

AN IMPORTANT ANNIVERSARY

1949-1969

THE GENEVA CONVENTIONS

Present position and prospects

by C. Pilloud

The date of 12 August 1949 takes its place amongst the important historic events of which the Red Cross can be justly proud: on 22 August 1864 there was the signing of the First Geneva Convention; the second revision of that Convention and the signing of the Geneva Convention relative to the treatment of prisoners of war were made on 27 July 1929 and on 12 August 1949 there were the revision of the old Conventions and the adoption of the Geneva Convention for the protection of civilian persons in time of war. On each occasion protection of the individual was extended to further categories of victims.

The signing of the Geneva Convention was like a repetition of the initial step taken by the Red Cross. We have pleasure in commemorating this twentieth anniversary by publishing the following article which recalls the work achieved by the Diplomatic Conference after three and a half months of uninterrupted effort, its importance and place in the world today (Ed.).

PARTICIPATION

On 30 June 1969, there were 123 States formally bound by the Geneva Conventions of 12 August 1949 for the protection of the victims of war.

Participation has been effected, either by ratification when it is a question of States having signed these Conventions in 1949, in the form of accession, or else, for States succeeding to a Power already bound by these Conventions, by a declaration of continuity in which the new States assert that they continue to be bound without interruption from the date of their acceding to

independence. (Some 23 States have resorted to such procedure.)

Generally speaking, for the Conventions of a humanitarian character such as the Geneva Conventions, it can validly be claimed that the successor States are bound by the participation of the State to which they succeed, unless they expressly manifest to the contrary and thus repudiate obligations previously contracted. It can therefore be maintained that successor States are bound to the Geneva Conventions without any special formalities and that they automatically become parties to these Conventions, without it being necessary for them to make any particular declaration, accession or declaration of continuity. However, in order to avoid all ambiguity, the ICRC has attempted to obtain that new States take formal undertakings as regards the Geneva Conventions. For this purpose, when it has been called upon to recognize a Red Cross or Red Crescent Society created in a new State, it has demanded that participation in the Geneva Conventions be made by a definite act, either of accession or of a declaration of continuity.

Of the 126 member States of the United Nations, only the following States are not bound by the 1949 Geneva Conventions: Bolivia, Burma, Burundi, Chad, Costa Rica, Equatorial Guinea, Ethiopia, Guinea, Maldive Islands, Singapore, South Yemen, Yemen.

As regards Burundi, Chad, Equatorial Guinea, Guinea, Maldive Islands, Singapore and South Yemen, it can be admitted that these States are bound by the 1949 Geneva Conventions, by reason of the participation of the States to which they have succeeded. However, in several of these States preparations are being made to accede to the Conventions or to make declarations of continuity in their regard. In Bolivia, Burma, Costa Rica, Ethiopia and the Yemen representations are being made for these countries to declare as soon as possible their participation in the Geneva Conventions. This is the case notably in Bolivia where the Parliament is to make a pronouncement shortly on the subject.

It should be pointed out that several States which are not members of the United Nations participate in the Geneva Conventions. These are the following: Democratic Republic of Germany, Federal Republic of Germany, People's Democratic

Republic of Korea, Liechtenstein, Monaco, San Marino, Switzerland, Vatican City State, Republic of Vietnam, Democratic Republic of Vietnam.

For China, the Government of the National Republic of China signed the Geneva Conventions in 1949, whilst the Government of the People's Republic of China ratified them in 1956.

As can be seen, participation in the 1949 Geneva Conventions is on an extremely wide scale, probably exceeded only by the Postal or Telegraphic Conventions. It can therefore be considered that they constitute the written expression of international custom and should therefore be applicable even without ratification or explicit accession, at least in so far as their basic provisions are concerned.

The custodian State of these Conventions (the Swiss Federal Council) has followed a flexible policy in connection with the ratifications and accessions which have been communicated to it. When the instrument of ratification or accession originated from a government which it did not recognize, but which was given recognition by other governments, communication of the instrument was made to the party or signatory States. The Federal Council sometimes mentioned that its transmission of an instrument of accession did not imply that it recognized as the Government the authority from which it derived. This flexible policy appears to be entirely justified and there is certainly need to apply to the humanitarian Conventions, such as the Geneva Conventions, different criteria from those which would be applied to other international agreements of a different character.

On this point, the wish has been expressed that in cases of internal conflict, the custodian State accepts, at least for the duration of the conflict, and transmits accessions which may be notified to it and which may emanate from an insurrectional or secessionist party exercising public force over a part of the territory.

RESERVATIONS

Out of the 123 States bound by the Geneva Conventions, 26 have qualified their participation by a certain number of reservations. Most of these reservations are not essential.

