RESERVATIONS TO THE GENEVA CONVENTIONS OF 1949

II

by Claude Pilloud

VI. Reservations to the Geneva Convention relative to the Treatment of Prisoners of War

Article 4

On signature, *Portugal* entered a reservation concerning this article and Article 13 of Convention I but did not maintain it on ratification. It reads as follows:

The Portuguese Government makes a reservation regarding the application of the above Articles in all cases in which the legitimate Government has already asked for and agreed to an armistice or the suspension of military operations of no matter what character, even if the armed forces in the field have not yet capitulated.

Article 4 of Convention III defines the categories of persons who, if they fall into the power of the enemy, must be considered as prisoners of war, while Article 13 of Convention I lists the categories of persons to whom that Convention must be applied.

It seems that Portugal wished to except from this definition those members of the enemy armed forces who continue fighting despite the conclusion of an armistice or truce by the legitimate Government.

This case is covered by A (3) of Article 4 and (3) of Article 13, which refer to "members of regular armed forces who profess allegiance to a Government or an authority not recognised by the Detaining Power". Many experiences of the Second World War led the authors of the Convention to include these persons in the category of those who, if captured, are entitled to the status and treatment of prisoners of war. There have often been cases of troops continuing to fight despite an armistice or the total occupation of the territory. In so far as these troops fight in accordance with the laws of war, it seems only logical and fair to consider their individual members as combatants entitled to be treated as prisoners of war if captured. This, of course, does not apply to persons who, after an armistice or during a truce, commit hostile acts under cover of secrecy.

The reservation entered by Portugal thus ran counter to the general feeling that in these cases the interests of the individual take precedence over those of the State.

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The Republic of Guinea-Bissau, when acceding to the Conventions on 28 February 1974, made the following reservation concerning this article:

The Council of State of the Republic of Guinea-Bissau does not recognize "the conditions" mentioned in the second clause of this article and relating to "members of other militias and members of other volunteer corps, including those of organized resistance movements", as these conditions are not compatible with the cases of "popular" wars as conducted nowadays.

The same reservation was made with regard to Article 13 of Convention I and Article 13 of Convention II.

The Provisional Revolutionary Government of the Republic of South Vietnam made the same reservation, although the text was slightly different:

The Provisional Revolutionary Government of the Republic of South Vietnam does not recognize the "conditions' mentioned under the second clause of this article and relating to "members of other militias and members of other volunteer corps, including those of organized resistance movements", since these conditions are not compatible with the cases of people's wars in the world today. (18 January 1974).

These reservations were the subject of declarations by the Federal Republic of Germany and by the United Kingdom:

United Kingdom

In relation to the reservations made by the Provisional Revolutionary Government of the Republic of South Vietnam and the Republic of Guinea-Bissau to Article 4 of the Convention relative to the Treatment of Prisoners of War and by the Republic of Guinea-Bissau to Article 13 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field and Article 13 of the Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, the Government of the United Kingdom wish to state that they are likewise unable to accept those reservations.

British Embassy, Berne, 19 November 1975.

Federal Republic of Germany

The reservations formulated by the Republic of Guinea-Bissau concerning

Article 13, clause 2, of the 1st Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,

Article 13, clause 2, of the 2nd Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea,

Article 4, clause 2, of the 3rd Geneva Convention relative to the Treatment of Prisoners of War,

exceed, in the opinion of the Government of the Federal Republic of Germany, the object and purpose of these conventions and cannot therefore be accepted by the said Government. In all other respects, the present declaration shall not affect the validity of those conventions as between the Federal Republic of Germany and the Republic of Guinea-Bissau.

Bonn, 3 March 1975

Here again, it appears that there is confusion regarding the validity and the meaning of the reservations. The conditions mentioned under clause 2, letter A, of Article 4 of the Third Geneva Convention are those to be fulfilled by combatants not forming part of the regular armed forces in order to be entitled, in the event of capture, to be treated as prisoners

of war. Any government may grant enemy combatants falling into its power prisoner-of-war status and treatment, even if those combatants do not fulfil the conditions mentioned in Article 4. The declarations made, therefore, give information on the manner in which the two governments concerned will treat enemy combatants whom they capture. On the other hand, these declarations can certainly not extend the obligations of co-contracting States and oblige them to treat as prisoners of war the enemy combatants falling into their hands, even if the conditions mentioned are not fulfilled.

Reference should be made to what was said at the beginning of this study on the nature of the reservations. From this it follows that, here again, the texts are declarations of intent binding only on their authors, and not reservations.

