CHRISTIANE SHIELDS DELESSERT: RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE END OF ACTIVE HOSTILITIES[1]

The study by Christiane Shields Delessert on the release and repatriation of prisoners of war at the end of active hostilities is a detailed analysis of the first paragraph of article 118 of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, which reads:

Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.

Although some people might wonder that such a short sentence should constitute the subject of a study of this size, that is not as astonishing as it might appear at first glance. The first paragraph of article 118 raises, in fact, two questions of some difficulty to jurists and of vital importance for the captives:

(*a*) How should the expression "cessation of active hostilities" be interpreted *?*

(*b*) Does the first paragraph of article 118 lay an obligation upon the Detaining Power to repatriate—by force if necessary—prisoners of war refusing to go back to their own countries *?*

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Before tackling those two questions, the author examines the historical background to the question of the status of prisoners of war.

The first part of the book is a historical study of the law relating to captivity. Through a consideration of the writings of publicists and of the relevant clauses in peace treaties, the author crystallizes the practice of States and the evolution of the status of prisoners of war. This status is a consequence of the emergence between the sixteenth and eighteenth centuries of the nation-state.

[1] Christiane Shields DELESSERT: *Release and Repatriation of Prisoners of War at the End of Active Hostilities, A Study of Article 118, Paragraph 1 of the Third Geneva Convention Relative to the Treatment of Prisoners of War*, Foreword by Professor Richard R. Baxter, Harvard Law School, Etudes Suisses du Droit international, vol. 5, Schulthess Polygraphischer Verlag, Zurich, 1977, xiv and 225 pp.

Before then, the prevailing notion was that of the "just war"; captured enemies were treated as criminals; their plight was most unenviable, and only the prospect of a lucrative ransom might from time to time put a stop to their captors' cruelty.

With the emergence of a large number of States having equal rights, armed conflict ceased to be the means to ensure the triumph of justice; war came to be considered as only one of the means employed, albeit a very imperfect one, to settle differences between sovereign States; none of the parties could take the law unto himself, and captured adversaries were no longer treated as criminals.

A consequence, too, of the development of the nation-state was the abolition of private wars. It was the sovereign prince who waged war; soldiers were only the sovereign's agents, acting upon his orders and could not be held responsible for acts of war.

It was thus that a new concept of captivity was evolved: detention was no longer considered as a punishment but a means to prevent an enemy who had surrendered from taking up arms once more against his captors. A return to peace brought an end to captivity. With the Treaty of Westphalia (1648), this principle became the practice and was given the force of law in the Hague Regulations of 1907.

However, two world wars brought to light new difficulties: interminable months might elapse between the conclusion of the armistice agreements and the entry into force of the peace treaties (if treaties were indeed made, which was not always the case). Was it right to make the release of prisoners contingent upon the conclusion of peace, with the risk of indefinitely prolonging a captivity which was not warranted by any military necessity?

While the Geneva Convention of 1929 had not brought any adequate solution to this question, the 1949 Diplomatic Conference adopted a radically new provision which made the end of captivity dependent on the cessation of active hostilities and no longer on the conclusion of peace.

The result was article 118, paragraph 1.

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The second part of the study is devoted to a consideration of the interpretation of the expression "cessation of active hostilities".

Historical events furnish one element of interpretation: the end of the Second World War was not brought about by the conclusion of any peace treaty; and yet, the collapse of the Axis Powers was complete; the resumption of hostilities was totally out of the question, and still,

four years after the capitulation of Germany and Japan, hundreds of thousands of prisoners were still awaiting repatriation. The 1949 Conference adopted a provision designed to prevent a recurrence of such a situation.

But in the conflicts since 1949, a situation arose which had not been envisaged by the Diplomatic Conference: in Korea, Kashmir, the Middle East, the armistice agreements putting an end to military operations did not exclude a possible resumption of hostilities. They only brought about the "freezing" of a dangerous situation. Was article 118, paragraph 1, applicable in these situations of "neither war nor peace" ? In other words, how can the likelihood of a resumption of hostilities be assessed ?

In seeking an answer to this question, the author first analyses the nature of armistice agreements and comes to the conclusion that an armistice or a cease-fire agreement (the actual terminology is not important), whatever its provisions, does not necessarily bring about the re-establishment of peace. Reference should be made to objective factual criteria: if no military operations take place, if borders are calm, if reports are made by organizations such as the United Nations attesting that all is quiet, then there is a likelihood that the parties involved are determined to put an end to the armed conflict.

