

RESERVATIONS TO THE GENEVA CONVENTIONS OF 1949

by Claude Pilloud

I. Introduction

The International Review of the Red Cross published in August 1957 a study concerning reservations to the 1949 Geneva Conventions for the protection of war victims. At that time a total of 66 States were bound by the Conventions and 18 of them had expressed their accession subject to reservations. In July 1965, the Review published an additional study on the same subject. At that date, the number of States bound by the Conventions had increased to a total of 106; of these, 20 had expressed reservations.

Since that time the Geneva Conventions of 1949 have become virtually universal and by 31 December 1975, 139 States had signed the Conventions, 21 of which had made reservations. It now seems necessary therefore to combine the two previous studies and to add new elements arising from the accession of new States. From the legal aspect, the adoption in 1969 of the Vienna Convention on the Law of Treaties provided a number of useful clarifications which had to be taken into account by eliminating or by modifying some of the opinions expressed in the previous studies.

The 1949 Geneva Conventions contained no clauses concerning reservations. Some parties considered that this was a regrettable omission and the ICRC gave consideration to this problem in drafting the

two Protocols additional to the Conventions which have been under study by a Diplomatic Conference since 1974. It made the following proposal in article 85 of the first Protocol:

1. Each one of the Parties to the Conventions may, when signing, ratifying or acceding to the present Protocol, formulate reservations to articles other than Articles 5, 10, 20, 33, Article 35, paragraph 1, first sentence, Article 38, paragraph 1, first sentence, and Articles 41, 43, 46 and 47.

2. Each reservation shall be operative for five years from the entry into force of the present Protocol in respect of the High Contracting Party formulating the reservation. Any reservation may be renewed for further successive periods of five years subject to a declaration being sent to the depositary of the Conventions not less than three months prior to the expiry of the said period. A reservation may be withdrawn at any time by notification to this effect addressed to the depositary of the Conventions.

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Since the Geneva Conventions have no clauses concerning reservations, the general principles of international law, largely customary in nature, must be applied to determine the validity and extent of the reservations made. The Vienna Convention of 1969 codified some of the customary law in this field.

It should be recalled that according to traditional theory a reservation had to be accepted by all the Signatory States either explicitly or tacitly in order to become effective. If a State party to a treaty or convention refused to accept the reservation made by another State, the latter could not remain a party to that treaty or convention. This theory was attacked in an advisory opinion by the International Court of Justice at the Hague in 1951 concerning reservations to the Genocide Convention. The Court stated that an objection to a reservation only entailed the exclusion of the State concerned if the reservations was incompatible with the object and purpose of the convention.

This rule was subsequently accepted by the International Law Commission of the United Nations in 1962 and by the Conference which drew up the Vienna Convention on the Law of Treaties in 1969.

II. Declarations

In signing the Conventions, several delegates made declarations deploring the fact that one subject or another had not been dealt with by the Conference, or that one provision or another had not been more generous in tenor. The Bulgarian and Hungarian delegations expressed their Governments' deep regret that the majority of the Diplomatic Conference had not accepted the Soviet delegation's proposal for the unconditional banning of atomic weapons and other weapons for the mass extermination of the population. As is known, the Diplomatic Conference, when this proposal was put forward, declared it unacceptable, most delegations considering that this problem was outside the scope of the Conference.

The delegations of Byelorussia, the People's Republic of China, Romania, the Ukraine and the USSR, in ratifying the Fourth Convention Relative to the Protection of Civilian Person in Time of War, expressed their regret that the Convention did not cover the civilian population in territory not occupied by the enemy and, for this reason, that it did not completely meet humanitarian requirements. At the time of its accession in 1957, the Government of the Democratic People's Republic of Korea made a comparable declaration. The significance of these statements is not completely clear but they presumably refer to the protection of civilian populations of belligerent countries against the dangers resulting from the use of weapons of mass destruction. It is indeed true that the Fourth Convention, apart from the protection of civilian hospitals and the suggested establishment of safety and neutralized zones, contains no provision against these dangers.

The Hungarian delegation, when signing the Conventions, noted with regret that Article 4 of the Fourth Convention excluded from the category of protected persons the nationals of States which had not adhered to that Convention and pointed out furthermore the dangers which might arise from the derogations listed in Article 5.