In any case, the problem cannot be dealt with by means of reservations. It was the subject of protracted discussion during the second session of the Diplomatic Conference, which, at the end of the second session, began to examine Article 42 of the Protocol relating to international conflicts. This article, in addition to the provisions of Article 4 of Convention III, aims at creating a new category of prisoners of war. The aim is to make the conditions mentioned in Article 4 more lenient. The debates demonstrated that there were wide differences of opinion concerning the extent and the nature of the minimal conditions to be fulfilled by combatants in order to be entitled, in the event of capture, to the status and the treatment of prisoners of war. In general, there is a tendency to relax the conditions mentioned above. The most radical proposal in this field emanates from the Democratic Republic of Vietnam, and reads as follows:

> All combatants in armed conflicts in which peoples are fighting against colonial domination or foreign occupation or against racist régimes in the exercise of the right of peoples to self-determination shall, if captured, have the status of prisoners of war throughout the period of their detention. (CDDH/III/253)

As can be seen, and in the cases mentioned, the combatants would not be subject to any restrictive condition and should all be granted prisoner-of-war status. In brief, if this amendment were to be accepted, the situation would be that envisaged by the Governments of Guinea-Bissau and of the Republic of South Vietnam in their declarations.

Article 12

A number of States have made reservations concerning this article, which deals with the transfer of prisoners of war from one Power to another. The same States have made a similar reservation with regard to Article 45 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, which deals with the same subject. We shall therefore discuss the two questions together. These reservations have been made by the following States: Albania, Byelorussia, Bulgaria, the Chinese People's Republic, Czechoslovakia, the German Democratic Republic, Guinea-Bissau,[1] Hungary, the Democratic People's Republic of Korea, Poland, Rumania, the Ukraine, USSR, the People's Republic of Vietnam, the Provisional Revolutionary Government of the Republic of South Vietnam, and Yugoslavia. They all have the same purport, although the wording differs slightly. As an example, the following is the reservation made by the Ukraine:

Article 12:

The Ukrainian Soviet Socialist Republic does not consider as valid the freeing of a Detaining Power, which has transferred prisoners of war to another Power, from responsibility for the application of the Convention to such prisoners of war while the latter are in the custody of the Power accepting them.

The responsibility for prisoners of war transferred from a Power to another was the subject of lively discussion during the Diplomatic Conference of 1949. The United States of America which, after the end of the Second World War, considered itself responsible for the prisoners it had transferred to Allied Powers, proposed that the transferring Power and the Power to whom the prisoners are transferred, should be jointly responsible. This proposal was supported by many delegations, including that of the USSR. Other delegations maintained that the Power which transfers prisoners of war to another Power also Party to the Convention should be released from all responsibility for the application of the Convention to such prisoners. Finally, a compromise solution was proposed and accepted by majority vote. Without being

[1] The reservation made by Guinea-Bissau applies only to Article 45 of Convention IV.

jointly responsible, the transferring Power retains some obligations, which it must fulfil if requested by the Protecting Power.

What is the scope of this reservation? Is it possible in this way to impose on co-signatory States a wider responsibility than that envisaged by the Convention? We saw above that reservations cannot have this effect. It should be noted, in this respect, that the Convention does not free the transferring Power from all responsibility, since that Power remains obliged to correct the situation if there is failure in some important particular to apply the Convention to the prisoners, and that this obligation may involve a request on its part for their return. It is doubtful how joint responsibility could be exercised in any other way, unless pecuniary responsibility, to be determined later, is envisaged.

In consequence, this reservation cannot be considered binding on States which have not made it. Since it is not intended to set aside or modify the obligations of the States which did make it, it constitutes in reality a unilateral declaration by those States, indicating the attitude they will adopt if the case arises. They are not entitled, however, to rely on the Convention for any demand that other States adopt the same attitude.

The same considerations are fully applicable to the transfer of civilians dealt with in Article 45 of the Convention relative to the Protection of Civilian Persons in Time of War.

Article 60

Portugal made the following reservation on signature, but did not maintain it:

The Portuguese Government accepts this Article with the reservation that it in no case binds itself to grant prisoners a monthly rate of pay in excess of 50 % of the pay due to Portuguese soldiers of equivalent appointment or rank, on active service in the combat zone.

The reasons for which Portugal made this reservation are not indicated. Article 60 provides for the payment of a monthly advance of pay to prisoners of war ranging from eight Swiss francs for the lowest category up to a maximum of seventy-five Swiss francs for general officers.

It must be stated that these amounts are very small. Furthermore, these advances of pay must be refunded to the Detaining Power after

the end of hostilities. They are considered, according to Article 67, as made on behalf of the Power on which the prisoners of war depend. Finally, the last paragraph of Article 60 provides that if the amounts payable would be unduly high compared with the pay of the Detaining Power's armed forces, the Detaining Powers may temporarily limit the amount made available to sums which are reasonable, but which, for Category I, shall never be inferior to the amount that the Detaining Power gives to the members of its own armed forces.

These considerations no doubt induced Portugal to abandon this reservation when she ratified the Geneva Convention.

Article 66

The *Italian Delegation* had made the following reservation on signature:

The Italian Government declares that it makes a reservation in respect of the last paragraph of Article 66 of the Convention relative to the Treatment of Prisoners of War.

This paragraph provides that the Power on which the prisoner of war depends shall be responsible for settling with him any credit balance due to him from the Detaining Power on the termination of his captivity. There may indeed be some room for criticism of the system inaugurated by the Convention, which releases the Detaining Power from its responsibility in this respect. However, the reservation was not maintained on ratification.