The author suggests that if such factual criteria were to last for a period of six months, it could be concluded that active hostilities were at an end, and article 118, paragraph 1, would be applicable: each party would be obliged to repatriate the prisoners held by it. On the other hand, if the possibility of a resumption of hostilities could not be ruled out, then the parties to the conflict would not be under the obligation to repatriate such prisoners.

But, then, in such cases, a new difficulty arises: a latent state of hostilities, broken from time to time by violent incidents, raids and forays, might be prolonged indefinitely. The detention of prisoners of war for several years would clearly be contrary to the humanitarian goals of the Geneva Convention.

To overcome this difficulty, the author proposes that a new rule limiting the total duration of captivity should be introduced. This period would start running, not from the end of hostilities, but from the beginning of captivity. A period of two years could be considered, as it has been observed that after two years of captivity the physical and psychological efficiency of soldiers was considerably impaired so that their detention for any further time was not warranted.

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The third part of this study deals with situations in which prisoners of war might be unwilling to be repatriated.

Such situations occurred at the end of the Second World War and of the conflict in Korea. In the first case, the Western Powers returned by force Soviet ex-prisoners of war who did not wish to go back to the USSR; in the second case, on the other hand, the principle was upheld that prisoners of war should be given the opportunity to decide freely whether or not to be repatriated.

Does article 118, paragraph 1, authorize the Detaining Power to take into account the will of prisoners of war who refuse to be repatriated, or are States obliged to repatriate all the prisoners they hold, if necessary by force.

Mrs. Shields Delessert discusses in detail the arguments advanced for or against each of those notions, and her conclusions are based essentially on the proceedings of the 1949 Conference. The Austrian delegation had proposed a draft amendment authorizing the Detaining Power to take into consideration the freely expressed wish of the prisoners of war. The amendment was rejected by the Conference, basically because it feared that the scope of article 118 might be weakened and that it would open the door to all kinds of abuses. It might conceivably lead to cases where a Detaining Power might exert pressure on prisoners of war to refuse to be repatriated, and where it might elude its obligations under article 118, by granting so-called political asylum. It should be concluded that the Diplomatic Conference deliberately dismissed the possibility of taking the freely expressed wish of prisoners of war into account. Detaining Powers are, therefore, under the obligation, under article 118, paragraph 1, to repatriate, if necessary by force, the prisoners in their hands.

Nevertheless, that is a conclusion that cannot be easily reconciled with the Convention's humanitarian goals. The author therefore proposes a new wording of article 118, authorizing the parties to a conflict to come to an agreement waiving the obligation to repatriate all prisoners of war. So as to eliminate the risk of captives' being submitted to undue pressure by the Detaining Power, it would be advisable for a third party (for instance, an impartial organization, or a commission composed of the representatives of three neutral States) to verify that prisoners of war are left free to decide for themselves.

As an example, the author gives suggestions for a model agreement concerning prisoners of war unwilling to return to their country of origin. Such a model agreement could be annexed to the Geneva Convention relative to the Treatment of Prisoners of War.

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Mrs. Shields Delessert's study indubitably constitutes a significant contribution to the better understanding of humanitarian law; she proposes solutions to two particularly delicate questions, the importance of which far outweighs considerations of a purely academic nature.

However, the writer of this review has not been entirely convinced by the interpretation of the expression "cessation of active hostilities" which Mrs. Shields Delessert puts forward in the second part of the book. Some doubts may be entertained whether the author might not have attached excessive importance to the historical circumstances that prevailed immediately after the end of the Second World War, and thereby neglecting a literal interpretation of the first paragraph of article 118.

The following argument could, in fact, be advanced: if the 1949 Conference had really wished to restrict the application of this first paragraph of article 118 to those cases where one could reasonably exclude any subsequent resumption of hostilities, it should have said so. Since it did not add to article 118, paragraph 1, any qualification, it can only be concluded that the obligation to repatriate the prisoners of war applies as soon as military operations have been suspended by an armistice or a cease-fire agreement of indefinite duration, setting aside any other consideration. The effect of any other interpretation of the expression "cessation of active hostilities" would be to confer on the parties to the conflict a freedom of appreciation which the 1949 Conference did not intend to give them.

We do not claim to decide between those two interpretations, the one calling upon the circumstances surrounding the drafting of article 118, paragraph 1, and the other resting basically on the actual wording of that article.

Besides, it was not the purpose of this review to make any adverse criticism of Mrs. Shields Delessert's study, but rather to give an account of a work which is the fruit of detailed research, contains a host of extremely useful indications on the law relating to captivity, and deserves to be read with attention by all those taking an interest in the development and application of humanitarian law.

F. Bugnion