These various declarations do not constitute reservations from the legal point of view. Doubtless, the Powers who made them would have wished the Conference to go further, but it must be admitted that the results actually obtained in 1949 were considered by many impartial observers to have been beyond all expectation. Of course, it would have been highly desirable for the Diplomatic Conference to have drawn

up texts showing still greater humanitarian feeling, but the prime necessity was to ensure that the Conventions were ratified by a large number of States, and in particular by all the great Powers. That result has today been achieved and is a matter for congratulation. Furthermore, there is nothing to prevent certain of the liberal ideas expressed in the declarations made at the Conference from one day becoming part of international law. It is gratifying to know that protection of the population against the dangers of war is the subject of major provisions in the draft Protocols submitted in 1974 to the Diplomatic Conference and that these have been well received by the Conference.

As we shall see below, several governments have described as “reservations” statements which actually refer only to matters of intention or interpretation. As stated in the Vienna Convention on the Law of Treaties, Article 2, paragraph 1 (d)

‘reservation’ means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

III. General problems

The Vienna Convention also provided important clarification on another point, namely, on the value that should be attached to reservations stated at the time of signature of a treaty, but not expressly confirmed or repudiated on the occasion of ratification or subsequent acceptance. Several governments expressed reservations on signing the Geneva Conventions of 1949 but made no further reference to the subject at the time of ratification. Article 23, paragraph 2 of the Vienna Convention is specific on this point:

If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty.

An interesting situation developed. After 1960, a great many States which were the successors to colonial powers confirmed their participation in the 1949 Geneva Conventions simply by making a declaration of continuity. This convenient formula has the advantage that it precludes any break in the previous participation in the Conventions, inasmuch

as the declaration of continuity takes effect as of the day established for the independence of the State in question. Other governments have preferred the formula of accession which presents the slight disadvantage that a six-months' delay elapses, under the very terms of the Conventions, between the act of accession and the time it enters into effect.

The formula of the declaration of continuity presented no difficulty when the power, to which the new State had succeeded, was a party which had made no reservations to the Geneva Conventions. This was the case, for example, for France and Belgium. On the other hand, for the States which succeeded to the United Kingdom, it must be noted that the British Government had made its ratification of the Fourth Geneva Convention of 1949 subject to a reservation concerning article 68. The United Kingdom in 1971, in a statement communicated to the States Parties to the Conventions, specifically withdrew this reservation. The question might then arise whether this withdrawal was equally effective concerning the States which had previously made declarations of continuity in their capacity as successors to the United Kingdom. This question involves the following States: Nigeria, Tanzania, Jamaica, Sierra Leone, Gambia, Lesotho, Guyana, Malta, Barbados, Mauritius and Fiji. It seems evident that following their declarations of continuity each of these States became a party to the Geneva Conventions of 1949 and that consequently whatever was done after their declaration of continuity by the power to which they succeeded could have no effect upon their status with regard to the Geneva Conventions of 1949. On the other hand, in applying by analogy the rule provided in article 23, paragraph 2 of the Vienna Convention concerning reservations expressed at the time of signature, one might say that the States which had made declarations of continuity should, if they had intended to assume on their own account the reservations expressed by the United Kingdom, have stated this specifically in their respective declarations of continuity. One might, on this basis, therefore, consider that these States are bound without reservations by the Geneva Conventions of 1949.¹

¹ This is not however the opinion of the International Law Commission of the United Nations (Report on 24th Session, No. 10 (A/8710/Rev.1), p. 15 and 26th Session (A/9610/Rev. 1), p. 66). That opinion was subject to criticism during discussions in the General Assembly by various speakers who would wish to see the successor state completely free to ratify, accede to, make reservations or withdraw them as it wished. This would amount to an illustration of the "clean slate" principle whereby successor States are not bound in any manner by treaties concluded by the State to which they succeed.

With regard to the attitude of States parties to the Conventions concerning the reservations expressed by other States, the United States, at the time of its ratification in 1955, made the following statement concerning each of the Conventions:

*Rejecting the reservations—other than to article 68, paragraph 2—which States have made with respect to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, the United States accepts treaty relation with all parties to that Convention, except as to the changes proposed by such reservations.*¹

In our 1957 study, we came to the conclusion that the position adopted by the United States with regard to the reservations of the other States parties to the Conventions was no different from that adopted by the States which had merely made no statement concerning these reservations.

