directly to

76 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Art. 95, available at: https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949.

77 GC III, Art. 82.

78 Under GC III, Art. 89, "[t]he disciplinary punishments applicable to prisoners of war are the following: (1) A fine which shall not exceed 50 per cent of the advances of pay and working pay which the prisoner of war would otherwise receive under the provisions of Articles 60 and 62 during a period of not more than thirty days. (2) Discontinuance of privileges granted over and above the treatment provided for by the present Convention. (3) Fatigue duties not exceeding two hours daily. (4) Confinement."

79 The Commentary on the Convention shares this opinion in the following terms: "Despite the clear and unambiguous wording of these rules, ICRC experience shows that imposing disciplinary sanctions strictly within the limits of Article 89 can raise a number of issues. These include, in particular, the point at which a restriction of privileges turns into a deprivation of a prisoner's fundamental rights; the types of tasks falling within the definition of fatigue duties; and the conditions and duration of confinement." See ICRC Commentary on GC III, above note 12, para. 3738.

80 *Ibid.*, para. 3754.

the military action of the Detaining Power: (iii) the general spirit of the regime protecting PoWs, which dictates that their detention cannot be perceived as punishment and must not include any penalty for their simply having taken a legal part in hostilities; and (iv) the regime governing work by civilian internees who, while also suffering deprivation of liberty for reasons of security, undertake work only if they so wish.

These elements are central to the IHL system, and the rule in GC III authorizing forced labour can be interpreted in light of them. This being so, the work authorized by the Convention should be seen as work that the Detaining Power can make available to PoWs, who should be free to carry it out in order to serve their own interests; however, PoWs can always accept work that is in principle prohibited. In either case, it is necessary to verify that the PoW's expression of will is genuine, on the basis of criteria and circumstances stemming from case law in particular.[81]

This solution should also reflect an equally essential IHL feature: the general balance on which IHL is based, between the principle of humanity, which demands that people be protected from the horrors of war, and that of military necessity, which ensures that belligerents can conduct hostilities without hindrance. In view of this second element, it would appear reasonable to require PoWs to carry out work connected with camp administration, installation or maintenance. Performing this type of work is not problematic for two reasons. Firstly, it is carried out in the PoW's interests, and it "contributes to good living conditions and order in the camp".[82] Secondly, it is not incompatible with IHRL, which does not consider the obligation to carry out maintenance work as prohibited forced labour. In addition, this IHRL obligation applies not only to those who have been convicted, but also to remand detainees.[83]

International human rights law

The other approach to enhancing the rules governing forced labour by PoWs is to examine those rules in the light of international law as a whole. International law includes areas other than IHL that can help us understand and interpret this body of law, with IHRL being of particular relevance. Refocusing the detention of PoWs on their interests and rights, and thus making the forced labour regime more flexible, is in line with IHRL developments regarding detention that have taken place over the years. While enshrining the principle of prohibiting forced or compulsory labour, most IHRL instruments provide for exceptions, such as the work normally required of a person detained following a criminal conviction. This is particularly the case for the 1930 Convention concerning Forced or

81 ICTY, *Kunarac*, above note 46, para. 259.
82 ICRC Commentary on GC III, above note 12, paras 2699–2700.
83 International Labour Office, *General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105)*, Report III, Part 1B, International Labour Conference, 96th Session, 2007, para. 51.

Compulsory Labour (Forced Labour Convention),[84] the International Covenant on Civil and Political Rights (ICCPR),[85] the European Convention on Human Rights (ECHR)[86] and the American Convention on Human Rights (ACHR),[87] all of which authorize forced labour by detained criminals. Human rights case law follows the same logic.[88]