Articles 82 and following

Spain made the following reservation on signature:

In matters regarding procedural guarantees and penal and disciplinary sanctions, Spain will grant prisoners of war the same treatment as is provided by her legislation for members of her own national forces.

This reservation amounted to depriving the chapter on penal and disciplinary sanctions of all meaning. Fortunately, it was not maintained on ratification.

Luxembourg signed the Convention with the reservation "that its existing national law shall continue to be applied to cases now under consideration."

This reservation was probably unnecessary, since the Convention was obviously not intended to deal with situations which began before it was drawn up. In any case the reservation was withdrawn on ratification.

Article 85

Reservations were made in respect of this article by the following states: Albania, Byelorussia, Bulgaria, the Chinese People's Republic, Czechoslovakia, the German Democratic Republic, Hungary, the Democratic People's Republic of Korea, Poland, Rumania, the Ukraine, the U.S.S.R. and the People's Republic of Viet Nam. The purport of the reservations is the same in each case, although there are slight variations in wording. The following is the reservation entered by the U.S.S.R.:

The Union of Soviet Socialist Republics does not consider itself bound by the obligation, which follows from Article 85, to extend the application of the Convention to prisoners of war who have been convicted under the law of the Detaining Power, in accordance with the principles of the Nuremberg Trial, for war crimes and crimes against humanity, it being understood that persons convicted of such crimes must be subject to the conditions obtaining in the country in question for those who undergo their punishment.

It may be noted that the Polish reservation speaks of the "principles set forth at the time of the Nuremberg trials" and the Hungarian reservation of the "principles of Nuremberg'.

This reservation, which is of considerable importance, calls for clarification. It may be wondered, indeed, what is meant by the "principles of the Nuremberg trial (or trials)". Is it a reference to the "principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal" which the United Nations General Assembly directed the International Law Commission to formulate? If so, war crimes are:

> Violations of the laws or customs of war, which include, but are not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

The International Law Commission defined crimes against humanity as:

> Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.[1]

It may be noted incidentally that this text has not been adopted by the United Nations General Assembly and that the subject is still under consideration.

The crimes covered by the reservation do not include the crimes against peace also mentioned in the Charter of the Nuremberg Tribunal and the judgment of that Tribunal. This is quite important, since on various sides anxiety has been expressed in case, by means of general accusations against a whole category of prisoners of war, they might be deprived of their status and the treatment to which the Convention entitles them, by being condemned, for example, for having taken part in an aggressive war. Mention has also been made of the Penal Code of the U.S.S.R. which, in Article 58 (4), permits the punishment of any support given to the section of the international bourgeoisie which does not recognize the legal equality of the Communist and capitalist systems and which tries to bring about the downfall of the Communist regime, or support given to groups or organisations under the influence of this bourgeoisie or organised directly by it.

Some authors have thought that the extension of this provision to apply to prisoners of war belonging to a country with a very different political system from that of the U.S.S.R. might lead, in fact, to many persons losing their rights as prisoners of war as a result of sentences inflicted on them.[2]

As we have seen above, even supposing that the U.S.S.R. were to apply this article of her Penal Code to prisoners of war, the offences in question would not be either war crimes or crimes against humanity and consequently the reservation would not apply. Furthermore, even

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[1] *Report of the International Law Commission covering its Second Session*, 5 June-29 July 1950 General Assembly, Official Records: Fifth Session, Supplement No. 12 (A/1316).

[2] See, in particular, Dr. Otto Lachmayer, *Juristische Blätter*, Vienna, 1956, No. 4, pp. 85-87.

while it is true that a fairly large number of German or Austrian prisoners of war was sentenced in the U.S.S.R. after the Second World War on the basis of this Article of the Penal Code, it is extremely improbable that it could again be applied now that the U.S.S.R. is bound by the new Geneva Conventions. The U.S.S.R. is Party to these Conventions, whereas she was not bound by the 1929 Convention relative to the Treatment of Prisoners of War. Both the letter and the spirit of the 1949 Convention are against a prisoner of war being sentenced for a political attitude held, or a political activity carried on, before his capture.

Moreover, some States considered that the words used in the Soviet reservation did not indicate clearly from what moment the benefits of the Convention would be withdrawn from prisoners of war under sentence. They also wished to know of which of the rights provided for in the Convention the prisoners of war under sentence would be deprived. These States requested the Swiss Federal Council, as depositary of the Geneva Conventions, to ask the Government of the U.S.S.R. for an explanation of the exact interpretation to be placed on this reservation. The Swiss Government undertook to do so and received from the U.S.S.R. Ministry of Foreign Affairs a note which was communicated to all the States Signatory or Party to the Geneva Conventions. The following is an English translation:

> As is shown by its wording, the reservation made by the Soviet Union concerning Article 85 of the Geneva Convention of 1949 relative to the Treatment of Prisoners of War means that prisoners of war who have been convicted under Soviet law for war crimes or crimes against humanity must be subject to the conditions applied in the U.S.S.R. to all other persons undergoing punishment after conviction by the courts. Consequently, this category of persons does not benefit from the protection of the Convention once the sentence has become legally enforceable.
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> With regard to persons sentenced to terms of imprisonment, the protection of the Convention will only apply again after the sentence has been served. From that moment onwards, these persons will have the right to repatriation in the conditions laid down by the Convention.
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> Moreover, it should be remembered that the conditions aplicable to all persons undergoing punishment under the laws of the U.S.S.R. are in every way in conformity with the requirements of humanity and health, and that corporal punishment is strictly forbidden by law. Furthermore, the prison authorities are obliged, under the regulations in force, to transmit immediately to the Soviet authorities concerned, for investigation, complaints of convicted persons with regard to their sentences, or requests for a review of their cases, and any other complaint whatsoever. — Moscow, 26 May 1955.

It follows clearly, as the text of the reservation does indeed state, that the benefits of the Convention are applicable to prisoners of war accused of war crimes or crimes against humanity up to the moment when the sentence becomes legally enforceable, i.e. until the moment when all means of appeal have been exhausted. They will therefore have the benefit of all the legal guarantees provided for in the Convention during their trial and in particular of the assistance of the Protecting Power. The Convention will again become applicable to prisoners of war sentenced to terms of imprisonment when they have completed their sentence. These details are very useful, for the reservation had raised some doubts.

The substance of the reservation is in line with the trend of opinion during and after the Second World War, to the effect that those who have violated the laws of war cannot claim their protection. Many Allied tribunals, in a series of judgments, for this reason refused prisoners of war accused of war crimes the benefit of the 1929 Convention. The attitude of the Anglo-Saxon Powers has varied considerably in this respect. Whereas in 1947 at the Conference of Governmental Experts the ICRC had had some difficulty in persuading them to agree that the benefits of the Convention should remain applicable to prisoners of war until such time as *prima facie* evidence of guilt was produced against them, in 1948 at the XVIIth International Red Cross Conference in Stockholm, the Powers whose experts had raised objections abandoned them and themselves proposed the text of Article 85 finally adopted. The International Committee had not thought of going so far. It had restricted itself to the proposal that prisoners of war accused of these crimes should remain entitled to the benefits of the Convention until such time as sentence had been pronounced on them, a proposal which closely corresponds to the reservations entered by the U.S.S.R. and other States.

This problem became very important during the war in Vietnam. The Government of the Democratic Republic of Vietnam captured a number of American servicemen, most of them aircrews. The American troops, for their part, in conjunction with the armed forces of the Republic of Vietnam, captured many combatants belonging either to the National Liberation Front of South Vietnam or to the armed forces of the Democratic Republic of Vietnam, and it was not always possible to determine clearly to which forces they did belong. The Government of the Democratic Republic of Vietnam publicly stated that it did not

consider that American servicemen captured by them were prisoners of war, and therefore refused to supply lists of such prisoners. Nor did it permit them to correspond with their families and it did not allow the ICRC to visit them as provided for in Convention III. It added nevertheless that these prisoners were being treated humanely. In support of its refusal, the Government of the Democratic Republic of Vietnam pointed out that when it acceded to the Geneva Conventions of 1949, on 28 June 1957, it had made a reservation in respect of article 85 of Convention III. The reservation in question, worded in French, was to the effect that:

The Democratic Republic of Vietnam states that prisoners of war prosecuted and sentenced for war crimes or crimes against humanity consistent with the principles laid down by the Nuremberg Court of Justice shall not be given the benefit of the provisions of this Convention as specified in article 85.

On several occasions, it was announced that legal proceedings were to be taken against these prisoners, accused of violating the laws and customs of war by indiscriminately attacking the civilian population of the Democratic Republic of Vietnam. However, no sentence was ever pronounced against these American servicemen who, after lengthy negotiations, were finally repatriated in 1973: some of them had been a long time in captivity (up to six years) and some had been without any news of their families.

In the final stages of the war, lists of American servicemen held by the Democratic Republic of North Vietnam were forwarded to the United States through private channels and many prisoners were able to correspond with their families.

The International Committee of the Red Cross several times stated its attitude towards the stand taken by the Democratic Republic of North Vietnam. On page 20 of its Annual Report for 1966, the ICRC stated:

> Referring to the reservation made by North Vietnam to article 85 of the Third Convention, the ICRC stressed that in any event prisoners were to be given the benefit of the Conventions and particularly of the guarantees provided for in case of prosecution until such time as they were convicted after a fair hearing.

The reservation made by the Democratic Republic of Vietnam gave rise to various articles by outstanding international legal experts, for

example, one by M. Meyrowitz in *Annuaire français de droit international*, 1969, p. 197; another entitled "The Geneva Convention and the Treatment of Prisoners of War in Vietnam" in the *Harvard Law Review*, 1967, p. 866; Professor Howard S. Levie's "Maltreatment of Prisoners of War in Vietnam" in *Boston University Law Review*, 1969, p. 323; an article by Professor Roger Pinto in *Le Monde* of 27 and 28 December 1969; and a more general one by Professor Paul de La Pradelle in *Revue générale de droit international public*, 1971, p. 313.

