THE GENEVA CONVENTIONS OF 12 AUGUST 1949

COMMENTARY

published under the general editorship of

Jean S. PICTET
Director for General Affairs of the International Committee of the Red Cross

(Translated from the original French)

I

GENEVA CONVENTION

FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD

Inter arma  *caritas*

GENEVA
INTERNATIONAL COMMITTEE OF THE RED CROSS
1952

Printed in Switzerland

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by

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INTERNATIONAL COMMITTEE OF THE RED CROSS
1952

CONTENTS

CHAPTER II
WOUNDED AND SICK

CHAPTER III
MEDICAL UNITS AND ESTABLISHMENTS

CHAPTER IV
MEDICAL PERSONNEL

CHAPTER V
BUILDINGS AND MATERIAL

CHAPTER VI
MEDICAL TRANSPORT

CHAPTER VII
THE DISTINCTIVE EMBLEM

FINAL PROVISIONS

FOREWORD

On 12 August 1949 Plenipotentiaries from almost every country in the world, after four months' continuous work at the Diplomatic Conference, approved the text of the new Geneva Conventions. All signed shortly afterwards and many have since ratified. There are thus good grounds for believing that these Conventions, a decisive step in the evolution of international law for the protection of war victims, will soon take effect universally.

As soon as the Conventions had been established, the International Committee of the Red Cross decided to undertake a Commentary. This task was naturally entrusted to the members of the staff who, from the end of the last world conflict—and even before—had worked on the revision of the Conventions, and were closely associated with the discussions of the Diplomatic Conference of 1949 and the meetings of experts which preceded it.

Although published by the International Committee, the Commentary is the personal work of its authors. The Committee, moreoever, whenever called upon for an opinion on a provision of an international Convention, always takes care to emphasize that only the participant States are qualified, through consultation between themselves, to give an official and, as it were, authentic interpretation of an intergovernmental treaty.

The present volume analyses the rules of the First Geneva Convention which, concluded in 1864, has now received its third revision; it succeeds the Report of Professor Louis Renault on the 1906 Convention and the Commentary on the 1929 Convention by Paul Des Gouttes, Secretary-General and Member of the International Committee—both works which have proved their worth. The substance of the second of these two works, the nearest in time, has been used again here wherever still applicable.

The present volume therefore owes much to the studies of the late Paul Des Gouttes, who was such a zealous and eminent authority on the Geneva Convention.

This Commentary has been written mainly by M. Jean S. Pictet, who called on M. Frédéric Siordet for Articles 1 to 3 and 8 to 10, M. Claude Pilloud for Articles 11 and 49 to 52, M. Jean-Pierre Schoenholzer for Articles 12 to 18, M. René-Jean Wilhelm for Articles 6, 7 and 46, and M. Oscar M. Uhler for Articles 45, 47, 48 and 52 to 64.

This study has been based solely on practical experience in the years before 1949, particularly during the period of the Second World War. The work of revision has been carried out in the light of the experience which proved it necessary.

The International Committee hopes that this Commentary will be of service to all who, in Governments, armed forces, and National Red Cross Societies, are called upon to assume responsibility in applying the Conventions, and to all, military and civilians, for whose benefit the Conventions were drawn up. It also hopes that by publishing this study it will help to make the Conventions widely known—for that is essential if they are to be effective—and to spread the influence of their principles throughout the world.

International Committee of the Red Cross.

INTRODUCTION

1. *The Red Cross and the Geneva Convention of 1864*

The Geneva Conventions are inseparable from the Red Cross, in their historical origin as in their living reality. It was to the founders of the Red Cross that the conclusion of the original Geneva Convention was due. In return, this Convention gave legal protection to the Red Cross. Nevertheless, the Conventions, like the Red Cross, retain their separate existence. The Red Cross derives authority from the Conventions for only a part of its work; and the Conventions deal with many obligations between States which do not directly concern the Red Cross, although they do apply to persons in whom it is interested.

At the end of his book *A Memory of Solferino*, Henry Dunant expressed a twofold wish—first, that each country should in peacetime set up a relief society which would aid the Army Medical Services in time of war and, secondly, that the nations should ratify by convention a solemn principle which would give the necessary standing to such societies. The Red Cross as an organization translates the first of these aspirations into reality; the second led to the Geneva Convention.

The origin of the Red Cross is well known. It is sufficient to mention here that the committee of five, nominated by the Geneva Public Utility Society to study Dunant's proposals, formed itself on 17 February 1863 into the "International Standing Committee for Aid to Wounded Soldiers" *(Comité international et permanent de secours aux militaires blessés)*. This Committee was the founding agency of the Red Cross and promoted the Geneva Convention. In 1880 it adopted the title "International Committee of the Red Cross", which remains unchanged.

This Committee of private individuals, restricted in number but

certainly not lacking in courage, almost immediately convened an unofficial international Conference, to study ways and means of dealing with the inadequacy of the medical services of armies in the field. The Conference, to which sixteen States sent representatives, founded the Red Cross in October 1863.

As the 1863 Conference did not intend to deal with problems of international law, it was by a recommendation annexed to its Resolutions that it asked for the "neutralization" of medical personnel and of the wounded themselves. Less than a year later, the recommendation was given effect when the Swiss Federal Council called a Conference which, attended by representatives of the same Powers, this time as Plenipotentiaries, drew up the 1864 Geneva Convention.

The Red Cross had come into existence, with a definite status in international law. It has developed in subsequent years to become what it now is—a leading moral influence in our time, including all, or practically all, aspects of human suffering in its terms of reference.

Although the founders of the Red Cross are fully entitled to the merit of having brought to its maturity the idea which lies behind the Geneva Conventions—namely, respect for the enemy who is put out of action—and of having grounded it firmly in international law and in practice by a treaty accepted by all States, their idea was nevertheless not new.

From ancient times right down to the Middle Ages the wounded and prisoners were at the mercy of the conqueror. Certain rulers were humane; but they were the exceptions. The idea of respecting a vanquished enemy and the practice of caring for his needs did not gain ground until modern times. In the 16th century they found expression in certain bilateral agreements between the commanders of opposing armies.

A certain rule of conduct was beginning to emerge, which found more definite acceptance in the 18th century. Credit is due to Jean Jacques Rousseau for having, in a celebrated passage of the *Contrat Social*[1], expressed in clear and definite terms the standards which are at the basis of the Geneva Conventions and the laws of war.

Nevertheless—no doubt because of increases in the size of armies—the wounded were worse off in the Napoleonic campaigns and, above all, during the wars in the Crimea and in Italy, than they had been in the 18th century. The appeal launched by Henry Dunant, which led

[1] Book I, Chapter IV.

to the foundation of the Red Cross and to the conclusion of the 1864 Geneva Convention, thus came opportunely in 1862. By 1867, all the Great Powers had ratified the Convention except the United States of America, which did so in 1882. A large part of the Convention's authority is due to this universal character, which it has retained ever since.

2. *Nature and significance of the Geneva Convention*

The 1864 Convention embodies the great principle that members of the armed forces who are wounded or sick, and thus harmless and defenceless, must be respected and cared for without distinction of nationality. As a corollary, and in the exclusive interest of the wounded, it adds that ambulances and military hospitals, and also the medical personnel, are to be protected against hostile acts. The distinctive emblem of the red cross on a white ground is the visible sign of this immunity.

As M. Max Huber, President for almost twenty years and today Honorary President of the International Committee, has shown, the significance of the Convention was many-sided. Apart from certain existing legal rules relating to maritime navigation, it represented the first entry of law into the preserves of war, where hitherto force alone had prevailed. It also marked the entry into the sphere of State interests of moral ideas touching the human person.