The interesting discussions which have taken place since 1957 on reservations to multilateral treaties, notably at meetings of the U.N. International Law Commission, confirm this conclusion and go even further. Particularly worthy of note is the report of the U.S. Senatorial Committee on Foreign Relations which examined the Geneva Conventions and originated the statement quoted above. According to this report:

... the Committee concurs with the conclusion of the executive branch that the most satisfactory means of dealing with these reservations is to make it clear that the United States does not accept them, but proposes to enter into treaty relations with the Soviet bloc countries with respect to the remaining, unreserved parts of the Conventions. If, in the event of armed conflict, any of those countries were to exploit reservations in an unwarranted manner so as to nullify the broad purposes of the Conventions, such action would, of course, alter the legal situation for the United States; and this Government would be free to reconsider its position. It is hoped that the members of the Soviet bloc may one day find it possible to withdraw their reservations, or will at least construe and apply them in a manner compatible with their legal and humanitarian obligations. In the meantime, by having treaty relations the United States has obtained agreement to the best standards of treatment and is in the soundest position to protect our nationals.²

¹ The language quoted refers specifically to the Fourth Convention. The texts concerning the other statements were the same except for the titles of the respective Conventions.

² Geneva Conventions for the protections of war victims. Report of the Committee on Foreign Relations: 48th Congress, 1st Session, Washington, 1955, p. 29.

After drawing up the text of the statement, the Committee continued:

It is the Committee's view that this statement adequately expresses the intention of our Government to enter into treaty relations with the reserving States so that they will be bound toward the United States to carry out reciprocally all the provisions of the Conventions on which no reservations were specifically made.¹

In his comments on the attitude adopted by the U.S. Government, Professor R. R. Baxter, gave an apt definition:

In effect, this statement constitutes a proposal to agree to disagree...²

Professor Baxter believes this attitude is in line with the views of the International Court of Justice on reservations to the Convention on Genocide and he quotes the following passage from an advisory opinion given by the Court:

It may be that the State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but that an understanding between that State and the reserving State will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation.

The position of the United States with respect to the Geneva Conventions and the reservations made by other States is therefore quite clear. Whilst recording disapproval of reservations other than those which it has itself made, the United States is treaty bound with reserving States except for the clauses affected by reservations. Consequently, as mentioned above, the U.S. standpoint is no different from that of other States which have made no statement on explicit reservations.

Such a situation is specifically covered by the Vienna Convention in article 20, paragraph 4 (b):

an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State.

Our reason for having examined the import of the U.S. Government's statement at length is that it is similar to those subsequently made by the Governments of the United Kingdom, Australia and New Zealand

¹ Ibid.

² *American Journal of International Law*, 1955, p. 552.

upon ratification (1957, 1958, 1959). These were of identical tenor and we quote hereunder the British version:

I am further instructed by Her Majesty's Government in the United Kingdom to refer to the reservations made to Article 85 of the Convention relative to the Treatment of Prisoners of War by the following States :

the People's Republic of Albania, the Byelorussian Soviet Socialist Republic, the Bulgarian People's Republic, the People's Republic of China, the Czechoslovak Republic, the Hungarian People's Republic, the Polish Republic, the Rumanian People's Republic, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics, and to the reservations to Article 12 of the Convention relative to the Treatment of Prisoners of War and to Article 45 of the Convention relative to the Treatment of Civilian Persons in Time of War made by all the above-mentioned States and by the Federal People's Republic of Yugoslavia.

I am instructed by Her Majesty's Government to state that whilst they regard all the above-mentioned States as being parties to the above-mentioned Conventions, they do not regard the above-mentioned reservations thereto made by those States as valid, and will therefore regard any application of any of those reservations as constituting a breach of the Convention to which the reservation relates.

New Zealand and Australia did not mention the People's Republic of China, but the Australian declaration had the following additional paragraph:

I am further instructed by the Government of the Commonwealth of Australia to refer to notifications concerning the "German Democratic Republic", the "Democratic People's Republic of Korea", the "Democratic Republic of Viet-Nam", and the "People's Republic of China". While the Government of the Commonwealth of Australia does not recognize any of the foregoing, it has taken note of their acceptance of the provisions of the Conventions and their intention to apply them. The position of the Government of the Commonwealth of Australia towards the reservations referred to above applies equally in relation to the similar reservations attached to such acceptance.