However, a current trend, known as the "normalization of conditions of detention", has been under way for several years, meaning, according to the *European Prison Rules*, that "[l]ife in prison shall approximate as closely as possible the positive aspects of life in the community".[89] Compulsory prison labour is contrary to such an ambition, which has been incorporated into national legislation in a number of ways. A series of States have removed compulsory labour in prison from their domestic legislation; these include Belgium, which required most detainees to work until 2007.[90] Current Belgian legislation requires prison governors to ensure that "the work available in prisons is allocated to those inmates who request it".[91] This change was motivated by the idea that compulsory work is not consistent with the principle of respect for prisoners, and that "the punitive nature of the custodial sentence consists solely in the total or partial loss of freedom of movement".[92] There have also been significant changes at the global level as regards the *Standard Minimum Rules for the Treatment of Prisoners*. The 1977 version stipulated that "[a]ll prisoners under sentence shall be required to work, subject to their physical and mental fitness";[93] this rule was no longer present in the 2015 version, which requires States to offer work in order to ensure the reintegration of prisoners into society upon release.[94] Finally, while it has not (yet) explicitly affirmed that persons detained under criminal law are free to decide whether or not to work, the European Court of Human Rights (ECtHR) has emphasized that a State may not take measures that would degrade a prisoner's conditions of detention on the

84 Convention concerning Forced or Compulsory Labour, 39 UNTS 55, 28 June 1930 (Forced Labour Convention), Art. 2(2)(c).
85 International Covenant on Civil and Political Rights, 171 UNTS 999, 16 December 1966 (ICCPR), Art. 8 (3)(c)(i).
86 European Convention on Human Rights, 213 UNTS 221, 4 November 1950 (ECHR), Art. 4(3)(c).
87 American Convention on Human Rights, 1144 UNTS 123, 22 November 1969 (ACHR), Art. 6(3)(a).
88 European Court of Human Rights (ECtHR), *De Wilde, Ooms and Versyp v. Belgium*, Appl. Nos 2832/66, 2835/66, 2899/66, Judgment, 18 June 1971, paras 89–90; ECtHR, *Stummer v. Austria* (Gd Ch.), Appl. No. 37452/02, Judgment, 7 July 2011, paras 119–120.
89 Council of Europe, *European Prison Rules*, June 2006, Rule 5, available at: https://rm.coe.int/european-prison-rules-978-92-871-5982-3/16806ab9ae. See Florence Dufaux, "L'emploi des personnes incarcérées en prison: Pénurie, flexibilité et précariat. Une normalisation?", *Déviance et Société*, Vol. 34, No. 3, 2010, available at: www.cairn.info/revue-deviance-et-societe-2010-3-page-299.htm.
90 Former Article 30(3) of the Belgian Penal Code.
91 Marie-Aude Beernaert, *Manuel de droit pénal pénitentiaire*, 4th ed., Anthémis, 2023, p. 150 (authors' translation).
92 *Ibid.* (authors' translation).
93 UN, *Standard Minimum Rules for the Treatment of Prisoners*, 13 May 1977, Art. 7(20), available at: www.refworld.org/legal/otherinstr/un/1955/en/108625.
94 UN, *Standard Minimum Rules for the Treatment of Prisoners*, 2015, Art. 4(2), available at: www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf.

grounds that they have refused to work.[95] In other words, no penalty which would have that effect may be imposed.

It is therefore necessary to examine the mechanisms that would make it possible to incorporate these IHRL developments, and the current trend towards "the normalization of the conditions of detention" that underpins them, into the rules related to armed conflict. Both scholarship[96] and case law or authoritative interpretations[97] indicate that IHRL can usefully supplement IHL. Currently, that complementarity is ensured primarily by two processes.[98] The first is the interpretation of IHL through IHRL (the "interpretation process"). This process is clearly noticeable in practice. Certain courts, such as the *ad hoc* international criminal tribunals[99] and the International Criminal Court (ICC),[100] have referred to IHRL concepts or norms to clarify the meaning of certain IHL terms. It is not necessary for the norm used as the interpretative standard to be applicable to the situation regulated by the IHL rule that is to be interpreted. Practice includes cases where the definition of a concept, such as hostage-taking, is used to interpret a similar concept found in IHL relating to international armed conflict, even though the definition appears in a convention that does not apply to this type of conflict.[101]

95 ECtHR, *Cenbauer v. Croatia*, Judgment, 9 March 2006, para. 47, available at: https://hudoc.echr.coe.int/eng?i=001-72704.

