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ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR

Mr. Albert J. Esgain and Colonel Waldemar A. Solf, both holding senior positions in the administration of military courts of the United States, have just published an important article¹ on the Geneva Convention of August 12, 1949 relative to the treatment of prisoners of war. This article, from every point of view, justifies being brought to the attention of readers of the International Review for it sets out most pertinently and with clarity the principles, the innovations and some defects which are to be found in this Convention.

The authors first recall the situation prior to the First World War. The Hague Convention, which at that time was the main statute relating to war, was in danger of being inapplicable on legal grounds in 1914, because one of its clauses subordinated its compulsory implementation to accession by all the parties engaged in conflict. However, neither Serbia nor Montenegro were bound by this Convention. We must be grateful to those who negotiated the 1949 Conventions for having steadfastly rejected the "si omnes" clause.

The article goes on to point out the following characteristics of the new Convention :

- a) it codifies the rules, both general and specific, governing the protection of prisoners of war ;

¹ North Carolina Law Review (Vol. 41, No. 3, 1963).

- b) it ensures for the latter the right to decent and humane treatment ;
- c) it endeavours to restrict breaches of humanitarian principles by imposing upon the contracting parties the enactment of rules providing for penal sanctions against persons guilty of serious infringement ;
- d) it gives the latter protection against arbitrary justice ;
- e) it lays down that prisoners of war hold no allegiance to the Detaining Power ;
- f) it provides that the legal status and the rights of prisoners of war shall be subject as far as possible to the laws, regulations and orders in force in the armed forces of the Detaining Power ;
- g) it makes provision for the important rôle of the Protecting Power, of the International Committee of the Red Cross and other relief organizations.

The authors, in the first part of their study, finally point out that, although the Convention has even now not been ratified by parties engaged in the conflict in Korea, and was therefore not applicable to this conflict, it has nevertheless been observed on the whole by the belligerents.

Mr. Esgain and Colonel Solf then gave detailed observations concerning the following points which do indeed call for reflection.

The Convention makes no provision for war carried on by an alliance of forces such as those of the United Nations or by geographical coalitions such as those of NATO or of the Warsaw Agreement. The expression " High Contracting Parties " does not indeed seem applicable to international or multi-national organizations of this nature ; hence the state of flux which was revealed, in particular, during the intervention by the United Nations forces in the Congo. No doubt the International Committee of the Red Cross has contributed to remedying this situation by an appropriate exchange of correspondence with the General Secretariat of the United Nations, but this is a procedure which is by no means an ideal

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alternative to United Nations accession to the Geneva Convention on the Treatment of Prisoners of War.

Article 3 of the Convention has been described as an important innovation in the law of war, in that it extends the principle of international control (by means of a clause in the Law of Geneva) to matters which, until 1949, were regulated exclusively by national laws. Mr Esgain and Colonel Solf consider this to be an assertion of the principle that the respect of fundamental human rights, to the extent to which they are embodied in contractual undertakings, is of concern to all members of the United Nations.

In respect of this same Article 3, stress is laid on the clause which specifies the inalienable legal status of the parties to the conflict. As a consequence, this Article is applicable irrespective of recognized belligerent status and legitimate governments may continue to seek out and punish rebels, subject to the latters' being granted the legal guarantees laid down in the Convention.

In their commentary on Article 4 and the inclusion of various categories of "partisans" among the persons protected by the Convention, these writers in *The North Carolina Law Review* point out that the conditions upon which this protection is dependent (the bearing of arms openly and the wearing of distinctive emblems recognizable at a distance) will deprive most of the members of resistance movements in occupied territory of the benefit of protection under the Convention. Indeed these guerillas can only operate from concealment. However, instead of regulations relating to prisoners of war, the rules of the Geneva Convention in respect of civilian populations remain applicable to members of such resistance movements. In particular, they should benefit from the provisions of Article 62 of the Convention restricting the application of the death penalty.