As mentioned above, a similar reservation was made by a number of governments and though the texts vary slightly it does not seem that those governments wished to express anything different. The Democratic Republic of Vietnam, when it acceded to the Geneva Conventions of 1949, in 1957, seems to have modelled its reservation on those made by several socialist States in respect of a number of articles, and in fact it formulated the same reservations to the same articles. Moreover, the Government of the Democratic Republic of Vietnam seems never to have claimed that it intended to express a reservation to article 85 at variance with the reservation made to the same article by the U.S.S.R. and the others States mentioned above.

However, as the reservation used the words "prosecuted *and* sentenced", the contention was made that the reservation affected prisoners who were merely prosecuted, as well as those who were sentenced; a contention which seems difficult to sustain. For a prisoner to be sentenced, he must obviously have been put on trial first. Consequently, one is inevitably attendant on the other, and only the actual sentence can set the date from which the condemned prisoner becomes subject to the national law, otherwise a chaotic situation would result: for instance, a prisoner who had been tried and acquitted would no longer be entitled to treatment as a prisoner of war.

It was claimed also that the American aircrews had been captured *in flagrante delicto* and should consequently be considered criminals of war. The relevance of this reasoning is hardly obvious; it is difficult to see why these circumstances should deprive an enemy soldier of the guarantees for his protection in the law; *flagrante delicto* can at most justify a simplified legal procedure without however incurring the forfeiture of essential safeguards. Moreover, not all captured American servicemen were taken *in flagrante delicto*; there was for example a seaman who had

fallen overboard and was picked up by the Democratic Republic of Vietnam.

In any case, the whole discussion, which sometimes became heated, seemed to be based on false premises. The status and treatment of prisoners of war are no longer what they were before the 18th century, that is to say, a favour granted to a captured enemy who had fought fairly. Since the end of the 18th century it has become an individual's right which he may claim individually and independently of his government. Consequently, the status and treatment of prisoners of war are by no means a sign of recognition of any specially honourable trait in a prisoner of war. In addition, when a soldier falls into the hands of an enemy he is vulnerable and it is precisely then that he has the greatest need of the legal and moral safeguards provided for him in international law. If the mere accusation was admitted to be sufficient without even showing evidence which would point to his likely guilt, the captured soldier would be at the mercy of the captor, as was the case in medieval times.

Further, and we have already mentioned this, the safeguards afforded by the Third Geneva Convention for prisoners of war, in the event of legal proceedings against them, are minimum requirements; those of most national legislations go further. Why then should an alleged war criminal be deprived of all the safeguards which national legislations grant every day to the worst penal law criminals?

It should be pointed out that the Geneva Conventions, particularly the Third, do not raise any obstacle to the trial of prisoners of war for war crimes, nor to their sentence by the courts of the Detaining Power should they be found guilty. All the Third Convention lays down is that the enemy prisoner accused of war crimes shall be given the benefit of certain legal guarantees. It should be added that those Conventions themselves stipulate that a serious breach of their provisions is a crime and they provide also for a universal system to repress such breaches.

In short, as mentioned above, the contention that, because of the reservation, servicemen accused of war crimes could be deprived of the benefits of the Conventions once they were captured does not stand up under examination. It was very likely for other reasons that the Government of the DRVN adopted the stand they did, but their motives undoubtedly exceed the purview of the Third Geneva Convention and the present study.

To conclude, we would underline that all controversy relating to the plight of American prisoners of war in the Democratic Republic of Vietnam has shown the weakness of the system for the implementation of the 1949 Geneva Conventions during a conflict which lasted many years. It would have been highly desirable to have determined, if possible by a court specified in the Conventions themselves, the scope and interpretation of article 85 and of the reservation made by the Democratic Republic of Vietnam. That is a loophole in the Geneva Conventions. In 1949, an attempt was made to provide a system which would have made it possible to settle cases of such nature, by arbitration or some other means, but every proposal put forward in that respect was rejected by the Diplomatic Conference.

The disputes which occurred concerning the status and treatment of American servicemen captured by the Democratic Republic of Vietnam also showed how difficult it was in present-day conflicts to differentiate between the treatment of prisoners of war and the plight of civilian populations. The lack of precise rules on the safeguarding of civilian populations and their protection against the effects of war and weapons makes it morally and psychologically difficult to apply rules, well established in international law, relative to the treatment of captured enemy soldiers. This is a situation which has caused concern to the International Committee of the Red Cross for a number of years. As far back as 1956, it drew up "Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War": the draft was not endorsed by governments.

In the draft Protocols which the ICRC submitted to the Diplomatic Conference which began its work in 1974, the protection of civilian populations against the effects of war is the most important chapter. Governments attending the Diplomatic Conference welcomed the ICRC's proposals intended to provide people taking no part in hostilities with the best possible protection from the effects of fighting.