It was also something quite new to see international law accord protection on the battlefield to a private activity such as the work of the voluntary relief societies. Thus a result of the Convention was to make possible the growth of the Red Cross, whose *sedes materiae* it is. The Red Cross, in return, benefited the Geneva Convention, which would scarcely have found the same degree of universal acceptance, had it been only a military agreement; it became popular through the Red Cross, which symbolizes disinterested relief, at the disposal of all. The 1864 Convention remained open to all the States not represented at the Conference. This again was an innovation.

The Convention was the point of departure for the great movement in international law for the protection of war victims represented by the Geneva Conventions as a whole. Its principle, first limited in appli-

cation to wounded soldiers, was extended gradually to other categories of war victims: the shipwrecked, prisoners of war, and, finally, civilians. With the signature of the four 1949 Conventions it can be said that the movement has achieved all it set out to do.

The law constituted by the Geneva Conventions has one inherent weakness: it forms part of the laws of war. As war threatens the very existence of States, legal rules are in danger, when war becomes total, of being trampled under foot on the pretext that necessity knows no law.

But it can be claimed that, generally speaking, this has not happened during the two World Wars. It must be acknowledged that in spite of their imperfections, and of certain abuses, the Geneva Conventions have withstood the ordeal by fire, and benefited great numbers of war victims.

The fact that the Conventions deal with superior interests—the safeguarding of the lives and dignity of human beings—does much to compensate the weakness we have just mentioned.

Their validity, however, does not depend only on their being the expression of a moral ideal transcending all purely legal considerations; it depends also on the reciprocal true interests of States. Through all the upheavals of war their authority has remained intact, because those who adopted them were realists. They realized that imposing formulae were not sufficient to control the forces let loose in war. They saw that nothing was to be gained by making rules which would, in the nature of things, remain a dead letter, and therefore asked for standards which could be observed because they were not incompatible with military necessity.

3. *Revision of the Geneva Conventions*

At the end of the Second World War, unprecedented as it was in extent, the necessity appeared of again revising and extending the Conventions in the light of experience. It had always been a tradition for the International Committee to strive for the improvement and development of the Conventions; and it therefore took up the task anew in 1945.

A choice had to be made between elaborating very full and detailed rules covering all possible eventualities, or formulating general principles sufficiently flexible to be adapted to existing circumstances in each country. It soon appeared that in governmental circles the first con-

ception prevailed, as it had already in 1929 in reference to the Prisoners of War Convention. The International Committee, however, set itself to modify this idea, firstly by introducing certain general and indefeasible principles at the beginning of the Conventions and, secondly, by leaving the way open for special agreements on the lines indicated by the model agreements and regulations annexed to the Conventions.

In the pursuit of these objects the Committee followed its usual method. The available literature was brought together, and points needing extension, confirmation or modification underlined. Draft Conventions were then drawn up with expert help from Governments, National Red Cross Societies and other relief societies.

Several Expert Conferences were convened in Geneva where the documentation was centralized. The most important were the Preliminary Conference of National Red Cross Societies in 1946, and the Conference of Government Experts in 1947, which marked a decisive step forward. The completed drafts were presented to the XVIIth International Red Cross Conference at Stockholm in 1948, where they were adopted with certain amendments.

The drafts were then taken as exclusive working documents for the Diplomatic Conference which, convened and extremely well organized by the Swiss Federal Council, as depositary of the Conventions, met at Geneva from 21 April to 12 August 1949, under the chairmanship of M. Max Petitpierre, Federal Councillor and Head of the Political Department. Fifty-nine States were officially represented by delegations with full powers to discuss the texts, and four by Observers. Experts from the International Committee gave daily co-operation.

The Conference immediately set up four main Committees, which sat simultaneously and considered (a) the First Geneva Convention, and the Second which adapts it to maritime warfare, (b) the Prisoners of War Convention, (c) a Convention for the protection of civilians, and (d) provisions common to all Four Conventions. Besides numerous working parties, there was also a Co-ordination Committee and a Drafting Committee, which met towards the end of the Conference and endeavoured to achieve a certain uniformity in the texts.

The First Committee was presided over by Sir Dhiren Mitra (India) and by M. Ali Rana Tarhan, President of the Turkish Red Crescent. It was fortunate in having the assistance of General René Lefebvre (Belgium) as Rapporteur and Chairman of the Drafting Committee of

the Committee. He was responsible for the Committee's Report to the Plenary Assembly, which gives a valuable indication of the grounds for decisions. We shall have occasion to refer to it often in this Commentary.

The Chairman of the Joint Committee on Articles common to all four Conventions was Professor Maurice Bourquin (Belgium), and of its "Special Committee", M. Plinio Bolla, Judge of the Federal Supreme Court (Switzerland). The Report by Professor Claude Du Pasquier (Switzerland), Rapporteur of the Joint Committee, will prove another fruitful source of reference.

It is not intended to dwell at length here on the discussions at the Conference; but mention must be made, not only of the detailed work of the Plenipotentiaries for almost four months, but also of the remarkable spirit of co-operation and understanding which prevailed—in spite of divergent opinions—and, above all, of their sincere humanitarian spirit. The discussions were dominated throughout by a common horror of the evils caused by the recent World War and a determination to lessen the sufferings of war victims.

On 12 August 1949 seventeen delegations signed the four Conventions. The others signed at a special meeting called for the purpose on 8 December of the same year, or subsequently up to 12 February 1950, bringing the total number of signatory States to sixty-one. Certain reservations made at the time of signing refer only to individual provisions, and do not affect the authority or general structure of the treaties.

Before entering into force for any country, the Conventions must be ratified by it. Six months having passed from the date of ratification by the first two States—Switzerland and Yugoslavia—the Conventions entered into force as between those two countries on 21 October 1950. They come into operation for the other countries six months after each of them ratifies. As from 21 October 1950, the new Conventions have become a part of positive international law, and are thus open to accession by countries which did not take part in their elaboration.

4. *The Conventions of 1864, 1906, 1929 and 1949*

The 1864 Convention had ten Articles only; but it laid foundations which have never since been shaken.

Its provisions may be summarized as follows. Military ambulances

and hospitals are recognized as neutral and, as such, must be protected and respected. Their personnel, and chaplains, while on duty, are also covered by this neutrality; if they fall into enemy hands, they are entitled to go back immediately, or else to finish their task, after which they will be returned to their own outposts. Ambulances retain their material; that of hospitals is subject to the laws of war. Local inhabitants aiding the wounded must be respected, and so must any house where a wounded man is taken in. Military wounded or sick must be cared for, whatever their country. Wounded who are captured must be sent home if they are incapable of further military service or if they undertake not to take up arms again. Hospitals and medical personnel are to display the sign of the red cross on a white ground.

The Convention was not without gaps and imperfections, and some of its provisions were hardly compatible with military necessities. A Diplomatic Conference met in 1868 to study its revision, and produced additional Articles which were never ratified. Their principal object was to adapt the principles of the Geneva Convention to maritime warfare; and although some of the Articles related to the Geneva Convention itself, they merely added certain subsidiary details.

It was left to the 1906 Diplomatic Conference to complete the Convention and give it an adequate form. While confirming recognized principles, it eliminated what "ordeal by fire" had shown to be impracticable.