96 Robert Kolb, "Aspects historiques de la relation entre le droit international humanitaire et les droits de l'homme", *Canadian Yearbook of International Law*, Vol. 37, 1999, pp. 75–80, available at: https://tinyurl.com/uate4cvd; Cordula Droege, "Elective Affinities? Human Rights and Humanitarian Law", *International Review of the Red Cross*, Vol. 90, No. 871, 2008, p. 501, available at: https://international-review.icrc.org/articles/elective-affinities-human-rights-and-humanitarian-law.

97 International Court of Justice (ICJ), *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, para. 216, available at: www.icj-cij.org/case/116/judgments; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 106, available at: www.icj-cij.org/case/131/advisory-opinions; Human Rights Committee, General Comment No. 31, "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 11, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F21%2FRev.1%2FAdd.13&Lang=en.

98 Raphaël van Steenberghe, "The Impacts of Human Rights Law on the Regulation of Armed Conflict: A Coherency-Based Approach to Dealing with both the 'Interpretation' and 'Application' Processes", *International Review of the Red Cross*, Vol. 104, No. 919, 2022, available at: https://international-review.icrc.org/articles/the-impacts-of-human-rights-law-on-the-regulation-of-armed-conflict-919.

99 See ICTY, *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Judgment (Trial Chamber II), 15 March 2002, para. 181, available at: www.refworld.org/jurisprudence/caselaw/icty/2002/en/19276; ICTY, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1, Judgment (Trial Chamber), 10 December 1998, paras 143 ff., available at: www.refworld.org/jurisprudence/caselaw/icty/1998/en/20418; ICTY, *Delalić*, above note 71, paras 452–493, 534–542.

100 ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Corrigendum to the Decision relating to the Confirmation of the Charges Brought against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 13 November 2019, paras 378–380, 383–384, 483, 492, available at: www.icc-cpi.int/court-record/icc-01/12-01/18-461-corr-red.

101 The elements of crimes subject to the jurisdiction of the ICC use the definition of hostage-taking found in the 1979 Convention against the Taking of Hostages (Hostages Convention) to define the similar concept in IHL, with respect to both non-international (ICC, *Elements of Crimes*, 2013, pp. 12, 23, available at: www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf) and international (*ibid.*, p. 23) armed conflicts. Article 12 of the 1979 Hostages Convention stipulates explicitly that it does not apply to an act of hostage-taking committed in the course of an armed conflict where IHL imposes a duty on

Treaty IHL is generally clear regarding PoW forced labour and leaves little room for interpretation. By contrast, customary law imposes broader prohibitions, forbidding forced labour if it is not remunerated or is "abusive". Whether work is abusive or not can be assessed in a number of ways, including by taking into consideration developments in IHRL governing work by detainees. Those rules could thus be seen as the common international law through which the "abusive" nature of work in detention should be determined, both in peacetime and during armed conflict. Such a result can be achieved through two main ways, depending upon the view adopted on the controversial issue of how the content of a customary norm may be determined. According to certain scholars,[102] who rely on international case law to support their claim,[103] a customary norm may be interpreted through a deductive process, whereby the content of that norm is determined based on the operation of interpretation rules similar to those applicable to treaties, rather than on State practice and *opinio juris*. Accordingly, the principle of systemic integration, as enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, could be relied upon to take into account recent IHRL developments regulating work by detainees as "any relevant rules of international law applicable in the relations between the parties", in order to interpret the customary prohibition of "abusive" forced labour. Certainly, the principle of systemic integration does require that the States bound by the rules used as the standard for interpretation – IHRL in this instance – include at least those States bound by the rules to be interpreted, in this case customary IHL.[104] All States are bound by customary law, but this condition could also be seen as being fulfilled in view of the particularly broad ratification of the relevant human rights instruments. According to other scholars[105] and the International Law Commission (ILC),[106] the content of a customary norm can only be determined through an inductive process, based on State practice and *opinio juris*, rather than on any interpretation rules. Yet, IHRL instruments and related national legislation might arguably be considered as relevant State practice in relation to forced labour in detention, which is widespread enough given the wide

States to prosecute hostage-takers, as is the case in international armed conflict. See also ICTY, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgment (Appeals Chamber), 29 July 2009, para. 639, available at: www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf; Special Court for Sierra Leone, *Prosecutor v. Issa Hassan Sesay et al.*, Case No. SCSL-04-15-T, Judgment (Trial Chamber I), 26 October 2009, paras 577–579, available at: www.refworld.org/jurisprudence/caselaw/scsl/2009/en/92027.