The Government of the Democratic Republic of Vietnam no doubt realized that the situation needed clarification. During the Diplomatic Conference it proposed the insertion of a new article reading as follows:

Article 42 ter. — Persons not entitled to prisoner-of-war status

1. Persons taken *in flagrante delicto* when committing crimes against peace or crimes against humanity, as well as persons prosecuted and sentenced for any such crimes, shall not be entitled to prisoner-of-war status.

2. Nevertheless, the persons mentioned in the foregoing paragraph shall be treated humanely during their detention, shall not be subjected to any attempt on their lives or on their corporal integrity and dignity, shall be fed and housed in average conditions of comfort for nationals of the detaining Party, and shall receive treatment in case of sickness or wounds. Should they be guilty of a serious offence against the law during their detention, their right to legal defence shall be guaranteed and they shall be entitled to a fair and proper trial. (CDDH/III/254)

This article has not yet been examined but will no doubt be considered during the third session of the Diplomatic Conference. As can be seen, although it would refuse prisoner-of-war status to certain people, it was specified that they shall be treated with humanity and shall be afforded the guarantee of fair trial. Yet the standards of humanitarian treatment for enemy soldiers captured are laid down in the Third Geneva Convention: why then should one wish to establish different standards?

* * *

When acceding to the 1949 Geneva Convention, in 1973, the Provisional Revolutionary Government of the Republic of South Vietnam made the following reservation to this article:

The Provisional Revolutionary Government of the Republic of South Vietnam declares that prisoners of war prosecuted and sentenced for crimes of aggression, crimes of genocide or for war crimes, crimes against humanity pursuant to the principles laid down by the Nuremberg Court of Justice, shall not receive the benefit of the provisions of this Convention.

It can be seen immediately that this reservation goes much further than the reservations made by other governments to this article, since it adds "crimes of aggression," and "crimes of genocide" as reasons for depriving prisoners of war of the benefits of the Conventions. During its third session in 1951, the International Law Commission drew up a draft law on crime against the peace and security of mankind. This draft law referred to "acts of aggression" which it defined as follows:

the following acts are offences against the peace and security of mankind.

Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.[1]

[1] Report of the third session of the International Law Commission No. 9 (A/1858).

Aggression, after lengthy discussion, was the subject of a definition accepted unanimously at its 29th session by the United Nations General Assembly in 1974. The main part of that definition reads:

> Article 1.
>
> Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other way inconsistent with the Charter of the United Nations as set out in this Definition.

According to the International Law Commission, the crime of aggression can be committed only by the authorities of a State.[1] This incidentally is consistent with the decisions of the Nuremburg Military Tribunal which tried the German senior officers accused of participation in a war of aggression. That tribunal considered that the following two considerations should be combined in order for an individual to be punished for responsibility in a war of aggression:

(*a*) knowledge that a war of aggression has been started,

(*b*) ability to direct or influence the political attitude which led to the launching or the continuation of the war.[2]

As can be seen, the crime of aggression can be perpetrated only by a few individuals and there can be no question of leveling such an accusation against extensive groups of people, for instance the armed forces as a whole or even certain units of those forces.

On the question of genocide, the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948, states in Article II:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
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> (*a*) Killing members of the group;
> (*b*) Causing serious bodily or mental harm to members of the group;
> (*c*) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (*d*) Imposing measures intended to prevent births within the goup;
> (*e*) Forcibly transferring children of the group to another group.[3]

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[1] Report of the third session of the International Law Commission; No. 9 (A/1858).

[2] Law Reports of Trials of War Criminals, Vol. XII, p. 68, London, 1949.

[3] Human Rights. A compilation of international instruments of the United Nations, New York, 1973.

This reservation drew objections from several governments. The United States Government, after stating that it did not recognize that the Provisional Revolutionary Government of the Republic of South Vietnam was qualified to accede to the Conventions, made the following declaration:

Bearing in mind, however, that it is the purpose of the Geneva Conventions that their provisions should protect war victims in armed conflict, the Government of The United States of America notes that the 'Provisional Revolutionary Government of The Republic of South Viet-Nam' has indicated its intention to apply them subject to certain reservations. The reservations expressed with respect to the Third Geneva Convention go far beyond previous reservations, and are directed against the object and purpose of the Convention. Other reservations are similar to reservations expressed by others previously and concerning which the Government of The United States has previously declared its views. The Government of The United States rejects all the expressed reservations.

The British Government gave its view in the following words:

In relation to the reservations made by the Provisional Revolutionary Government of the Republic of South Vietnam to Articles 12 and 85 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, the Government of the United Kingdom of Great Britain and Northern Ireland, recalling their declaration on ratification in relation to similar reservations by other States, wish to state that, whilst they do not oppose the entry into force of the two Conventions in question between the United Kingdom and the Republic of South Vietnam, they are unable to accept the above reservations ..... because in the view of the Government of the United Kingdom these reservations are not of the kind which intending parties to the Conventions are entitled to make.