However, in the Vietnam conflict, the Democratic Republic of Vietnam has given to the reservation it had made to article 85 of the Third Geneva Convention an interpretation which has given rise to argument.¹

It does not appear to be possible to draw from this reservation the conclusion that captured enemy military personnel could be deprived of their right to treatment as prisoners of war, before being recognized as guilty of war crimes by a competent and regular court. This was, moreover, declared by the Government of the USSR which made a similar reservation in answer to a query raised by the custodian Government, at the request of other States.²

Other reservations have so far not given rise to difficulties of application. It would, however, naturally be desirable that, by unilateral decisions or reciprocal concessions, States which have placed themselves under the benefit of reservations should forego them, so that engagements devolving from the Geneva Conventions be the same for all participating States.

TRANSLATIONS AND RULES OF APPLICATION

It will be recalled that the Geneva Conventions have been drawn up in French and English, both texts being equally authentic. The Swiss Federal Council, as the custodian State, was requested to establish official translations in Russian and Spanish. This work has been duly carried out.

Furthermore, in countries whose language is neither French, English, Russian nor Spanish, translations have been made and forwarded to other States parties to the Conventions through the intermediary of the custodian Government. The ICRC thus possesses a collection of translations of the Geneva Conventions in some thirty languages.

¹ Here is the text of this reservation, also made by a number of other governments:
" La République démocratique du Vietnam déclare que les prisonniers de guerre poursuivis et condamnés pour des crimes de guerre ou pour des crimes contre l'humanité, conformément aux principes posés par la Cour de Justice de Nuremberg, ne bénéficieront pas des dispositions de la présente Convention ainsi que l'a spécifié l'article 85. »

² See *International Review*, July 1965.

As regards the rules of application, communications through the custodian State were less frequent, although certain States had resort to them.

The ICRC, for its part, in connection with the repression of infractions against the Geneva Conventions, in two reports, the one submitted to the XXth Conference and the other to the XXIst International Conference, has collected the penal provisions adopted in a number of countries. It can be seen that in this sphere there still exist considerable shortcomings in not a few sets of regulations which should be adjusted by adequate legislation.

Mention should also be made in this connection of the drawing up in 1968 by the United Nations of a Convention on the indefeasibility of war crimes which naturally touches on the repression of grave breaches of the Geneva Conventions.

PRACTICAL APPLICATION

First Convention: Wounded and sick in armed forces in the field

The application of this Convention has not presented any major difficulty. These provisions indeed represent all that is necessary for the military medical service on land.

There were, however, numerous accusations of the bombing of hospitals and it seems that on occasions medical establishments duly marked have been illegally attacked.

It should also be pointed out that in fighting areas there is an increasing tendency to camouflage medical posts and field hospitals, as is the case with military installations. In fact, these posts in the fighting areas are very often sited in close proximity to military units in order to be able to bring aid rapidly to the wounded.

By clearly marking a military post or a field hospital, it is wished to avoid revealing at the same time the emplacements of other military units. This situation is naturally due to the ever increasing development of aviation and in particular of reconnaissance aircraft.

It should also be noted that in many countries there is tendency to organize, for time of war, a single medical service, consisting of both civilians and military to give treatment to military and

civilians alike. It is, in fact, generally estimated that the number of wounded caused by a war would be so great that all available forces would have to be collected to cope, as far as possible, with the needs which would be brought about by an armed conflict.

Finally, it is apparent that the regulation relative to medical aircraft stipulated in articles 36 and 37 could not be applied in practice. In fact, it is no use imagining that in time of war one could reach agreements ensuring respect for medical aircraft flying at heights, times and on routes specifically agreed upon between the belligerents concerned. Therefore, if the transport of the wounded by aircraft or helicopter has been considerably developed in most armies, this is not in the form of immunized medical aviation, but as air transport subjected to the same risks as other military aircraft.

Second Convention: Wounded, sick and shipwrecked members of armed forces at sea

This Convention has had but little application.

Furthermore, there are few hospital ships in the naval armed forces. However, in the absence of a Protecting Power, the ICRC had to notify the entry into operation of hospital ships in the Suez conflict in 1956 and in Vietnam in 1966/1967.

In addition, one government requested the ICRC to notify the States parties to the Geneva Conventions characteristics of small craft employed by the country for coastal rescue operations in application of articles 22, 24 and 27 of the Convention.

Third Convention: Treatment of prisoners of war

This Convention has proved its usefulness on a number of occasions.

It manifestly constitutes today the standards of treatment which should be given to all military personnel detained or captured as a result of an armed conflict.

