

RESERVATIONS TO THE 1949 GENEVA CONVENTIONS ¹

by C. Pilloud

By July 31, 1957, sixty-six States were bound to the Geneva Conventions, either by ratification or accession. From that date to May 31, 1965, a further 40 States ² acceded to these Conventions, bringing the total to 106. Several of the newly independent States confirmed their participation by delivering to the Custodian Government—the Swiss Federal Council—a declaration of continuity, that is to say, a document in which they confirmed that from the date of their independence they were committed by the ratification signed by the Powers to which they had succeeded.

Of these 40 States, five made or confirmed reservations upon ratification or accession, namely: Democratic People's Republic of Korea, United Kingdom, Australia, New Zealand and Portugal.

Upon accession on August 27, 1957, the *Democratic People's Republic of Korea* made a series of reservations similar to those laid down by the USSR and a number of other countries. The first of the series referred to Article 10 of the First, Second and Third Conventions and Article 11 of the Fourth, dealing with the appointment of a substitute for the Protecting Power. The Government of the Democratic People's Republic of Korea does not admit the legality of a Detaining Power's request to a neutral State or humanitarian organization to assume the duties of a Protecting

¹ For the situation obtaining on July 31, 1957, see "Reservations to the 1949 Geneva Conventions" by the same author originally published in French in the August 1957 issue of *Revue internationale de la Croix-Rouge*, and in English in the June, July and September 1958 supplements.

² In chronological order: Democratic People's Republic of Korea, Great Britain, Sudan, Dominican Republic, Ghana, Indonesia, Australia, Cambodia, Mongolian People's Republic, Ceylon, New Zealand, Republic of Algeria, Republic of the Congo (Leopoldville), Portugal, Nigeria, Paraguay, Upper Volta, Colombia, Ivory Coast, Dahomey, Togo, Cyprus, Federation of Malaysia, Ireland, Islamic Republic of Mauritania, Tanganyika, Senegal, Trinidad and Tobago, Kingdom of Saudi Arabia, Somalia, Madagascar, Federal Republic of Cameroon, Kingdom of Nepal, Republic of Niger, Rwanda, Uganda, Jamaica, Republic of Gabon, Canada, Mali.

RESERVATIONS TO THE 1949 GENEVA CONVENTIONS

Power on behalf of detained persons protected by these Conventions, unless the agreement of the State to which those persons belong is obtained.

As we pointed out in our 1957 study, neutral States and humanitarian organizations called upon to act as a Protecting Power would be well advised to obtain the approval of the protected person's own Government whenever possible, if it exists.

The second reservation concerns Article 12 of the Third Convention and Article 45 of the Fourth, dealing with the Detaining Power's responsibility in the event of a transfer of POW's or civilian detainees to another Power bound by the Geneva Conventions. According to this reservation the Power making the transfer should remain responsible for application of the Conventions even after the transfer. As mentioned in our previous article, this is more in the nature of a unilateral declaration than of a reservation, as its purpose is to increase the obligations incumbent on member States beyond those provided for in the Conventions.

Finally, the Democratic People's Republic of Korea does not consider itself bound by Article 85 of the Third Convention as regards the treatment of prisoners of war who have been convicted of war crimes or crimes against humanity under the Detaining Power's national law based on principles developed by the Nuremberg and Tokyo international military courts. Our earlier article dealt at length with the interpretation and consequences of this reservation.

The *United Kingdom, Australia and New Zealand*, upon acceding to the Conventions confirmed the reservation they had previously laid down on signing, that is to say, the right to apply the death penalty pursuant to the second paragraph of Article 68 of the Fourth Convention irrespective of whether the offences specified therein were or were not punishable by death under the law of an occupied territory before the occupation began. Pakistan, the U.S.A., and the Netherlands have qualified their accession with the same reservation³.

In addition, *Australia* has specified that it interprets "military installations of the Occupying Power", used in the second paragraph

³ For scope and consequences see previous study of 1957 and 1958.

RESERVATIONS TO THE 1949 GENEVA CONVENTIONS

of Article 68, to mean “installations of *essential* military interest to the Occupying Power”.

New Zealand, upon ratification, waived the reservation, made when signing, in respect of the first paragraph of Article 70 of the Fourth Convention ⁴.

When *Portugal* deposited its instrument of ratification, that country's representative declared that:

. . . the Portuguese Government has decided to withdraw the reservations it had made on signature in respect of Article 3, common to all the four Conventions, Article 13 of the First, and Articles 4 and 60 of the Third.

On the other hand, the Portuguese Government only accepts Articles 10 of Conventions I, II, III and Article 11 of Convention IV with the reservation that requests by the Detaining Power to a neutral State or to a humanitarian organization to undertake the functions normally performed by Protecting Powers are made with the consent or agreement of the governments of the country of which the persons to be protected are nationals (countries of origin).

This reservation is the same as that expressed by the Democratic People's Republic of Korea and we have already seen in what light it should be considered.

When *Canada* ratified the Conventions on May 12, 1965, it withdrew the reservation it had made on signing in 1949 with respect to the second paragraph of Article 68 of the Fourth Convention. Canada therefore acceded to the 1949 Geneva Conventions without any reservation, for which it is to be congratulated.