A subsequent exchange of notes on these statements, through the intermediary of the custodian government, took place between the

USSR and other countries which contested their validity on the one hand and the Governments of the United Kingdom, Australia and New Zealand on the other hand, without any completely clear conclusion being arrived at. Both sides advanced the advisory opinion of the International Court of Justice as justification for their standpoint.

With regard to the substance of the problem raised by the three foregoing statements we may observe that they can have no effect except upon article 85 of the Convention Relative to the Treatment of Prisoners of War, since the only genuine reservation is the one applying to this article. Under the Vienna Convention a reservation is a unilateral statement made by a State whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

On the other hand, the object of reservations made in respect of Article 12 of the Third Convention and Article 45 of the Fourth is not to exclude or modify the obligations incumbent on the reserving States, but to increase those incumbent on other States. In effect, the reserving States postulate that States transferring prisoners of war or civilians to some other Power remain responsible for the treatment of those persons, whereas the Conventions do not make any such provision.

As can be seen, the effect of these three statements is restricted; they only affect treatment of prisoners of war who, after trial, have been convicted for war crimes or crimes against humanity under the national law of the Detaining Power.

The standpoint of the British, Australian and New Zealand Governments would seem to be a new departure from any previously accepted theories. These Governments did not claim that the reservations were incompatible with the object and purpose of the treaty inasmuch as they specifically recognized the entry into force of the Conventions between themselves and the reserving States. Under the circumstances the legal situation between the three governments and the States making reservations would appear to be governed by paragraph 3 of article 21 of the Vienna Convention:

When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

IV. Reservations concerning articles common to the four Geneva Conventions of 1949

Article 3

Two reservations were made with regard to this article at the time of signature.

Argentina :

“I shall, therefore, sign the four Conventions in the name of my Government and subject to ratification, with the reservation that Article 3, common to all four Conventions, shall be the only Article to the exclusion of all others, which shall be applicable in the case of armed conflicts not of an international character.”

This reservation was without doubt unnecessary, since the text of Article 3 itself shows that it is the only article applicable to internal conflicts. Otherwise, there would be no point in the recommendation in paragraph 3 that Parties to the conflict should endeavour to bring into force, by means of special agreements, all or part of the other provisions of the Conventions. It is probably for this reason that the reservation was abandoned on ratification

Portugal :

As there is no actual definition of what is meant by a conflict not of an international character and as, in case this term is intended to refer solely to civil war, it is not clearly laid down at what moment an armed rebellion within a country should be considered as having become a civil war, Portugal reserves the right not to apply the provisions of Article 3, in so far as they may be contrary to the provisions of Portuguese law in all territories subject to her sovereignty in any part of the world.

This reservation raises a rather difficult problem of interpretation of the Geneva Conventions. Although Article 3 does give some important indications on the question, it does not provide an exact definition of a conflict which is not of an international character. This question was dealt with in detail by the ICRC in its Commentaries on the four Geneva Conventions. Furthermore, the Commission of Experts convened by the ICRC in 1955 for the study of the question of the application of humanitarian principles in the event of internal disturbances tried to define the scope of Article 3. They came to the conclusion that under

the terms of Article 3, the States bound by the Geneva Conventions are left a certain freedom in the interpretation of doubtful cases, but that it would be completely contrary to the spirit of the Conventions to base a decision on whether or not to apply Article 3 solely on national laws. The adoption of such an attitude would deprive of all meaning an article forming an important part of an international agreement.

Portugal, fortunately, did not maintain its reservation on ratification.

Article 10 of the first three Conventions and Article 11 of the fourth Convention, concerning the designation of a Protecting Power, are subject to reservations on the part of the following States: Albania, Byelorussia, Bulgaria, the People's Republic of China, Czechoslovakia, the German Democratic Republic, Guinea-Bissau, Hungary, Democratic People's Republic of Korea, Poland, Portugal, Romania, Ukraine, USSR, Democratic Republic of Vietnam, Provisional Revolutionary Government of South Vietnam and Yugoslavia.