102 See e.g. Panos Merkouris, "Interpreting the Customary Rules on Interpretation", *International Criminal Law Review*, Vol. 19, 2017.

103 *Ibid.*, pp. 140–142 fn. 45–60.

104 See Ulf Linderfalk, "Who Are 'the Parties'? Article 31, Paragraph 3(c) of the 1969 Vienna Convention and the 'Principle of Systemic Integration' Revisited", *Netherlands International Law Review*, Vol. 55, No. 3, 2008, available at: https://tinyurl.com/3aypf6x6.

105 See e.g. Roni Katzir and Hadar David, "Identifying Customary LOAC in Practice", *EJIL: Talk!*, 29 August 2023, available at: www.ejiltalk.org/identifying-customary-loac-in-practice/; Michael Wood and Omri Sender, "Between Theory, Practice, and 'Interpretation' of Customary Law'", *CIL Dialogues*, November 2022, available at: https://cil.nus.edu.sg/blogs/between-theory-practice-and-interpretation-of-customary-international-law/.

106 See ILC, *Draft Conclusions on Identification of Customary International Law*, UN Doc. A/73/10, 2018, Conclusion 2, p. 124.

ratification of such instruments.[107] In any case, it is worth observing that the ICRC relies on IHRL as a means for determining the content of both treaty-based[108] and customary IHL rules.[109] In the latter case, IHRL is used for the interpretation as well as the identification of a customary norm.[110] In sum, customary law is particularly capable of evolving in line with new concerns,[111] such as making the protection of detainees dependent on their interests and rights, and may therefore be affected by developments in IHRL on detention.

The second process whereby IHRL can complement IHL is through the application of IHRL to armed conflicts in parallel with IHL (the "application process"). It is no longer disputed that IHRL remains applicable during armed conflict,[112] but its applicability depends on the specific scope of application of that branch of law. In other words, in the application process, as opposed to the interpretation process, the impact of IHRL on the regulation of armed conflict depends on the extent of its applicability. The relevant IHRL rules will therefore be applicable in parallel with IHL only if (i) they have not been subject to any valid derogation;[113] (ii) the person concerned is on the territory of the entity responsible for ensuring compliance or under its personal or territorial control if that person is abroad;[114] and (iii) this entity is a State and not a non-State entity

107 Regarding widely ratified treaties as relevant practice for the formation of customary law, see e.g. ICJ, *North Sea Continental Shelf Cases* (*Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands*), Judgment, 20 February 1969, *ICJ Reports 1969*, para. 73. Regarding treaties as relevant practice for the formation of customary IHL, see e.g. ICRC Customary Law Study, above note 50, pp. xlviii–xlix.

108 See ICRC Commentary on GC I, above note 1, paras 39–41; ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd ed., Geneva, 2017, paras 41–42, available at: https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949; ICRC Commentary on GC III, above note 12, paras 99–105. For concrete cases, see *ibid.*, paras 651–659 (esp. para. 655), 665–669.

109 See e.g. ICRC Customary Law Study, above note 50, pp. xxxvi–xxxvii.

110 *Ibid.*

111 Regarding the capacity of custom to rapidly take account of practices "that give rise to impatient compromises impossible to reach through the more brutal procedure of diplomatic agreement on the text of a treaty" (authors' translation), see Patrick Daillier, Mathias Forteau and Allain Pellet, *Droit international public*, 8th ed., LGDJ, Paris, 2009, p. 373.