The 1906 Convention has thirty-three Articles, their contents being classified in Chapters in order of importance. There is no longer any mention of the "neutrality" of ambulances and medical personnel. For this inexact term the notion of "respect and protection" is substituted. It is explicitly stated that the wounded and sick are to be respected, which in 1864 was only implicit. There are provisions concerning the burial of the dead and the transmission of information regarding their identity. The protection accorded to medical personnel becomes permanent, and is no longer restricted to periods when they are on duty. The co-operation of voluntary relief societies is expressly recognized. On the other hand, the prerogatives of inhabitants who take in the wounded are reduced to more reasonable proportions.

In 1929 the Convention was not recast as in 1906, but adapted, experience during the First World War having shown that this was necessary. The most significant improvements are the clauses recogniz-

ing the advent of medical aircraft, the extension of the use of the emblem to the peacetime activities of National Red Cross Societies, the recognition and repression of violations of the Convention and the abolition of the *clausula si omnes*.[1] The rules governing the repatriation of the seriously wounded are incorporated in the Prisoners of War Convention of the same date. Auxiliary medical personnel are protected. As we shall see later, it is a cause for regret that the Conference did not tackle in the detail necessary the problem of medical personnel retained in enemy hands.

The 1949 revision followed a similar course. The Plenipotentiaries were anxious to maintain the basic principles of the Convention, but at the same time to make it more explicit and above all bring it up to date.

There are those who think the new Convention retrograde from the standpoint of humanitarian law, inasmuch as it recognizes the retention of medical personnel, abandons the principle that material must be restored, and does nothing to encourage the development of medical aviation. But in considering these points the general evolution of modern methods of warfare must be born in mind. The Conference remained within the limits of what was practicable. It had no desire to retain or introduce impracticable regulations, the ignoring of which was bound to lower standards which it was essential to guard intact. Firmly resolved that any future victims of war should be provided with the widest possible safeguards, the 1949 Conference was sufficiently realistic to put these safeguards in a form to which every State could subscribe.

In its new version, the Geneva Convention is worthy of its traditions. Should the disaster of a new war occur, it will be a safeguard for countless persons and the last refuge of civilization and humanity. Being thus, perhaps more than ever before, a protest of the spirit against the unleashing of material forces, it makes to the world a powerful appeal for peace.

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[1] Provision to the effect that the Convention is binding only if all the belligerents are bound by it.

TITLE OF THE CONVENTION

GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD OF AUGUST 12, 1949

The title is not an integral part of the Convention. It comes before the Preamble (*"The undersigned... have agreed as follows:"*), and it does not appear again after it. However, as it was the subject of discussion, and subsequently of a vote by the Conference, it is official, and calls for brief comment.

A difference from the title of the Convention of 27 July 1929 will be at once apparent. The latter was a "Convention for the Relief of the Wounded and Sick in *Armies* in the Field". The 1949 Conference, on the other hand, decided to adopt the wording "in *Armed Forces* in the Field", as being a logical consequence of the extension of the protection accorded by the Convention, which in its new form does not relate solely to soldiers and to other personnel officially attached to the *Army*, but also to other categories of persons specified in Article 13.[1]

The title of the Convention of 27 July 1929 was not an exact reproduction either of the 1906 Convention, of which it purported to be a revision, or of the original Convention of 1864. In the first place it related (in the original French) to "the wounded and the sick" (*des blessés et des malades*), whereas the 1864 Convention related only to the "wounded", and the 1906 Convention to the "wounded and sick" (*"des blessés et malades"*)—a defective expression, inasmuch as it might be taken to mean that only the wounded sick were to be protected.[2]

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[1] See below, on Article 13, pages 142 ff.

[2] The confusion could not arise in the English text, which accordingly translated both "*des blessés et des malades*" and "*des blessés et malades*" by "the wounded and sick". ("*Les blessés qui étaient malades*" would be in English "the wounded sick" or "the sick wounded".) — TRANSLATOR.

In the second place it included the word "Geneva" as a tribute to the city which had seen the birth of the Red Cross and, at the instigation of the latter, the conclusion of the original Convention.

The two changes in question were maintained in the title of the 1949 Convention, the designation "Geneva Convention" being extended to all four of the Conventions signed on 12 August 1949.[1] The Diplomatic Conference took the view that "from a practical point of view it would be preferable... to give the official title of 'Geneva Conventions' to all these documents, as a tribute to the city of Geneva, the headquarters of the International Committee of the Red Cross, and also to Switzerland as a whole".[2]

PREAMBLE

The undersigned, Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of revising the Geneva Convention for the Relief of the Wounded and Sick in Armies in the Field of July 27, 1929, have agreed as follows :

The extreme brevity of the Preamble will be noted. Unlike the 1929 Convention, it contains no list of the Sovereigns or Heads of States of the signatory Powers, or of the names of their Plenipotentiaries, and makes no mention of the presentation or verification of the latter's credentials; nor does it include the usual statement of the motives which have led the Powers to conclude the Convention. The 1929 Convention still observed this customary practice. The Heads of States, enumer-

[1] For brevity the first of the four Geneva Conventions of 12 August 1949, which is the subject of the present Commentary, will be called "the Convention" or "the First Convention". The other Conventions, where there is occasion to refer to them, will be known by their serial numbers, *i.e.*:

"Second Convention" will mean the "Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949";

"Third Convention" will mean the "Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949"; and

"Fourth Convention" will mean the "Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949".

[2] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, page 457.

ated in alphabetical order, stated that they were "animated no less by the desire to diminish, so far as with them lay, the evils inseparable from war, and seeking to that end to perfect and complete the agreements reached at Geneva on 22 August 1864 and 6 July 1906..." All this is replaced in the present Convention by a summary indication of the purpose of the meeting of the Diplomatic Conference, namely the revision of the Geneva Convention for the Relief of the Wounded and Sick in Armies in the Field of July 27, 1929.

"Revising" is the term used here. Whereas the 1929 Convention spoke of "perfecting" and "completing" the earlier Conventions. Though the two latter conceptions do not actually figure in the new title, they may be said to be implicitly included in the word "revise". The rest of this Commentary, as it proceeds Article by Article, will make it abundantly clear that the work of the Diplomatic Conference of Geneva was much more than mere revision. The Conference not only strengthened the protection accorded to wounded and sick military personnel: it also extended that protection to categories of persons who had previously been without it, or had been liable to have their claim to it contested by over-literal interpretation of the former texts.

As the 1949 Convention was only a "revision" of the 1929 Convention, and as the latter was a Convention to "perfect" and "complete" the earlier instruments of 1864 and 1906, it is essential, if we are to arrive at the precise purposes which the new Convention has in mind, to go back to the source—that is to say, to the Preamble to the earliest of the Conventions. The Plenipotentiaries of 1864 said that they were "animated no less by the desire to mitigate, so far as with them lay, the evils inseparable from war, to put an end to unnecessary hardships, and to ameliorate the lot of wounded combatants on the battlefield..." All this is included, in shortened form, in the 1949 text; there is the same desire, now extended to others as well as to the wounded and sick, to mitigate the evils inseparable from war, to ameliorate the lot of the war victims, and to put an end to unnecessary hardships. Although the last of these motives ("to put an end to unnecessary hardships") no longer figures in the various revisions of the original Convention, they are none the less inspired by it. It has an interest all its own as an embodiment of the idea which was born in the mind of Henry Dunant when he saw the thousands of wounded lying uncared-for on the battlefield of Solferino—an idea which within so few years was to conquer the world.

Why try to put an end to the unnecessary hardships of war? Out of respect for human personality, which centuries of civilization have gone to create. That end to unnecessary hardships, that respect for human personality, which even war can no longer ignore, represented such a victory for humanity that one is inclined to regret that they are not proclaimed again in the Preambles to the Geneva Conventions.