One of the most recent ideas in this study concerns the position of deserters and traitors. Are such individuals entitled to treatment as prisoners of war within the terms of this Convention? This is an important question, for if they may claim such treatment, they shall no longer take part in the struggle. If, on the other hand, they are not entitled to such treatment, there is no objection, if they and the detaining Power so desire, to their taking up arms

on the side of the army of the Detaining Power, having in this manner merely changed sides. From the legal point of view, the fate of such persons depends on the interpretation which may be given to the expression "fallen into the power of the enemy" (Art. 4, A). This expression indeed differs from that used in the 1929 Geneva Convention (Art. I) which, like The Hague Convention of 1907 (Art. 1, 2 and 3) refers to persons "captured" by the enemy.

The spokesman of the ICRC on the appropriate commission during the Geneva Conference of 1949, stated that in the opinion of the experts consulted by the International Committee in 1947, the new phraseology had a "wider meaning" than the former and referred to members of armed forces who had surrendered without offering resistance and also to those who were in enemy territory at the outbreak of hostilities. Must desertion or treason imply, as interpreted by some authorities, that the deserter or the traitor forfeits any claim to protection under the Convention, on the grounds that the latter postulates that the protected persons must have faithful patriotic leanings without which certain characteristics of prisoner of war status could not be justified (communication of names, the rôle of the Protecting Power, financial regulations)? Should it not rather be decided that such individuals are nevertheless protected by the Convention, as advocated by Mr. Esgain and Colonel Solf, who point out that there is no international statutory provision covering deserters and that national legislation does not relieve deserters and traitors from their national status? The issue is open and expert opinions differ.

The writers of the article conclude from this that the Swiss Federal Council would be well advised to consult all the participants in the Convention on this point in order to arrive at a correct interpretation. If opinions could not be reconciled, the question would have to be settled by a fresh international agreement, otherwise parties to a conflict would have no alternative but to settle the issue by special agreement when hostilities break out.

Among the other important questions which, in the opinion of the authors, necessitate clarification by international agreement, is that which calls for the examination of a substitute for the Protecting Powers in the event of the latters' default. This hypothesis is not one which can be ignored in view not only of the evolution

of international relationships, but also of the material conditions which protection demands, particularly the need for personnel of diplomatic status and the expenses involved.

Two further problems to be solved are those of United Nations accession to the Convention and conditions for extradition within the framework of multilateral measures for the repression of war crimes. This study by specialists in matters of military jurisdiction, is devoted to a great extent to the position of the United States with regard to repression not only of serious infringements, but also of misdemeanour against the rules laid down in the Convention. The instructions in force in the United States army are quoted by these two authors, who point out that the United States only punishes war crimes as such, if they have been perpetrated by nationals of an enemy power or by persons in the service of an enemy State. Violations of the law of war by persons subject to military law in the USA are dealt with under the terms of the military code of laws of the United States and consequently punishment is meted out in accordance with that code. Breaches of the law of war perpetrated on United States territory by other persons come within the scope of criminal law, either Federal or State, and are punished in accordance with such law.

Finally, detailed comment is devoted to the controversial question which was so troublesome at the end of the Korean War and which, in point of fact, was the cause of considerable delay in negotiating the armistice, i.e. the question of prisoners of war refusing to be repatriated at the end of hostilities. The authors' conclusion supports the American point of view—which was moreover approved by the United Nations and was finally embodied in the terms of the armistice agreement—according to which no one may be forcibly repatriated. The authors nevertheless point out that it would be an exaggeration to draw the conclusion from this liberal interpretation of articles 7 and 118 of the Convention, that the Detaining Power is obliged to grant asylum on its territory to prisoners who refuse to be repatriated and they further express the opinion that henceforth asylum will continue to be reserved, as in the past, only to prisoners who in good faith seek refuge for political motives. They also add that asylum will similarly be granted to those who voluntarily deserted their own army to join the enemy.

This obligation on the Detaining Power is the consequence for having assumed the responsibility of encouraging such desertions by radio or by the distribution of pamphlets.

This important study makes continual reference to the comments on the Geneva Convention relative to the treatment of prisoners of war published by the International Committee of the Red Cross (Geneva, 1960).

The concluding observation of this monograph is in an optimistic vein and refers to the "consensus omnium" in Geneva in 1949 in favour of humanitarian aims and which, in the opinion of the authors, should help to remedy the defects revealed by experience in the implementation of the Convention.

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