* * *

Fortunately the reservations which have been made to the Geneva Conventions are few and of relatively minor importance. None of them jeopardize the regular application of the Conventions. As we have seen, some have been withdrawn on ratification.

Of the 66 States parties to the Conventions in 1957, 18 had qualified their participation by reservations; by May 31, 1965, only

⁴ See our previous study.

RESERVATIONS TO THE 1949 GENEVA CONVENTIONS

23 States out of a total of 106 had stipulated reservations; a very small minority.

* * *

With regard to the attitude adopted by States parties to the Conventions in respect of reservations made by other States, it will be recalled that the United States, upon ratification, made the following statement, *mutatis mutandis*, in the case of each Convention:

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

In our previous study we came to the conclusion that the position adopted by the U.S.A. with regard to the reservations of the others States Parties to the Conventions was no different from that adopted by States which had quite simply made no statement concerning these reservations.

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

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

RESERVATIONS TO THE 1949 GENEVA CONVENTIONS

by having treaty relations the United States has obtained agreement to the best standards of treatment and is in the soundest position to protect our nationals.⁵

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

It is the Committee's view that this statement adequately expresses the intention of our Government to enter into treaty relations with the reserving States so that they will be bound toward the United States to carry out reciprocally all the provisions of the Conventions on which no reservations were specifically made.⁶

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

In effect, this statement constitutes a proposal to agree to disagree...⁷

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

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

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

Our reason for having examined the import of the U.S. Government's statement at length is that it is similar to those subsequently made by the Governments of the United Kingdom, Australia and New Zealand upon ratification. These were of identical tenor and we quote hereunder the British version:

⁵ Geneva Conventions for the protection of war victims. Report of the Committee on Foreign Relations: 48th Congress, 1st Session, Washington, 1955, p. 29.

⁶ *Ibid.*

⁷ *American Journal of International Law*, 1955, p. 552.

RESERVATIONS TO THE 1949 GENEVA CONVENTIONS

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

the People's Republic of Albania, the Byelorussian Soviet Socialist Republic, the Bulgarian People's Republic, the People's Republic of China, the Czechoslovak Republic, the Hungarian People's Republic, the Polish Republic, the Rumanian People's Republic, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics,

and to the reservations to Article 12 of the Convention relative to the Treatment of Prisoners of War and to Article 45 of the Convention relative to the Treatment of Civilian Persons in Time of War made by all the above-mentioned States and by the Federal People's Republic of Yugoslavia.

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

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

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

A subsequent exchange of notes on these statements, through the intermediary of the custodian government, took place between the USSR and other countries which contested their validity, on the one hand, and the Governments of the United Kingdom, Australia and New Zealand on the other hand, without any completely clear conclusion being arrived at. Both sides advanced the advisory opinion of the International Court of Justice as justification for their standpoint.

In the absence of definitive rules and widely accepted practice, it is difficult to give any opinion on the basic issue raised by these three statements. However, it can be said that they affect only Article 85 of the Convention relative to the treatment of prisoners of war: in fact, the only genuine reservation made is the one applying to this article.⁸

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

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

The standpoint of the United Kingdom, Australian and New Zealand Governments on this matter seems at first sight to be a new departure from all previously acceptable or defensible theories. The International Court of Justice, followed by the U.N. General Assembly, broke new ground by establishing the postulate of a reservation's compatibility with a treaty and its aims. This was also the direction in which the International Law Commission's work has been proceeding. Its work, moreover, has not yet been completed. The Organization of American States goes even further;

⁸ "A reservation means a unilateral statement made by a State whereby it purports to exclude or vary the legal effect of some provision of the treaty in its application to that State". International Law Commission; 1962 Report, Treaty Law, Art. 1.

RESERVATIONS TO THE 1949 GENEVA CONVENTIONS

it admits that an objection to a reservation—even to one which is incompatible with a treaty and its aims—is effective only between the reserving and objecting States. The United States statement considered above implies the concept that a State's opposition to another's reservation may not vitiate a treaty between them except in respect of such clauses as are affected by the reservation. Further, according to the British view, a State may consider as nul and void a reservation to which it objects, and propose application of the whole treaty.

As can be seen, in theory the situation is by no means straightforward, particularly as the United Kingdom, Australia and New Zealand themselves made reservations upon ratification. In spite of these varying points of view, there is no doubt that all States which have ratified or acceded to the Geneva Conventions are bound by them and must implement them in contingencies for which they make provision. This is a positive attribute which can rightly be welcomed with great satisfaction.

Nevertheless, the case in point shows how useful it would be to have exact rules or at least some guiding lines. The United Nations International Law Commission has included treaty law on its agenda and almost the whole of its last sessions was devoted to that subject. The procedure to be observed in case of reservations to multilateral agreements was studied at length and draft rules were framed. It is to be hoped that this important work will soon be completed and that the outcome will be received favourably by governments.

CLAUDE PILLOUD

Deputy Director for General
Affairs of the ICRC