It is not always a matter of indifference whether a treaty does or does not open with a statement of motives and an exact definition of its object. A Preamble has no legal force; but it frequently facilitates the interpretation of particular provisions which are less precise than they should be, by its indication of the general idea behind them and the spirit in which they should be applied. The present Convention was very nearly given a Preamble of this kind.

In the drafts submitted by it to the XVIIth International Red Cross Conference in 1948, the International Committee of the Red Cross had not made any suggestions with regard to a Preamble, preferring to leave the coming Diplomatic Conference to draw up such Preamble as it thought fit. But the XVIIth International Conference introduced a Preamble in the following terms into the draft Convention for the Protection of Civilian Persons in Time of War:

> The High Contracting Parties, conscious of their obligation to come to an agreement in order to protect civilian populations from the horrors of war, undertake to respect the principles of human rights which constitute the safeguard of civilization and, in particular, to apply, at any time and in all places, the rules given hereunder:
>
> (1) Individuals shall be protected against any violence to their life and limb.
>
> (2) The taking of hostages is prohibited.
>
> (3) Executions may be carried out only if prior judgment has been passed by a regularly constituted court, furnished with the judicial safeguards that civilized peoples recognize to be indispensable.
>
> (4) Torture of any kind is strictly prohibited.
>
> These rules, which constitute the basis of universal human law, shall be respected without prejudice to the special stipulations provided for in the present Convention in favour of protected persons.

The decision to include the above Preamble was explicable in connection with the elaboration of an entirely new Convention, as distinct from the revision of an earlier instrument such as the Wounded and Sick Convention. The idea was a happy one. On reflection it appeared to

the International Committee of the Red Cross that it would be a good thing to enunciate the basic principle on which all the Conventions repose, not only in the new Convention but also in the three Conventions under revision. Realizing that human rights are the concern more or less of all mankind, and that in modern war, where the fighting is no longer restricted to clearly delimited battlefields, any man or any woman may at any time be faced with a situation in which they have either to invoke, or (it may be) to apply, the Conventions, the International Committee, alive to the necessity (as expressly laid down in all the four drafts submitted to the Diplomatic Conference of Geneva) of disseminating knowledge of the new Conventions widely and in peacetime without waiting for the outbreak of war, concluded that it was desirable to bring home to the "man in the street" the guiding principle and *raison d'être* of the Conventions by means of a Preamble or initial explanatory Article.

However carefully the texts were drawn up, and however clearly they were worded, it would not have been possible to expect every soldier and every civilian to know the details of the odd four hundred Articles of the Conventions, and to be able to understand and apply them. Such knowledge as that can be expected only of jurists and military and civilian authorities with special qualifications. But anyone of good faith is capable of applying with approximate accuracy what he is called upon to apply under one or other of the Conventions, provided he is acquainted with the basic principle involved. Accordingly the International Committee of the Red Cross proposed to the Powers assembled at Geneva the text of a Preamble, which was to be identical in each of the four Conventions. It read as follows:

Respect for the personality and dignity of human beings constitutes a universal principle which is binding even in the absence of any contractual undertaking.

Such a principle demands that, in time of war, all those not actively engaged in the hostilities and all those placed *hors de combat* by reason of sickness, wounds, capture, or any other circumstance, shall be given due respect and have protection from the effects of war, and that those among them who are in suffering shall be succoured and tended without distinction of race, nationality, religious belief, political opinion or any other quality...[1]

[1] See *Remarks and Proposals submitted by the International Committee of the Red Cross.* Document for the consideration of Governments invited by the Swiss Federal Council to attend the Diplomatic Conference of Geneva (April 21, 1949), Geneva, February 1949, page 8.

The proposal met with approval, and the First Committee, which was the body instructed to draw up the first two Conventions, appointed a Sub-Committee to submit a text.

The draft quoted above gave rise to no fundamental objections; and the second paragraph, which contained the essential points, formed the basis of the various amendments moved. The resulting discussions were indeed very arduous; but they turned, not on anything in the wording of the draft, but on the additions which it was proposed to make to it. Certain delegations urged that the principle of respect for human rights should be justified by an affirmation of the divine origin of man. They argued that an affirmation to this effect would add weight to the Preamble and force to the Convention itself. Clearly no such profession of faith was capable of passing without comment a body representing almost all States of the world, and consequently a congeries of profoundly different religions and philosophies. Other delegations were equally insistent that the Preamble should include provisions relating to the punishment of persons violating the Conventions. The majority took the view that a Preamble should confine itself to the enunciation of a clear statement of principle, and that it should neither contain rules in application or sanctions, nor religious considerations representing the convictions of a proportion only of the signatory States. In the end the Committee adopted by a majority a Preamble, the text of which reproduced, with a few verbal changes, the essentials of the ICRC draft.

In the meanwhile the same points came up for discussion in the two other Committees responsible for drawing up the Third and Fourth Conventions. After lengthy debate both these Committees, faced with the uncompromising attitude of the advocates of the proposed additions, abandoned the idea of a Preamble altogether, preferring to do without it rather than insert in it provisions on which unanimity could not be reached. On learning of this decision, the First Committee decided to reverse its previous vote, and to leave the First and Second Conventions also without a Preamble.[1]

Accordingly the essential motive which had brought sixty-four nations together at Geneva, was left unexpressed solely on account of non-essential additions that parties on both sides were resolved to make.

[1] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-A, pages 112 ff., 164-168, 181-182.

The Preamble having been finally abandoned (apart from the dry introductory formula reproduced at the beginning of this Chapter), it may be asked why there should be so much to say on the subject. The answer is that, in spite of its not having been proclaimed at the head of the Conventions, the expression of the guiding principle underlying them has not been altogether discarded. The possible application of this principle to conflicts other than international wars was considered by the Conference in connection with what ultimately became Articles 2 and 3 of the present Convention. The drafts submitted to the Conference provided for full application of the Conventions even in cases of civil war, colonial conflicts or wars of religion, which was admittedly going very far. The States, as it proved, were not prepared to bind themselves in advance by all the provisions of the Conventions in the case of their own nationals rebelling and launching a civil war; but they were nevertheless at one in recognizing the "indivisibility" of the principle underlying the Conventions. They agreed that in the case of non-international conflicts such as civil wars, a minimum of humanitarian provisions should be respected; and in defining that minimum they very naturally reverted to the essential elements of the draft Preambles, which had been so fully discussed and so strangely rejected. Accordingly we find that Article 3 begins as follows:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.[1]

Article 3 refers only to cases of conflict not of an international character. But, if these provisions represent (as they do) the minimum applicable in a non-international conflict, that minimum must *a fortiori* be applicable in an international conflict. That is the guiding principle common to all the Geneva Conventions. That is their justification. It is from this principle that each of them derives the essential provision on which it centres. That provision in the case of the present Convention is Article 12.

[1] See below, on Article 3, pages 39 ff.

CHAPTER I

GENERAL PROVISIONS

Like all treaties, the Geneva Conventions contain certain provisions of a general character and others which are merely executive regulations more limited in their application.

In the 1929 Convention, as in the earlier Conventions, these two different kinds of provisions were intermingled. But when it was proposed to revise the former Conventions and to draw up a new one in addition, it was thought necessary to arrange the provisions methodically. The International Committee of the Red Cross accordingly placed at the beginning of each of the four draft Conventions the principal provisions of a general character, in particular those which enunciated fundamental principles and so should, by rights, be repeated in the various Conventions. This more logical arrangement had the advantage of preparing the way for the combination of the four Conventions in a single instrument, which was contemplated at the time. The suggested arrangement was adopted by the XVIIth International Red Cross Conference, and later by the Diplomatic Conference.