It must certainly be admitted that its application has not always been easy. First of all, the definition of a regular combatant which

conditions the application of the Convention has often been disputed, particularly in the case of some guerillas, such as in Malaya and Israel. Moreover, amongst "combatants not wearing uniforms", members of resistance movements and "freedom fighters" there exists a general tendency to commit acts of hostility and claim the status of prisoners of war without submitting themselves to the respect of any rule. This situation leads to many altercations. However, on this particular point, the provisions of the Third Convention are without ambiguity and those wishing to claim the status of prisoner of war in the event of capture must observe the conditions laid down in article 4.

The non-recognition of a state of war or conflict has also sometimes led States to refuse the status of prisoner of war to captured enemy military personnel. This was notably the case of Goa in 1961. The Indian Government considered that it was not in a state of war and consequently was not bound to apply the Convention. However, that government agreed to treat detained Portuguese military in accordance with the Convention.

The indoctrination of prisoners of war during captivity was also much criticised. According to art. 38, the Detaining Power, while respecting the individual preferences of every prisoner should encourage the practice of intellectual, educational and recreational pursuits.

It is evident, however, that if prisoners of war are constrained to attend meetings on political propaganda, there is then violation of that article. In addition any propaganda which inclines the prisoner of war to take position against his own government is contrary to the respect which the Detaining Power owes to the personal dignity and integrity of each prisoner of war. It is certainly inevitable that prisoners of war, when listening to the radio, reading newspapers and by perhaps attending courses or lectures given in camps are subjected to some sort of propaganda, but it is essential that they should not be forced to take part in such activities.

The repatriation of prisoners of war at the end of the Korean war gave rise to a considerable amount of discussions in the General Assembly of the United Nations. Whilst the Third Convention was not yet legally applicable in that conflict, since neither the Democratic People's Republic of Korea, the Republic of Korea, the United States of America nor the People's Republic of China were

at that time bound to the Convention. However, in the discussions which took place on the subject of repatriation, it was the very articles of the Convention which were taken as the basis for discussion and it was their interpretation which gave rise to discussion. As is known, it was finally agreed that the Detaining Power can comply with the wishes of prisoners of war who, for serious reasons, might ask individually not to be repatriated to their own country.

Fourth Convention : Protection of civilian persons in time of war

Cases of application of this Convention have not been very numerous. One of the first of these was that of the Suez conflict in 1956. In fact, a considerable number of French and British civilians were living in Egypt and were mostly interned. At the end of the conflict these enemy nationals were expelled for the most part. In this connection it should be noted that the Fourth Convention lays down nothing on the subject. Proposals had been made during the Diplomatic Conference to regulate and restrict a Detaining Power from expelling enemy nationals living in its territory either during or after hostilities. It appears that the Allied Powers, taking into account the attitude they had adopted towards nationals of the Axis in certain colonial territories, did not consider it possible to introduce provisions into the Convention which might have appeared to be in contradiction to the attitude which they had themselves adopted. However, it does seem, generally speaking, that mass expulsions of enemy nationals after a conflict is contrary to the spirit of the Convention and to the general tendency of regarding individuals as not being held responsible for their government's actions.

The Convention was applicable in 1962 in the conflict between China and India. A certain number of Chinese nationals living in India were interned and were able to avail themselves of the provisions of the Convention.

A further case of application was the conflict in the Middle East in 1967 which led to the occupation by Israeli forces of Syrian, Jordan and Egyptian territory. This application is at present being pursued. This is indeed the first occasion on which provisions relative to occupation have found application.

The Government of Israel has not so far taken up a clear position concerning the applicability of the Fourth Convention which seems, however, to be evident. In practice, the attitude of the Israeli Occupation authorities is, in most cases, in accordance with the provisions of the Fourth Convention, although there are some important articles whose provisions are not entirely respected (for example arts. 33, 47, 49 and 53).

Articles common to the 4 Conventions

The measures laid down in article 2 of each of the four Conventions, according to which the Conventions apply to all cases of declared war or of any other armed conflict, have proved themselves. In fact, since the entry into force of the United Nations Charter, States are increasingly reluctant to admit that they find themselves in a state of war and one has seen large-scale conflicts, involving considerable numbers of victims, taking place without either side recognizing that it is a question of a war. This has not, however, prevented the application of the Geneva Conventions by virtue of the clause mentioned above. This clause has, moreover, become almost customary and appears to apply even now to previous Conventions, such as the Hague Convention of 1907 or the Geneva Protocol of 1925.

An almost similar formula has been employed in the Convention for the protection of cultural property concluded at The Hague in 1954.

On the other hand, the designation and functioning of Protecting Powers charged with contributing to the application of the Conventions have proved to be more difficult. The reasons must be sought in the fact mentioned above, namely the reluctance of the parties to a conflict to recognize that a state of war exists.