These reservations are all to the same effect, although there are slight differences of wording. For example, the reservation made by the USSR in respect of the Third Convention (prisoners of war) and the general reservations made by Portugal and Hungary read as follows:

USSR concerning article 10 :

“The Union of Soviet Socialist Republics will not recognize the validity of requests by the Detaining Power to a neutral State or to a humanitarian organization, to undertake the functions performed by a Protecting Power, unless the consent of the Government of the country of which the prisoners of war are nationals has been obtained.”

Hungarian People's Republic :

“In the opinion of the Government of the Hungarian People's Republic the provisions of Article 10 of the Wounded and Sick, Maritime Warfare and Prisoners of War Conventions and of Article 11 of the Civilians Convention, concerning the replacement of the Protecting Power, can only be applied if the Government of the State of which the protected persons are nationals no longer exists.”

Portugal :

Article 10 of Conventions I, II, III, and Article 11 of Convention IV :

The Portuguese Government only accepts the above articles with the reservation that requests by the Detaining Power to a neutral State or to a humanitarian organization to undertake the functions normally performed by protecting Powers are made with the consent or agreement of the government of the country of which the persons to be protected are nationals (Countries of origin).

The concern reflected in these reservations is not altogether pointless. There are cases in which the designation of a Protecting Power is impossible. The conflicts which broke out between Israel and her neighbours in 1956, 1967 and 1973 provide examples, for the fact that a number of the governments concerned did not recognize Israel as a State prevented the designation of Protecting Powers. Neither Israel nor the Arab countries involved asked any of the neutral States to assume the functions assigned to Protecting Powers by the Geneva Conventions of 1949. In fact, with the tacit agreement of the governments concerned, some of the humanitarian functions normally performed by the Protecting Powers were carried out by the International Committee of the Red Cross.

The problem therefore did not arise, but it is reasonable to suppose that if neutral States had been asked by the belligerents to act as Protecting Powers on behalf of enemy nationals, they would have sought to obtain the approval of the governments concerned.

This amounts to saying that a neutral State asked by a Detaining Power to act as Protecting Power will certainly not do so without having consulted the Government of the country of which the detainees are nationals, in so far as such a Government exists and can properly give an opinion. The question is more difficult in the case of a Government or a provisional body outside the national territory, but claiming to speak on behalf of the occupied State. It may happen that there are two Governments, each claiming to be the legitimate one, one in the national territory which has been occupied and the other abroad. Such cases occurred in the Second World War. As will be seen, the decisions which will have to be taken by the neutral States will not always be easy. However, these States must always be guided by two principles:

- (a) In such a situation, a neutral State which agrees to act as Protecting Power does not receive a mandate to do so from the Detaining

Power, but exercises its protection on behalf of all the States bound by the Conventions and must therefore consider itself responsible towards all those States.

- (b) Wherever it is possible to consult the Government of the country of origin of the protected persons or an authority or body which seems to be entitled to speak on their behalf, the neutral State must consult that Government, authority or body and take into account the opinion expressed.

If it is a humanitarian organization which is designated by the Detaining Power, the above considerations remain valid. The ICRC which is mentioned by name, performs the functions peculiar to it, some aspects of which are fixed by the Conventions themselves; for the Committee, therefore, it is merely a matter of adding to these functions the humanitarian tasks incumbent upon a Protecting Power. In a situation of this kind, the ICRC would certainly consult those who may properly speak on behalf of the persons for whose benefit these tasks are to be performed. Indeed, it did do so during the Second World War. When it was invited to take part in the defence before the courts of prisoners of war who were nationals of a country completely occupied by Germany, it first of all obtained the approval of the Government in exile. Of course, this applies only to the duties of the Protecting Power. The activities of the ICRC on behalf of war victims are carried out with complete independence, according to the principles of humanity, and the International Committee does not have to seek the prior consent of the country of origin of the persons to whom it brings relief.

As we can see, the reservations to Article 10 of Conventions I, II and III, and to Article 11 of Convention IV constitute nothing more than official commentaries on the articles in question.

They have the advantage of drawing the attention of neutral States and humanitarian organizations to their responsibilities. They will prevent a Detaining Power designating as Protecting Power a State only neutral in name and thus hindering other States which are really neutral from exercising their real functions.