112 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports 1996*, para. 25, available at: www.icj-cij.org/case/95/advisory-opinions; Human Rights Committee, above note 97, para. 11; Human Rights Committee, General Comment No. 36, "Article 6: Right to Life", UN Doc. CCPR/C/GC/36, 30 October 2018, para. 64, available at: https://digitallibrary.un.org/record/3884724; ECtHR, *Hassan v. United Kingdom*, Judgment, 16 September 2014, para. 104, available at: https://hudoc.echr.coe.int/fre?i=001-146501; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 Rev. 1 Corr., 22 October 2002, para. 61, available at: www.cidh.org/Terrorism/Eng/intro.htm; Inter-American Court of Human Rights, *Ituango Massacres v. Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), Series C, No. 148, 1 July 2006, para. 179, available at: www.corteidh.or.cr/docs/casos/articulos/seriec_148_ing.pdf; African Commission on Human and People's Rights, *Communication 227/99: Democratic Republic of the Congo v. Burundi, Rwanda and Uganda*, 29 May 2003, available at: https://achpr.au.int/en/decisions-communications/democratic-republic-congo-burundi-rwanda-uganda-22799.

113 Most human rights instruments allow parties to derogate from some of the rights that they establish. See ICCPR, above note 85, Art. 4; ECHR, above note 86, Art. 15; ACHR, above note 87, Art. 27.

114 See ECtHR, *Al-Skeini and Others v. United Kingdom*, Judgment, 7 July 2011, paras 136–139, available at: https://hudoc.echr.coe.int/fre?i=002-428; Human Rights Committee, above note 97, para. 10.

such as an armed group.[115] Certainly, it is possible for States to derogate from the rules of IHRL regarding forced or compulsory labour in time of war, but derogations from IHRL in cases of international armed conflict have been limited.[116] Moreover, it seems that the other conditions would necessarily be met in the case of PoW labour: the work of PoWs presupposes that, on the one hand, they are under the control of a State that is required to respect human rights, even if they are abroad, and that, on the other hand, this work is not imposed by armed groups since it only concerns combatants captured by States in the context of an international armed conflict.

That being said, IHRL regulates forced labour during armed conflict in a particular manner. Most human rights instruments exclude work required during armed conflict from the concept of forced and compulsory labour. This exclusion appears explicitly in the 1930 Forced Labour Convention[117] and can be deduced implicitly in the International Covenant on Civil and Political Rights,[118] the European Convention on Human Rights[119] and the American Convention on Human Rights,[120] which excludes "service exacted in time of danger or calamity that threatens the existence or the well-being of the community". Such exclusions mean that these human rights instruments are not intended to apply to PoW forced labour;[121] in other words, their rules are without prejudice to the IHL ones. However, IHL includes not only GC III but also customary law, which, as explained above, can be interpreted in light of developments in IHRL regarding detention.

The IHL rules concerning PoW forced labour should hence be brought into line with the development of human rights in the field of detention, which means that the Detaining Power may not impose work on PoWs but should provide them with work if possible and if they so request. This solution must, however, be adjusted in light of practice, which shows that the incorporation of IHRL into another branch of international law, in particular IHL, may require certain adaptations of the incorporated regime in order to take account of the specific features of that law.[122] It should therefore take account of the fact that IHL

115 It is traditionally held that human rights do not bind armed groups, although there is a trend towards holding those groups responsible for respecting such rights when they exercise quasi-governmental functions and/or occupy a significant part of a territory. See David Kretzmer, "Rethinking the Application of IHL in Non-International Armed Conflicts", *Israel Law Review*, Vol. 8, No. 42, 2009, p. 38, available at https://ssrn.com/abstract=2666425; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2014, p. 95; Andrew Clapham, "Human Rights Obligations of Non-State Actors in Conflict Situations", *International Review of the Red Cross*, Vol. 88, No. 863, 2006, esp. p. 508, available at: www.icrc.org/en/doc/assets/files/other/irrc_863_clapham.pdf.

116 ECtHR, *Georgia v. Russia (II)*, Judgment, 21 January 2021, para. 139, available at: https://hudoc.echr.coe.int/fre?i=001-207757.