In this way States have arrived at a situation of prolonged hostilities without breaking off diplomatic relations between each other. This was notably the case in 1964 during the conflict between China and India and in the conflict between India and Pakistan in 1965.

The fact that States do not recognize each other has sometimes also prevented Protecting Powers being designated, which was in

particular the case of the conflicts in 1956 and 1967 between Israel and the Arab States.

As against this, during the Suez conflict in 1956, British and French interests in Egypt, and Egyptian interests in France and Great Britain were duly protected by the Protecting Powers which functioned normally. This, however, was an exceptional case.

Paradoxically, in peaceful relations between States, there are Protecting Powers in abundance. Many States have, in fact, broken off diplomatic relations and entrusted the safeguard of their interests to Protecting Powers. During the Goa conflict in 1961, India's interests in Portugal and in the Portuguese territories had been regularly protected over a number of years by a Protecting Power and this was also the case for Portuguese interests in India. These Protecting Powers continued to function both during and after the conflict.

In the case in which no designation was made of Protecting Powers, it does not appear that the original States or Detaining Powers made efforts, in accordance with articles 10/10/10/11 of the Conventions, to designate substitutes for Protecting Powers. The ICRC was itself not requested to assume such functions.

Article 3 common to the four Conventions bears on internal armed conflicts. It has been applicable to numerous situations which have taken place during the course of these last two decades. Its application has shown itself to be extremely useful but has encountered a large number of difficulties which are described in the report submitted by the ICRC to the XXIst International Conference of the Red Cross.¹

INCIDENCES RESULTANT FROM THE NON-APPLICATION
OF OTHER PROVISIONS OF THE LAW OF WAR

Since 1949, it has become more and more evident that the provisions of the Geneva Conventions whose object it is to protect persons against arbitrary actions of the enemy, cannot be entirely dissociated from other provisions dealing with weapons, their employment and methods of war.

¹ See *International Review*, July 1969.

Systematic attacks by aircraft on civilian populations can render the application of the provisions of the Geneva Conventions problematical, particularly those connected with the respect due to combatants who have surrendered or have fallen into the hands of the enemy.

Such a situation will persist and will most likely continue to deteriorate, as long as belligerents take it upon themselves to decide what is meant by military objectives and to attack objectives which they have thus defined.

This is a matter of grave concern and the ICRC is presenting to the XXIst International Conference a comprehensive report on the re-affirmation and the development of the laws and customs applicable in armed conflicts; the main point of this report bears precisely on the respect due to the civilian population and to attacks on military objectives.

Naturally, the use of weapons of mass destruction could also render precarious the application of the provisions of the Geneva Conventions. As regards nuclear weapons, it is known that circumstances make their employment most unlikely, yet they always constitute a very serious threat.

On the other hand, in the field of chemical and bacteriological (biological) weapons considerable study has been given to the question of completing existing prohibitions.

GENERAL CONCLUSIONS

It can be admitted that as a whole the Geneva Conventions of 12 August 1949 have fulfilled the hopes placed in them; they have acquired universal fame, although their dissemination still needs to be developed. It is certain that some provisions may appear complicated and even too detailed. It should, however, be remembered that they were formulated on the basis of experiences made by persons who had known the rigours of occupation or captivity, and for whom certain details assumed great importance. It can also be observed that the strict and complete application of these Conventions does not represent for the belligerents any hindrance to the military operations which they have to undertake and that no military impossibility is involved in their application.

Such as they are, they do represent the charter of the rights of the individual in armed conflicts and are certainly an important element in civilization today.

PROSPECTS

It is evident that the Geneva Conventions could be completed and improved on a number of points and readers of the *Review* have on several occasions had opportunities to read articles on subjects of this nature.

The ICRC, for its part, has scrupulously noted all points where improvements are necessary, either according to its own experiences, or communications sent to it.

However, it does not seem at present that any revision of these Conventions could be effected with sufficient chances of success. The best texts have little value unless they are ratified by governments. Now, it is even claimed by some that in present circumstances it would be difficult to obtain the approximate unanimity realized in 1949.

The ICRC would therefore envisage, for those points where it might appear urgent and necessary to make development, rather to resort to protocols annexed to the Geneva Conventions and which could be submitted to governments for accession or ratification, without the Conventions themselves being called in question. The points on which such protocols might be considered, would deal principally with internal conflicts, medical aviation, a better definition of combatants, taking into account the present forms of hostilities, the situation of civil defence organizations and of civilian medical personnel, etc. . . .

The XXIst International Conference of the Red Cross will no doubt give indications and guidance in this sphere on the appropriate ways to follow.

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