Most of the Articles in the present Chapter are accordingly to be found in identical, or slightly modified, form in the three other Conventions. Attention will be drawn to each individual case.

ARTICLE 1 — RESPECT FOR THE CONVENTION [1]

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

[1] Article common to all four Conventions.

The Conventions of 1864 and 1906 had no similar provision. The 1864 Convention (Article 8) merely said: "The implementing of the present Convention shall be ensured by the Commanders-in-Chief of the belligerent armies, following the instructions of their respective Governments, and in accordance with the general principles set forth in this Convention." The 1906 Convention (Article 25) reproduced this provision in approximately the same terms.

The provision did not mean that the entire responsibility for the execution of the Conventions was left to the Commanders-in-Chief. The ratification by two States of a treaty in itself constitutes an obligation to respect its terms. It was in 1929 that the need for making the provision more explicit was first felt. Article 25 of the 1929 Convention said that "The provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances". The idea was to give a more formal character to the mutual undertaking by insisting on its character as a general obligation. It was desired to avoid the possibility of a belligerent State finding some pretext for evading its obligation to apply the whole or part of the Convention.

The provision adopted in 1949 has the effect of strengthening that of 1929. This is due both to the prominent position which it is given at the beginning of the Convention and to its actual wording. By undertaking at the very outset to respect the clauses of the Convention, the Contracting Parties draw attention to the special character of that instrument. It is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations *vis-à-vis* itself and at the same time *vis-à-vis* the others. The motive of the Convention is such a lofty one, so universally recognized as an imperative call of civilization, that one feels the need for its assertion, as much because of the respect one has for it oneself as because of the respect for it which one expects from one's opponent, and perhaps even more for the former reason than for the latter.

The Contracting Parties do not undertake merely to respect the Convention, but also to *ensure respect for* it. The wording may seem redundant. When a State contracts an engagement, the engagement extends *eo ipso* to all those over whom it has authority, as well as to the

representatives of its authority; and it is under an obligation to issue the necessary orders. The use of the words "and to ensure respect" was, however, deliberate: they were intended to emphasize and strengthen the responsibility of the Contracting Parties. It would not, for example, be enough for a State to give orders or directives to a few civilian or military authorities, leaving it to them to arrange as they pleased for the details of their execution.[1] It is for the State to supervise their execution. Furthermore, if it is to keep its solemn engagements, the State must of necessity prepare in advance, that is to say in peacetime, the legal, material or other means of loyal enforcement of the Convention as and when the occasion arises. It follows, therefore, that in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention.

The Convention is to be applicable in *all circumstances*. How should this be interpreted? The commentator on the 1929 Convention held that the intention behind these words was to emphasize the general obligation imposed by the Convention, and to make it plain that the Convention must be respected in peace as well as in war in the case of those of its provisions which are applicable both in peace and in war. He added: "Can it be that the words 'in all circumstances' were meant to imply civil war? We do not think so... The obligation between the States is international. But it is eminently desirable that the opposing parties in a civil war should bear in mind the humane provisions of the Convention for observance as between themselves".[2]

The commentator's aspiration has not always been fulfilled; but it has not remained entirely vain. On certain occasions, during the Spanish Civil War, for example, both sides have undertaken to respect, in a greater or lesser degree, the humanitarian principles of the Convention.[3] The Diplomatic Conference of 1949 went much further. In Article 3, common to all four Conventions, the signatory States undertook in advance, in the event of a non-international conflict, to respect, if not the Convention, at least the regulations contained in that Article.[4]

[1] See below, on Article 45, page 340.

[2] See Paul DES GOUTTES, *Commentaire de la Convention de Genève du 27 juillet 1929*, Genève, 1930, on Article 25, pages 186 ff.

[3] See Frédéric SIORDET, *The Geneva Conventions and Civil War*, Supplement to the *Revue internationale de la Croix-Rouge*, Vol. III, Nos. 8, 9 and 11, Geneva, August, September and November 1950.

[4] See below, pages 37 ff.

It may therefore be said, with the commentator of 1929, that the words "in all circumstances" do not relate to civil war. But the reason is no longer the one that was given by the commentator—namely, that the States do not contract other than international obligations. The reason is that since the commentator wrote, the States have bound themselves explicitly in the case of non-international conflicts—a development which is tantamount to a revolution in international law. Disregarding the provisions applicable in peacetime, and Article 3 which relates only to non-international conflicts, the words "in all circumstances" mean that, as soon as one of the conditions of application for which Article 2 provides is present, no Power bound by the Convention can offer any valid pretext, legal or other, for not respecting the Convention in all its parts. The words "in all circumstances" mean in short that the application of the Convention does not depend on the character of the conflict. Whether a war is "just" or "unjust", whether it is a war of aggression or of resistance to aggression, the protection and care due to the wounded and sick are in no way affected.

In view of the preceding considerations and of the fact that the provisions for the repression of violations have been considerably strengthened [1], it is evident that Article 1 is no mere stylistic clause, but is deliberately invested with imperative force, and must be obeyed to the letter.

ARTICLE 2 — APPLICATION OF THE CONVENTION [2]

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

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

[1] The Contracting Parties are no longer merely required to take the necessary legislative action to prevent or repress violations. They are under obligation to search for, and prosecute, guilty parties, and cannot evade their responsibility. See below, on Chapter IX, Articles 49 ff, page 362.

[2] Article common to all four Conventions.

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.

GENERAL AND HISTORICAL

This Article is one of the most important in the Convention in view of the notable extension which it involves in the applicability of the latter.

The earlier Conventions were silent as to the conditions calling for their application. They were obviously intended for use in time of war. In the absence of any other indication, it was generally agreed that this meant only international war, regularly declared, with recognition on either side that a state of war existed. It is intelligible that this should have been so. Until recent times war was ordinarily preceded by a regular diplomatic ceremonial. Before there was any resort to arms, there was a declaration of war by one of the opposing parties, followed by the inauguration of a state of war by both belligerents with all the legal consequences which that entailed, both in relation to nationals and in relation to enemy nationals and enemy property. Consequently, in those days, in theory, where war had not been declared, or the state of war had not been recognized by one of the parties for one reason or another (*e.g.* the non-recognition by one party of the Government of the other party), the applicability of the Convention might be contested. The danger arising in such cases is obvious. There had been too many cases where the contested legitimacy of the enemy Government, or the temporary disappearance of sovereign States as a result of annexation or capitulation, had been invoked as pretexts for not observing one or other of the Conventions. The need for a remedy to this state of affairs had become urgent. Moreover the development in the whole conception of humanitarian Conventions pointed the same way. It has already been said that the Conventions are coming to be regarded less and less as contracts on a basis of reciprocity concluded in the national interest of each of the parties, and more and more as solemn affirmations of principles respected for their own sake, and as a series of unconditional engagements on the part of each of the Contracting Parties *vis-à-vis* the others. A State does not proclaim the principle of the protection due to wounded and sick combatants in the hope of saving a certain number of its own nationals. It does so out of respect

for the human person as such. This being so, it is difficult to admit that this sentiment of respect has any connection with the concrete fact of recognition of a state of war. A wounded soldier is not more deserving, or less deserving, of medical treatment according to whether his Government does, or does not, recognize the existence of a state of war. The XVIth International Red Cross Conference had, moreover, drawn attention as long ago as 1938 to the necessity of providing in any future revision of the Conventions for their application to undeclared as well as to declared wars. It was only natural that the question should be raised again after the cruel experiences of the Second World War.