Article 87

Uruguay, upon ratification of the 1949 Geneva Convention in 1969, expressed a reservation to articles 87, 100 and 101 of the Third Convention and article 68 of the Fourth Convention "as regards the application and execution of the death sentence". Article 87 deals with penalties imposed on prisoners of war, article 100 with the death penalty, while article 101 says that if the death penalty is pronounced on a prisoner of war, the sentence shall not be executed before the expiration of

at least six months from the date the sentence was pronounced. Article 68 of the Fourth Convention provides for the death sentence but limits the kinds of cases when it may be pronounced in occupied territories.

This reservation is not clear; it might be that Uruguay, having, like several South American States, abolished the death penalty, viewed with some reluctance an international convention under which, in certain extreme cases, the death sentence might still be pronounced.

In any case, it is unlikely that the reservation means that Uruguay might apply the death penalty in cases where the Conventions would preclude it.

Article 99

Spain entered the following reservation with regard to this article:

Under 'International Law in force' (Article 99), Spain understands she only accepts that which arises from contractual sources or which has been previously elaborated by Organizations in which she participates.

This reservation, which was entered on signature, was confirmed on ratification in 1952. It is not our purpose to describe here Spain's international position during the years which followed the war of 1939-1945. It is impossible, however, not to think that the reservation has direct relation to that position. Since then, the situation has developed and Spain has become a member of the United Nations and its various specialized agencies. Probably the reasons behind the reservation have disappeared or at least have greatly lessened in importance. In this sphere, moreover, apart from the new Geneva Conventions and the Hague Convention of 1954 for the Protection of Cultural Property, international law has not been the subject of other international agreements. As has been seen, the Nuremberg principles, as stated by the International Law Commission, have still not become positive law any more than the code of offences against the peace and security of mankind drawn up by the same Commission.

Article 118

The Republic of Korea, upon acceding to the 1949 Geneva Conventions, in 1966, entered the following reservation with regard to this article:

The Republic of Korea interprets the provisions of article 118, para-

graph 1, as meaning that there is no obligation on the Detaining Power to repatriate prisoners of war by force against their openly and freely expressed wishes.

In reality, as was mentioned at the beginning of this article, this is rather a declaration of interpretation than a reservation. By this declaration the Republic of Korea, in effect, merely gave an indication of the way it would act and would expect others to act, but it could not oblige them to do so. It is, therefore, a declaration of interpretation which is in line with the principles set forth in the United Nations General Assembly resolution of 3 December 1952, the pertinent passage of which reads:

Force shall not be used against prisoners of war to prevent or effect their return to their homelands, and no violence to their persons or affront to their dignity or self-respect shall be permitted in any manner or for any purpose whatsoever. This duty is enjoined on and entrusted to the Repatriation Commission and each of its members. Prisoners of war shall at all times be treated humanely in accordance with the specific provisions of the Geneva Conventions and with the general spirit of that Convention.

This problem was discussed at length in the Commentary published by the ICRC on the Third Conventions.[1]

VII. Reservations to the Geneva Convention relative to the protection of civilian persons in time of war

Article 44

Brazil made the following reservations on signature:

Brazil wishes to make two express reservations, in regard to Article 44, because it is liable to hamper the action of the Detaining Pover...

Fortunately, this reservation was not maintained on ratification. Furthermore, its meaning was not very clear since Article 44 simply provides that the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any government. Its object

[1] *Commentary*, Geneva Convention Relative to the Treatment of Prisoners of War, Geneva, 1960, Vol. III, pp. 540-549.

is to protect *bona fide* refugees against restrictive measures which might be applied to them in their capacity, even though a theoretical one, as enemy aliens.

Pakistan made the following reservation on ratification:

Every protected person who is national de jure *of an enemy State, against whom action is taken or sought to be taken under Article 41 by assignment of residence or internment, or in accordance with any law, on the ground of his being an enemy alien, shall be entitled to submit proofs to the Detaining Power, or as the case may be, to any appropriate Court or administrative board which may review his case, that he does not enjoy the protection of any enemy State, and full weight shall be given to this circumstance, if it is established whether with or without further enquiry by the Detaining Power, in deciding appropriate action, by way of an initial order or, as the case may be, by amendment thereof.*

It is difficult to say whether this is a real reservation. It seems, above all, that Pakistan wished to explain the way in which she has decided to act if the case arises with regard to enemy aliens who are in fact refugees without the benefit of the protection of any enemy State. Thus, this reservation may be termed rather a statement of interpretation. Furthermore, the procedure proposed by Pakistan seems quite logical and in line with a reasonable interpretation of Articles 43 and 44. It is obviously to the Detaining Power in the first place, i.e. to the authorities who take the decision to place in assigned residence or to intern a refugee of enemy nationality, that he should submit his case with the necessary proofs. If the decision to intern him or place him in assigned residence has already been taken, the papers in the case will naturally be put before the court or administrative tribunal which reconsiders the decision taken.

Article 46

Brazil entered the following reservation on signature:

Brazil *wishes to make two express reservations,... in regard to Article 46, because the matter dealt with in its second paragraph is outside the scope of the Convention, the essential and specific purpose of which is the protection of persons and not of their property.*

The paragraph in question provides, in effect, that restrictive measures affecting the property of protected persons shall be cancelled in accordance with the laws of the Detaining Power as soon as possible after the close of hostilities.