It should be remarked that the wording used by Hungary seems to be the most realistic. Indeed, it merely limits the application of these articles to cases where a government no longer exists. In such a situation, it becomes impossible, at least officially, to engage in a prior consultation.

In the second session of the Diplomatic Conference, which has been studying the draft Additional Protocols to the Geneva Conventions of 1949 since 1974, the system of Protecting Powers was the subject of lengthy consideration. Committee I of the Conference, to which the question was referred, finally reached agreement on the text of articles dealing with the problem. It is worthy of note that in the course of lengthy and animated discussions the possibility that a Protecting Power should be designated by the Detaining Power was never raised. The lack of interest in such a procedure is probably due to the fact that since 1949 no situation has ever arisen in which a Protecting Power was designated by the Detaining Power. The discussions rather centered on the reinforcement of the obligation of designating and accepting Protecting Powers and on setting up a system for the all but automatic intervention of a substitute should the designation of a Protecting Power prove to be impossible. The procedure for the designation of this substitute reflects some of the concerns expressed by the authors of the various statements referred to above and the text finally adopted takes these concerns into account to a great extent. Thus, paragraph 4 of article 5, as adopted by the Committee, reads as follows:

If, despite the foregoing, there is no Protecting Power, the Parties to the conflict shall accept without delay an offer which may be made by the International Committee of the Red Cross or by any other organization which offers all guarantees of impartiality and efficacy, after due consultations with the said Parties and taking into account the result of these consultations, to act as a substitute. The functions of such a substitute is subject to the consent of the Parties to the conflict; all efforts shall be made by the Parties to facilitate the operation of a substitute in fulfilling its tasks under the Conventions and this Protocol. (CDDH/I/271)

As can be seen, the organizations which would serve as substitutes for the Protecting Powers are required by this paragraph to engage in appropriate consultations with the Parties to the conflict and take their views into account.

Article 11 of Conventions I, II and III, and **Article 12** of the Fourth Convention led to the following reservation by Hungary:

(2) The Government of the Hungarian People's Republic cannot approve the provisions of Article 11 of the Wounded and Sick, Maritime Warfare and Prisoners of War Conventions and of Article 12 of the Civilians Convention, according to which the competence of the Protecting Power extends to the interpretation of the Convention.

Now, this article in no way gives Protecting Powers competence to interpret the Conventions, but merely invites them to lend their good offices to settle differences concerning the application or interpretation of the Conventions—a very different thing. This reservation may therefore be regarded as the result of a misunderstanding; in any case it does not change the meaning of the article under consideration.

V. Reservations to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field

Article 38

Israel ratified the Convention:

Subject to the reservation that while respecting the inviolability of the distinctive signs and emblems of the Convention, Israel will use the Red Shield of David as the emblem and distinctive sign of the medical services of her armed forces.

Comparable “reservations” were made with regard to the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea and the Convention Relative to the Protection of Civilian Persons in Time of War. As we know, the Geneva Conventions of 1949 established as a distinctive emblem the red cross on a white background and also accepted, for countries which were already using them as a distinctive emblem instead of the red cross, the red crescent and the red lion and sun on a white background. The Conventions made no reference to the Red Shield of David.

At the Diplomatic Conference in 1949, which adopted the four Geneva Conventions, the Israel delegation proposed an amendment providing for the acceptance of the Red Shield of David as a distinctive emblem on an equal basis with the red crescent and the red lion and sun. This amendment was rejected by majority votes both in committee and in plenary session.

The question remains whether the statement made by Israel at the time of its ratification constitutes a reservation. As we have seen, the declaration of a reservation by a State may exclude or modify its own obligations but cannot, on the other hand, increase the obligations of other States which are parties to the treaty. We must conclude therefore that the Israel statement constitutes a unilateral declaration and not a reservation. A State can obviously identify its medical personnel and installations as it seems fit, but if this identification does not conform to the Geneva Convention it clearly does not have the same value. It should be recalled however, that hospitals, medical personnel, hospital ships, for example, must be respected as such as soon as their nature has been recognized, whether or not they have been identified by an emblem.