The International Committee of the Red Cross took the matter up. The Preliminary Conference of National Red Cross Societies, which it convened in 1946, fell in with the views of the Committee, and recommended that a new Article, worded as follows, should be introduced at the beginning of the Convention: "The present Convention is applicable between the High Contracting Parties from the moment hostilities have actually broken out, even if no declaration of war has been made and whatever the form that such armed intervention may take".[1]

The Conference of Government Experts, which was also convened by the International Committee, in its turn recommended that the Conventions should be applicable to "any armed conflict, whether the latter is or is not recognized as a state of war by the parties concerned", and also "in cases of occupation of territories in the absence of any state of war".[2]

Taking into account the recommendations of these two Conferences, which tallied incidentally with its own opinion, the International Committee of the Red Cross drew up a draft text, which was adopted by the XVIIth International Red Cross Conference and subsequently became Article 2 of the Convention, as cited above, less the last sentence of the third paragraph.

There was no discussion on the Committee's proposal, the experience of the Second World War having convinced all concerned of the necessity

[1] See *Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of various Problems relative to the Red Cross* (Geneva, July 26-August 3, 1946), Geneva, 1947, page 15.

[2] See *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* (Geneva, April 14-26, 1947), Geneva, 1947, page 8.

of including the provisions in question in the new Convention. But that was not sufficient. The draft text said nothing about the relations between a belligerent, or belligerents, party to the Convention on the one hand and a belligerent, or belligerents, not party to the Convention on the other hand. International Conventions engage only those who are parties to them. There could be no question, therefore, of making the Convention binding on States deliberately remaining outside it. Nor could the signatory Powers themselves be said in strict law to be bound by its provisions in relation to others not parties to it. But here once more the interests at stake (namely, human lives), and the upholding of the principles on which civilization is based, are too important to be circumscribed by rigid rules.

It was natural, therefore, to wonder whether belligerents parties to the Convention should not, to some extent at any rate, be bound in relation to opponents who were not parties to it.

The question had already arisen incidentally in connection with the drafting of Article 25 of the 1929 Convention. It had been suggested that on the outbreak of hostilities the signatory belligerents should ask the non-signatory belligerents to undertake to observe the Convention, leaving the signatories free, in the event of a refusal by the non-signatories, to decide whether they for their part would, or would not, respect it.[1] The suggestion, which as it was put forward was hesitant and exploratory in character, was rejected. But the idea was in the air. The experiences of the Second World War lent it new force; and the International Committee of the Red Cross sought to put it into legal shape.

The ideal solution obviously would have been to require all Parties to a conflict to apply the Convention in every case, that is to say, even in relation to an opponent not party to the Convention. But the International Committee of the Red Cross could not shut its eyes to the fact that the signature of the Conventions rested with the Governments and, however bold one should be on an issue touching human lives, it was necessary to take certain practical considerations into account, if it was desired to embody such ideas in legal texts. Accordingly the Committee suggested to the Governments represented at the Diplomatic Conference of 1949 that the two following sentences should be added to Article 2:

[1] *Actes de la Conférence diplomatique de 1929*, pages 621-622.

In the event of an international conflict between one of the High Contracting Parties and a Power which is not bound by the present Convention, the Contracting Party shall apply the provisions thereof. This obligation shall stand unless, after a reasonable lapse of time, the Power not bound by the present Convention states its refusal to apply it, or in fact fails to apply it.[1]

The feeling on the subject was so far advanced that the proposal of the International Committee did not stand alone. The Diplomatic Conference was in fact faced from the outset with two other proposals.[2] The first of these, which came from the Canadian Delegation, suggested that the Convention should be applicable to a Power not party to the Convention so long as that Power complied with its provisions. The second proposal, which was from the Belgian Delegation, was in the following terms: "...The Powers which are a Party to the Convention shall invite the Power which is not a Party to it to accept the terms of the said Convention; as from the latter Power's acceptance of the Convention, all Powers concerned shall be bound by it."

The principle encountering no objections, the discussion turned solely on the conditions to be fulfilled. The condition underlying the Canadian proposal, as also the proposal of the International Committee of the Red Cross, was resolutory, whereas that of the Belgian proposal was suspensive. Under the Canadian proposal the signatory Powers were automatically bound, and continued to be bound, so long as the non-signatory Power complied with the Convention. Under the Belgian proposal the signatory Powers were not bound until such time as the non-signatory Power notified its acceptance of the invitation to comply with the Convention. No agreement was possible as between these two proposals. They were both accordingly discarded in favour of the compromise wording of the present text.

The Rapporteur of the Special Committee gives the following explanation of the motives which guided his Committee: "As a general rule, a Convention could lay obligations only on Contracting States. But, according to the spirit of the four Conventions, the Contracting States shall apply them, in so far as possible, as being the codification of rules which are generally recognized. The text adopted by the

[1] *Remarks and Proposals submitted by the International Committee of the Red Cross*, Geneva, February 1949, page 9.

[2] *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, pages 53-54 and 107-108.

Special Committee, therefore, laid upon the Contracting State, in the instance envisaged, the obligation to recognize that the Convention be applied to the non-Contracting adverse State, in so far as the latter accepted and applied the provisions thereof." [1]

PARAGRAPH 1 — ARMED CONFLICTS INVOLVING THE APPLICATION OF THE CONVENTION

This paragraph is entirely new. It fills the gap left in the earlier Conventions, and deprives the belligerents of the pretexts they might in theory invoke for evasion of their obligations. There is no longer any need for a formal declaration of war, or for recognition of the state of war, as preliminaries to the application of the Convention. The Convention becomes applicable as from the actual opening of hostilities. The existence of armed conflict between two or more Contracting Parties brings it automatically into operation.

It remains to ascertain what is meant by "armed conflict". The substitution of this much more general expression for the word "war" was deliberate. One may argue almost endlessly about the legal definition of "war". A State can always pretend, when it commits a hostile act against another State, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression "armed conflict" makes such arguments less easy. Any difference arising between two States and leading to the intervention of armed forces [2] is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims. Nor, incidentally, does the application of the Convention necessarily involve the intervention of cumbrous machinery. It all depends on circumstances. If there is only a single wounded person as a result of the conflict, the Convention will have been applied as soon as he has been collected and tended, the provisions of Article 12 observed in his case, and his identity notified to the Power on which

[1] *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, page 108 (First Report drawn up by the Special Committee of the Joint Committee).

[2] Or similar forces as described in Article 13.

he depends. All that can be done by anyone: it is merely a case of taking the trouble to save a human life!

PARAGRAPH 2 — OCCUPIED TERRITORIES

This provision, which is also new, may at first sight seem almost superfluous; for if there is no military resistance, what victims will there be? But the paragraph, though more especially in place in the Fourth Convention, is not without its value here. To provide for the protection and care of wounded and sick members of the armed forces the Convention also protects a whole series of persons, establishments and property [1]; and without this paragraph it would be possible for an Occupying Power to refuse to care for the sick military personnel of the occupied Power. It might requisition or sequestrate for its own purposes medical establishments or property protected by the Convention. It might also take into its service the military personnel of the (non-resistant) occupied Power, including the doctors and other members of its Medical Service, to cite no other examples. Thanks to the present paragraph protection is given not only to the sick military personnel of the occupied country, but also to all the personnel, establishments and property covered by the Convention, so that they are all free to carry on their charitable work as required; at the same time, of course, the sick, and the protected personnel, establishments and property of the Occupying Power are assured of the respect to which they are entitled.