117 Forced Labour Convention, above note 84, Art. 2(2).

118 ICCPR, above note 85, Art. 8(3)(3).

119 ECHR, above note 86, Art. 4(3)(c).

120 ACHR, above note 87, Art. 6(3)(c).

121 ICRC Commentary on GC III, above note 12, para. 2682.

122 See the modifications made to the definition of torture set out in the 1984 Convention against Torture when it was used by the ICTY to interpret the concept of torture in international humanitarian law:

combines the objective of protecting people, which it shares with IHRL, with the need for belligerents not to be hindered in the conduct of hostilities, which distinguishes it fundamentally from IHRL. This last point means that PoWs may be required to perform certain tasks that should not be a burden on the Detaining Power, in particular the administration, development or maintenance of camps.[123]

Conclusion

Today's rules concerning PoW forced labour go back a long way, dating mainly from 1949, when GC III was adopted. Since then, new concerns have emerged, particularly under the impetus of IHRL on detention, according to which detention must be centred on the interests and rights of detainees. These considerations prompt us to seek ways of developing these rules, either through IHL itself or by resorting to the complementary relationship between IHRL and IHL.

Such developments could achieve increased flexibility regarding PoW forced labour. Firstly, they would confer on PoWs a right to work, meaning the right to work, to not work[124] or to stop working. The detaining State could offer the prisoners work, and, if it did not, the prisoners could request it. In such cases, "[t]he Detaining Power should try to accommodate such requests as far as practicable".[125] This right to work should not therefore be interpreted as an obligation on the detaining State to supply work to any PoW who requests it; prisoners would only have a "right to the available work".[126] If there were a high demand for work, it would be allocated in accordance with the terms of GC III, which require the Detaining Power to take account of a prisoner's age, sex, rank and physical aptitude.[127] This is important, because under such a legal regime, all prisoners – and not only officers and persons of equivalent status – would have freedom of work, so the Detaining Power would have to take account of the special status of officers[128] in assigning the tasks to be performed. The legal regime would hence be uniform only as regards freedom of work; indeed, under

ICTY, *Kunarac*, above note 46, para. 496; ICTY, *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Judgment (Trial Chamber), 2 November 2001, para. 138, available at: www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf.

123 In reality, prisoners other than PoWs would appear to be under such an obligation, even though they do have freedom regarding work.

124 Regarding freedom of work, see Charles Dunoyer, *De la liberté du travail ou simple exposé des conditions dans lesquelles les forces humaines s'exercent avec le plus de puissance*, Librairie de Guillaumin, Paris, 1846, pp. 11–12.

125 This is the same as the solution adopted by GC III regarding non-commissioned officers, officers and persons of equivalent status. See ICRC Commentary on GC III, above note 12, para. 2688.

126 Authors' translation. Regarding this concept, see Véronique Van Der Plancke and Guido Van Limberghen, *La sécurité sociale des (ex) détenus et de leurs proches*, La Charte, Brussels, 2008, p. 107.

127 ICRC Commentary on GC III, above note 12, para. 2679.

128 While certain scholars criticize this status, it is accepted that it is inherited from military traditions that should be observed. See H. Marquis, above note 17, p. 68.

the current regime, PoWs, whose rank is lower than that of non-commissioned officers, have no right to work except when the work to be done is dangerous, unhealthy or prohibited. The suggested uniform regime would extend their freedom to work to the performance of work carried out in the interest of the Detaining Power, which is only recognized for officers and non-commissioned officers.

Furthermore, PoWs could still be required to undertake work connected with camp administration, installation or maintenance. While this obligation does mean that the Detaining Power is not burdened with those tasks, carrying them out is also particularly beneficial for the PoWs themselves.[129] Such a regime would have the advantage of taking into account current developments regarding detention, while remaining compatible with the realities of war. It would also reduce the risk of PoWs being instrumentalized in the service of the Detaining Power's war effort and would generally improve the protection of PoWs.

129 ICRC Commentary on GC III, above note 12, para. 2699.