This situation has had various repercussions upon the Red Cross. The fact is that Israel has, under the name of Magen David Adom, a very active National Society with a programme comparable to that of National Red Cross Societies but which uses as its name and emblem the Red Shield of David. This organization has repeatedly asked the ICRC for recognition as the National Society of the State of Israel and has sought membership in the League of Red Cross Societies. The conditions customarily sought for recognition of new National Societies were formally confirmed in 1948 by the XVIIIth International Red Cross Conference. The fifth condition for recognition provides that the new society shall "use the title and emblem of the Red Cross (Red Crescent, Red Lion and Sun), in conformity with the Geneva Convention". This text is explicit and the ICRC has been obliged, to its regret, to refuse the requests submitted to it, but it maintains close working relations with this Society.

The Magen David Adom had asked that its recognition be placed on the agenda of the XIXth International Conference of the Red Cross in 1957. The Standing Commission of the International Red Cross, however, whose task it is to draw up the draft agenda for the Conference, rejected this request, indicating that only a Diplomatic Conference for the revision of the Geneva Conventions could possibly create a new emblem.

This course is now being followed by the Government of Israel. Its delegation to the Diplomatic Conference which opened in Geneva in 1974 presented to the second session the following amendment:

“Add the following new article 2 bis to Part I of Protocol I:

Where the Red Shield of David on a white ground is already used as a distinctive emblem, that emblem is also recognized by the terms of the Conventions and the present Protocol.” (CDDH/I/286)

This amendment has not yet been considered by the Conference but will probably be taken up during the third session opening in Geneva on 21 April 1976. Without expressing any opinion on the merits of this proposal, we must recognize that the procedure chosen is correct. Only a Diplomatic Conference can modify the existing rules in this field. It is regrettable that the ICRC or the League of Red Cross Societies should ever have been blamed for this situation, for which they are not responsible.¹

Article 53

The *United States*, on ratifying the Conventions, entered the following reservation, which had not been made on signature:

The United States in ratifying the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field does so with the reservation that irrespective of any provision or provisions in said Convention to the contrary, nothing contained therein shall make unlawful, or obligate the United States of America to make unlawful, any use or right of use within the United States of America and its territories and possessions of the Red Cross emblem, sign, insignia, or words as was lawful by reason of domestic law and a use begun prior to January 5, 1905, provided such use by pre-1905 users does not extend to the placing of the Red Cross emblem, sign, or insignia, upon aircraft, vessels, vehicles, buildings or other structures, or upon the ground.

The date of January 5, 1905 mentioned in this reservation is the date of the first American law regulating the use of the Red Cross emblem and reserving it for use by the military medical services and the American Red Cross. This law reserved the rights of prior users. Under the 1906 Geneva Convention and its revised version of 1929, the United States did not consider herself under the absolute obligation to prohibit the commercial use of the Red Cross emblem, whatever the date at which the undertakings concerned had begun to use it, and this situation

¹ See, *inter alia*, the Bulletin of the Magen David Adom, No. 8, January 1976. S. Rosenne, Israel Year Book on Human Rights, Vol. 5, 1975.

presented numerous disadvantages, particularly for the American Red Cross, since several commercial houses use the emblem and name of the Red Cross for advertisement or as a trade mark. It was hoped that the new 1949 Conventions would put an end to this confused situation. Unfortunately, this was not so; the commercial enterprises concerned were able to plead their cause before the Senate Committee on Foreign Relations, and judgment went in their favour. It appears that the Senate allowed itself to be convinced by the argument, which we consider fallacious, that a prohibition of the use of the trade marks concerned would have a retroactive character, which would be contrary to the Constitution of the United States and the general principles of law.¹ As the *Commentary* on the Convention emphasizes,² a law only has retroactive effect when it punishes or prohibits past acts, it cannot be considered retroactive if it punishes or prohibits future acts. Now, in the present case, it was simply a matter of prohibiting misuse of the emblem from the date of the entry into force of the Convention.

With regard to rights acquired before 1905, this question could have been settled by granting users time to alter their trade mark, or even by the payment of fair compensation, if it was considered that appreciable damage had been done to their interests. Of course, this reservation has most effect on the national level, and internationally it has almost no bearing.

(To be continued)

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¹ *Report of the Committee on Foreign Relations, D.E.F. and G., 82nd Congress, 1st session.*

² *Commentary, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, by Jean S. Pictet, page 387.*