We may note in this connection that should the circumstances for which the two first paragraphs of Article 2 provide, arise before the expiry of the waiting period of six months after ratification of the Convention, the latter will enter into force before the due date.[2]

PARAGRAPH 3 — CONFLICTS IN WHICH THE BELLIGERENTS ARE NOT ALL PARTIES TO THE CONVENTION

1. *Relations between belligerents parties to the Convention*

The first sentence of this paragraph is taken with slight changes from Article 25 of the 1929 Convention, in which it ran as follows: "...If, in

[1] See Chapters III to VI of the Convention.
[2] See below, on Article 62, pages 409 ff.

time of war, a belligerent is not a party to the Convention, its provisions shall, nevertheless, be binding as between all the belligerents who are parties thereto."

The provision seems a perfectly natural one. But this was not always the case. The 1864 Convention was silent on the subject; but the authors both of the 1906 Convention and of the 1899 Convention for the adaptation of the 1864 Convention to maritime warfare introduced a *clausula si omnes*, under which the Convention was not applicable unless all the Parties to the conflict were equally bound. That was the position when the First World War broke out in 1914; and it is interesting to note that as one of the smallest of the belligerent States, Montenegro, was not party to the Convention, the Convention was not in theory applicable by any of the belligerents. Happily none of them claimed exemption on this ground. All in general honoured their signatures, even though strictly speaking they were not bound to do so. For once, as the commentator on the 1929 Convention remarked, "the facts, backed by the signatures of the signatories and by the humanitarian interests of all, outweighed the law".[1]

It was essential, however, to clarify the position, and to prevent a recurrence in the future of a situation similar to that of 1914. The horrors of the Second World War justify the belief that, if the *clausula si omnes* had still been in force then with no further provision governing the situation, the consequences in one connection or another might have been disastrous.

2. *Relations between Contracting and non-Contracting Parties*

The second sentence added by the Diplomatic Conference of 1949 has certainly the characteristics of a compromise, inasmuch as it does not come to a decision between the suspensive and the resolutory conditions. At first sight it appears to incline towards the Belgian amendment. [2] But, whereas the latter did not make the Convention applicable until after the formal acceptance of the non-Contracting Power, the sentence adopted by the Diplomatic Conference drops any reference to an invitation to be made to the non-Contracting Power, and substitutes

[1] Paul DES GOUTTES, *Commentaire de la Convention de Genève du 27 juillet 1929*, Geneva, 1930, on Article 25, page 188.

[2] See above, page 31.

for the words "as from the latter Power's acceptance" the words "if the latter accepts and applies the provisions thereof".

What then is the position in the interval between the launching of hostilities and the non-Contracting belligerent's acceptance? Is the Contracting Power released from all obligation?

The passage of the report just quoted shows how this not very clear provision should be interpreted. The Conventions, it says, should be regarded "as being the codification of rules which are generally recognized", and it is in their spirit that the Contracting States "shall apply them, in so far as possible".[1]

The spirit and character of the Conventions conclusively indicate that the Contracting Party must apply their provisions from the moment hostilities break out until such time as the adverse Party has had the time and an opportunity of stating his intentions. That is not perhaps a strictly legal solution based on a literal exegesis of the text; but it is to our thinking the only honourable and reasonable solution. It follows from the spirit of the Conventions, and is in accordance with their character, as we have already stated. It is also in accordance with the moral interest of the Contracting Party insofar as it invites the latter to honour the signature he has given before the world. It is in accordance even with his practical interest, because the fact of his making a beginning himself with the application of the Convention will encourage the non-Contracting Party to declare his acceptance, whereas any postponement of the application of the Convention by the Contracting Party is likely to give the non-Contracting Party a pretext for reserving his decision.

There are two conditions to be fulfilled under this part of the paragraph — (a) acceptance and (b) *de facto* application of the Convention. What happens if the non-Contracting Party makes no declaration, but in actual fact applies the Convention? Before answering this question, let us see what is meant by accepting the provisions of the Convention.

Is a formal and explicit declaration by a non-Contracting State indispensable? The Rapporteur of the Special Committee seems to say that it is. "A declaration", he wrote, "was necessary, contrary to the Canadian amendment, according to which an attitude on the part of the non-Contracting State in conformity with the Convention would

[1] See above, page 31.

have sufficed to make it applicable". He added, it is true, that it was not possible to lay down any uniform procedure in the matter, and that "the Convention would be applicable as soon as the declaration was made. It would cease to be applicable as soon as the declaration was clearly disavowed by the attitude of the non-Contracting belligerent".

Does it follow from this that, if the second condition—namely the application of the Convention *de facto*—is alone fulfilled, the Contracting Party is released from its obligations?

Closely as that may seem to follow from the letter of the text, it does not appear possible to maintain such an interpretation. It would make the application of the Convention dependent on a suspensive condition even more rigid than that of the Belgian proposal, which was itself regarded as being too strict. It would bring about a paradoxical—not to say, a monstrous—situation. It would entitle a Power to refuse to recognize rules solemnly proclaimed by itself, while its adversary, though not legally bound by these rules, was scrupulously applying them; and all this only because of the omission of the latter to make a declaration, or because of delay in the transmission of such a declaration.

Summum jus summa injuria. The saying may often be true; but it should never be cited in reference to a humanitarian Convention. The present Convention, like its three sister Conventions, rightly condemns reprisals in the most categorical terms. But would it not be worse than any reprisals to ill-treat wounded or sick persons before one's adversary had done so, merely because one inferred from his silence that he was intending to do so?

The two conditions laid down for the non-Contracting Power are that he should *accept* and *apply* the provisions of the Convention. In the absence of any further indication, there is no reason to assume that "acceptance" necessarily implies an explicit declaration. It can equally well be tacit. It may be implicit in *de facto* application. These considerations do not in any way minimize the importance of an explicit declaration by the non-Contracting Power. The latter should always make such a declaration, and with the least possible delay. The International Committee of the Red Cross for its part, when it offers its services at the beginning of a conflict, never fails to ask Parties to conflict which are not legally bound by the Convention to declare their intention of applying it or of observing at least its essential principles, as the case may be.

In practice any Contracting Power in conflict with a non-Contracting Power will begin by complying with the provisions of the Convention pending the adverse Party's declaration. It will be guided first and foremost by the latter's actions.

Furthermore, although the Convention, as a concession to legal form, provides that in certain circumstances a Contracting Power may legally be released from its obligations, it leaves the Power in question completely free to continue to honour its signature, whatever grounds the adverse Party may afford it for failing to do so.

ARTICLE 3 — CONFLICTS NOT OF AN INTERNATIONAL CHARACTER [1]

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions :

(1) *Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed* hors de combat *by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.*

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons :

(a) *violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture ;*

(b) *taking of hostages ;*

(c) *outrages upon personal dignity, in particular humiliating and degrading treatment ;*

(d) *the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted*

[1] Article common to all four Conventions.

court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) *The wounded and sick shall be collected and cared for.*

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

HISTORICAL INTRODUCTION

This Article is common to all four of the Geneva Conventions of 1949, and is one of their most important Articles. It marks a new step forward in the unceasing development of the idea on which the Red Cross is based, and in the embodiment of that idea in the form of international obligations. It is an almost unhoped for extension of Article 2 above.

