The Geneva Conventions and Reciprocity

by J. de Preux

In 1981, the Twenty-fourth International Red Cross Conference, in Resolution VI, deplored the fact that in several armed conflicts fundamental provisions of the Geneva Conventions were being violated and that those violations impeded the International Committee of the Red Cross in the discharge of its activities. In spite of the Conference's solemn appeal to remedy the situation, there are still signs of reluctance to fully respect those fundamental rules, and even of ill-will towards them. Under the pretext that it requires reciprocity, the application of Convention provisions is at times made conditional on the outcome of bargaining and the prisoners themselves are treated as hostages, even as instruments of blackmail. Such attitudes are inadmissible. The following text discusses the matter in detail. (Editor.)

Application of the Geneva Conventions is not conditional on reciprocity. This assertion may be cause for surprise, since it is on reciprocity that treaties concluded for the benefit of citizens of the contracting States are usually based. Reciprocity in treaties can be diplomatic, meaning that the parties agree to equal treatment towards each other, or legislative, where one party grants the benefit of the law on the condition that the other party also does so. This is not the case for the Geneva Conventions.

One must bear in mind, however, that "reciprocity" is a general term covering widely differing aspects of one phenomenon. Thus the idea of reciprocity is the basis of any convention; without it, States would not conclude treaties. A treaty implies reciprocal obligations for the sole and mutual benefit of the parties thereto. The Geneva Conventions are no exception to this rule; indeed, Article 4 (2) of the Fourth Convention states: "Nationals of a State

which is not bound by the Convention are not protected by it." This means that the Convention is of mutual benefit only for those who are parties to it, or who accept as binding on themselves the same obligations. Article 2 (3) common to the four Conventions states this very clearly: "Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their *mutual* relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof." The same holds true for reservations. States which made no reservations are bound in relation to States which did so, except as concerns the provisions affected by the reservations. Reciprocally, States having made reservations are bound to apply all the provisions to which they made no reservations. There is therefore reciprocity of obligations, and this is valid for the Geneva Conventions as well as for other international law treaties.

The Geneva Conventions are an exception, however, to the general rule on termination of obligations agreed to. According to this rule, a material breach of the treaty by one of the parties "entitles... a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State" (Vienna Convention on the Law of Treaties, Art. 60, para. 2(b)). This rule does not "apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties" (*ibid.*, para. 5). The Geneva Conventions are therefore directly concerned by this exception, if only because failure to apply the rules adopted in favour of protected persons is tantamount, in this situation, to reprisals, which are forbidden.

Moreover, the selfsame Conventions contain a provision that confirms the position on humanitarian law, adopted by the United Nations Conference on the Law of Treaties, namely the article, common to the four Conventions, relative to denunciation (First, Art. 63; Second, Art. 62; Third, Art. 142; Fourth, Art. 158). While this article does not deprive the contracting parties of the right to denounce the Conventions, it stipulates that "a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release, repatriation and re-establishment of the persons protected

by the present Convention have been terminated" (Fourth Convention, Art. 158(3)).

The legal obligations therefore remain unchanged, no matter what breaches are committed by the adverse party. The rule of reciprocity is not operative.

The rule of reciprocity is also not operative in the application of provisions, which we have just seen cannot be denounced during an armed conflict. This is a peculiarity of humanitarian law, and any comparison with other branches of international law is pointless. It goes without saying, for example, that business transactions are based on mutual performance (material reciprocity). Should one of the terms of the exchange not be met, in whole or in part, the agreement, based on the adage *Do ut des* (I give so that you give), will not be applicable, or will be applied only partially. Generally speaking, reciprocity in the application of treaties is considered to reflect the principle of equality of States. It can be extended to demands for "point by point" reciprocity (reciprocity in kind) which makes one contracting party's performance as stipulated in the treaty subject to identical performance on the territory of the other contracting party. Should the latter default, the former may refuse to perform his part of the bargain by virtue of the exception *non adimpleti contractus* (unperformed contract). These systems of reciprocity reflect concerns relating not only to the principle of equality but also to that of the independence of States, or even of their sovereignty. And it is indeed for this reason that critics have spoken out against practices that can become absurd. Man is not made for the State: the State is made for man. By introducing, in each case, a condition suspending the application of the rules adopted—their application by the other party—the clause of reciprocity tempts each of the contracting parties to stick to its guns until the other makes a move. It prohibits any initiative and paralyzes the development of the law. Others see it as reflecting the principle of *lex talionis*, the taking of an eye for an eye in a vicious circle, foreshadowing a return to primitive society. They are not entirely wrong. Equal performance is not enough to guarantee an inviolable minimum of protection and justice, and these remarks were made well before the law of human rights proclaimed that respect was due each human being for the simple reason that he was a human being.

As seen from the point of view of the application of the Geneva Conventions, the condition of reciprocity would be an aberration. It would reflect complete ignorance as to the nature of the agree-

ments that include the Conventions, which contain "integral type" obligations. This means that "the force of the obligation is self-existent, absolute and inherent for each party and not dependent on a corresponding performance by the other" (Sir Gerald Fitzmaurice, quoted in "United Nations Conference on the Law of Treaties", *Official Records,* New York, 1971, p. 36, footnote 117).

One could even wonder whether the Geneva Conventions as a whole were not of the province of *jus cogens.*

According to the Vienna Convention on the Law of Treaties, a norm of *jus cogens,* or rather "a peremptory norm of general international law" is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character (Art. 53). The indisputable expression of the universal conscience, the common denominator of what men of all nationalities consider to be inviolable, i.e. respect and protection for the rights of each individual, this is the common basis of the Geneva Conventions and of *jus cogens.* Whatever the case may be, these rules spring from the legal conscience of mankind, and not the capacity or incapacity of the other party to observe them. They are indispensable to co-existence of the members of the international community in its present state; indeed, the derogations they brook are all the fewer because, above and beyond the persons expressly protected, they protect the interests of the international community as a whole.

It is for this very reason that the Geneva Conventions do not simply require respect for their provisions by the parties to the conflict themselves; they require also all the contracting parties to ensure respect for them (common Article 1). This is undoubtedly a more advanced stage of the law of nations, outside the normal anarchy of relations between States. Mutual recognition of the rights of protected persons is an essential element of the structure of today's international community. To deny these rights, to make their respect subject to what another party does, is to deny the existence of that community.

The community is based on the mutual recognition of certain values, not on a balance of power. Wounds, shipwrecks, captivity, occupation, internment; these depend on a balance of power; not so the treatment granted under the Conventions. The Geneva Conventions have wrapped in legal language the moral duties of States and their representatives, according to which man is cared

for for himself, without considerations of opportunism or compromise. They aim, in the midst of the dissension, and even of the hatred and disorder that reign on the battlefield, to safeguard and re-establish the values that seem no longer to count in the heat of battle. The very meaning of the Conventions is, above all, to instruct each party on what it must do, not on what the other parties must do. They are intended as a unifying force, not as a pretext for one-upmanship. Justice does not reign in combat, but the Conventions must be firmly applied. They say, "I am and therefore I do". They provide no grounds for the objection *tu quoque* (you too), which is only a pretext for evading commitments.

J. de Preux
Legal adviser at the ICRC