During the Diplomatic Conference, this provision, introduced at the suggestion of a delegation, was criticized, particularly by the Brazilian delegation. The reservations entered by Brazil, however, were not maintained on ratification.

Article 68

According to paragraph 2 of this article, the death penalty may be imposed on a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power, or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began. This paragraph was the subject of long and lively discussions during the Diplomatic Conference, but was adopted by majority vote. A number of States considered it necessary to reserve their position with regard to the reference to the legislation of the occupied territory. They were: Argentina, Australia, Canada, Netherlands, New Zealand, Pakistan, the Republic of Korea, the United Kingdom and the United States of America.

Argentina and Canada did not confirm on ratification the reservation they had made on signing the Conventions. The reservation expressed by the United Kingdom was confirmed in 1957 on ratification but, as was mentioned above, was withdrawn in 1971. Australia withdrew in 1974 the reservation it had expressed on ratification in 1958. The following is the text of the United States reservation:

The United States reserve the right to impose the death penalty in accordance with the provisions of Article 68, paragraph 2, without regard to whether the offences referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins.

After the Second World War a very strong feeling arose against the numerous death sentences inflicted on inhabitants of occupied territories and there was a general desire that the possibility of inflicting capital punishment should be as restricted as possible. This is the reason for

the text of paragraph 2 of Article 68, which only permits the death penalty for a small number of specially listed crimes and then only when the same penalty would have been inflicted under the law of the occupied territory for the same crimes.

In its *Commentary* on the IVth Convention, the International Committee of the Red Cross showed that "law of the occupied territory in force before the occupation began" should be interpreted as meaning the actual penal law ruling in the territory when the occupation began. This expression includes special war-time laws, whether special legislation has been enacted at the beginning of the conflict, or such legislation was already in existence and came automatically into force in time of war.[1]

In effect, the fears of the States which made this reservation are illusory. There is no country, it appears, which in war-time does not have laws punishing with death the crimes listed in Article 68, especially when they are committed against military personnel or military property. Nevertheless, if there were a country to which the idea of the death penalty was so repugnant that it banned capital punishment even in war time, would it be fair to impose the penalty on it through occupation? As resolute adversaries of the death penalty, we do not think so. Furthermore, the events of the Second World War showed such abuses in this sphere that the greatest possible precautions are necessary.

We saw earlier that Uruguay made a reservation in respect of article 68, but its signification is certainly not the same as that expressed by the above-mentioned States. It may be added that Australia, on ratification in 1958, specified that its interpretation of the term "military installations" in the second paragraph of article 68 was that of installations of imperative military importance to the Occupying Power.

Article 70

New Zealand made the following reservation, not confirmed on ratification:

In view of the fact that the General Assembly of the United Nations, having approved the principles established by the Charter and judgment of the Nuremberg Tribunal, has directed the International Law Commission to include these principles in a general codification of offences against the

[1] *Commentary*, Geneva Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 1958, pp. 345-346.

peace and security of mankind, New Zealand reserves the right to take such action as may be necessary to ensure that such offences are punished, notwithstanding the provisions of Article 70, paragraph I.

The paragraph concerned provides that nationals of the occupying Power who, before the outbreak of hostilities have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace.

This paragraph is of a very special nature. It is the only passage in the Convention where some protection is granted to nationals of the Occupying Power. At first sight, it seems that the reservation is easily reconcilable with the text of the article, since the offences envisaged would certainly be considered as offences under common law justifying extradition.

Furthermore, it should be noted that the task of codifying the law in this sphere undertaken by the United Nations is far from being finished. When it is finished, its acceptance by the various States will still be necessary.

VIII. Conclusions

Putting aside all the declarations of interpretation or of intention which were not strictly reservations but were called so by their authors, it will be seen that twenty-one States made valid reservations. In alphabetical order, these are:

	Conventions		
	I	III	IV
Albania		85	
Bulgaria		85	
Byelorussian SSR		85	
China (People's Republic of)		85	
Czechoslovakia		85	
German Democratic Republic		85	
Hungary		85	
Korea (Democratic People's Republic of)		85	
Korea (Republic of)			68
Netherlands			68
New Zealand			68
Pakistan			44, 68

	Conventions		
	I	II	III
Poland		85	
Romania		85	
South Vietnam (Republic of)		85	
Spain		99	
Ukrainian SSR		85	
Uruguay		87, 100, 101	68
USSR		85	
United States of America	53		68
Vietnam (Democratic Republic of)		85	

It is gratifying to find that reservations did not prevent any of the governments from becoming a party to the Conventions. Admittedly, the reservations concerning article 85 of the prisoners-of-war Convention and article 68 of the civilians Convention are important ones, but none of the other States parties to the Conventions made any objection to the participation of the reserving State.

It would be desirable if the reserving States would consider withdrawing their reservations, following the good example given by the United Kingdom in 1971 and by Australia in 1974 when they waived the reservation they had made to article 68 of the civilians Convention. The possibility of negotiations leading to the waiver of all or most reservations should not be excluded.

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