Born on the battlefield, the Red Cross called into being the First Geneva Convention to protect wounded or sick military personnel. Extending its solicitude little by little to other categories of war victims, in logical application of its fundamental principle, it pointed the way, first to the revision of the original Convention, and then to the extension of legal protection in turn to prisoners of war and civilians. The same logical process could not fail to lead to the idea of applying the principle to *all* cases of armed conflicts, including those of an internal character.

The importance of the Article, in which the whole of the Convention is concentrated, so far as non-international conflicts are concerned, makes it necessary, before embarking on analysis and commentary proper, to say something of the origin of the Article and of the principal phases of its development by the Diplomatic Conference in the course of the twenty-five meetings which were devoted to it.[1]

[1] See Frédéric SIORDET, *The Geneva Conventions and Civil War*, Supplement to the *Revue internationale de la Croix-Rouge*, Vol. III, Nos. 8, 9 and 11, Geneva, August, September and November 1950.

1. *Origin and development of the idea*

All international Conventions, including the one with which we are concerned, are primarily the affair of Governments. Governments discuss them and sign them, and it is upon Governments that the duty of applying them devolves. But it is impossible to speak of the Geneva Conventions, and in particular of their application to civil war, without reference to the part played by the Red Cross.

The principle of respect for human personality, which is at the root of all the Geneva Conventions, was not a product of the Conventions. It is older than they are and independent of them. Until 1949 it only found expression in the Conventions in its application to military personnel. But it was not applied to them because of their military status: it is concerned with persons, not as soldiers but as human beings, without regard to their uniform, their allegiance, their race, or their religious or other beliefs, without regard even to any obligations the authority on which they depend may have assumed in their name or in their behalf. Wounded or sick, they are entitled as such to the care and aid which the respect for human personality enjoins.

There is nothing astonishing, therefore, in the fact that the Red Cross has long been trying to aid the victims of international conflicts, the horrors of which sometimes surpass the horrors of international wars by reason of the fratricidal hatred which they engender. But the difficulties which the Red Cross encountered in its efforts in this connection—as always when endeavouring to go a step beyond the text of the Conventions—were enhanced in this case by special obstacles arising out of the internal politics of the States in which the conflict raged. In a civil war the lawful Government, or that which so styles itself, tends to regard its adversaries as common criminals. This attitude has sometimes led governmental authorities to look upon relief given by the Red Cross to war victims of the other Party to the conflict as indirect aid to those who are guilty. Applications by a foreign Red Cross or by the International Committee of the Red Cross have more than once been treated as unfriendly attempts to interfere in the internal affairs of the country concerned. This conception still prevailed when a draft Convention on the role of the Red Cross in civil wars or insurrections was submitted, for the first time, to the International Red Cross Conference in 1912. The subject was not even discussed.

But the Red Cross was not discouraged. In spite of frequent lack of understanding on the part of the authorities, it was able in certain cases to carry out a certain amount of humanitarian work in civil conflicts.[1] The question was again placed on the agenda of the Xth International Red Cross Conference in 1921, and a Resolution was passed affirming the right to relief of all victims of civil wars or social or revolutionary disturbances in accordance with the general principles of the Red Cross. The Resolution further laid down in considerable detail the duties of the National Red Cross of the country in question and, in the event of the National Red Cross being unable to take action, the course to be followed by the International Committee of the Red Cross or foreign National Societies with a view to making available the necessary relief. The Resolution, as such, had not the force of a Convention. But it enabled the International Committee in at least two cases—the civil war in the plebiscite area of Upper Silesia in 1921, and the civil war in Spain—to induce both sides to undertake more or less to respect the principles of the Geneva Convention.[2]

Noting the results achieved by the International Committee of the Red Cross, the XVIth International Red Cross Conference in 1938 passed a Resolution which did much to supplement and strengthen that of 1921. The text of the 1938 Resolution is worth quoting. It is as follows:

The Conference,

having taken cognizance with keen interest of the Report presented by the International Committee of the Red Cross on the role and activity of the Red Cross in time of civil war,

recalling the Resolution relating to civil war adopted by the Xth Conference in 1921,

pays tribute to the work spontaneously undertaken by the International Committee of the Red Cross in hostilities of the nature of civil war, and relies on the Committee to continue its activity in this connection with the co-operation of the National Societies, with a view to ensuring on such occasions respect for the high principles which are at the basis of the Red Cross movement,

requests the International Committee and the National Red Cross Societies to endeavour to obtain:

[1] See *Revue internationale de la Croix-Rouge*, 15 December 1919, pages 1427 ff.

[2] See the following documents of the XVIth International Conference: Document No. 12 *(General Report of the International Red Cross Committee on its activities from August* 1934 *to March* 1938*)* and Document No. 12 *bis (Supplementary Report by the International Committee on its activities in Spain)*.

(a) the application of the humanitarian principles which were formulated in the Geneva Convention of 1929 and the Tenth Hague Convention of 1907, especially as regards the treatment of the wounded, the sick, and prisoners of war, and the safety of medical personnel and medical stores;

(b) humane treatment for all political prisoners, their exchange and, so far as possible, their release;

(c) respect of the life and liberty of non-combatants;

(d) facilities for the transmission of news of a personal nature and for the reunion of families;

(e) effective measures for the protection of children,

requests the International Committee, making use of its practical experience, to continue the general study of the problems raised by civil war as regards the Red Cross, and to submit the results of its study to the next International Red Cross Conference.

The International Conference was thus envisaging, explicitly and for the first time, the application by the Parties to a civil war, if not of all the provisions of the Geneva Conventions, at any rate of their essential principles. This Resolution, coupled with the results achieved in the two conflicts mentioned above, encouraged the International Committee of the Red Cross to reconsider the possibility of inserting provisions relating to civil war in the Conventions themselves.

At the Preliminary Conference of National Red Cross Societies in 1946 the International Committee proposed that, in the event of civil war in a country, the parties should be invited to state that they were prepared to apply the principles of the Convention on a basis of reciprocity. The suggestion was modest enough owing to the fact that it took account of "realities". It was merely an attempt to provide a practice, which had already yielded satisfactory results, with a more solid foundation in the future by giving it some sort of legal footing in the Conventions. It was based on the belief that an invitation to the Parties to the conflict to make an explicit declaration (which it would undoubtedly be difficult for them to refuse) would encourage them to line up with the advocates of humanitarian ideas, and that the sufferings arising out of civil wars would thereby be appreciably reduced. The Preliminary Conference of National Red Cross Societies did not merely approve the suggestion: it went further. It went in fact straight to the root of the problem by a recommendation to insert at the beginning of the Geneva Convention an Article to the effect that: "In the case of armed

conflict within the borders of a State, the Convention shall also be applied by each of the adverse Parties, unless one of them announces expressly its intention to the contrary".[1]

Such was the view, idealistic but logical, of the Red Cross world. It remained to be seen what would be thought of it in Government circles. There was reason to fear that Governments would be reluctant to impose international obligations on States in connection with their internal affairs, and that it would be said to be impossible to bind provisional Governments, or political parties, or groups not yet in existence, by a Convention! But the Conference of Government Experts, which was convened by the International Committee of the Red Cross in 1947, did not take this view. Far from repeating the arguments which the charitable efforts of the International Committee of the Red Cross had so often encountered in the past, they admitted the necessity of making provision in the Convention for at least a partial extension of the latter to the case of civil war. As the result of their labours an Article was drafted, under which the principles of the Convention were to be applied in civil wars by the Contracting Party, provided the adverse Party did the same.[2]

This proposal fell a long way short of that of the Red Cross Societies. It spoke only of the application of the *principles* of the Convention, and made even their application subject to reciprocity. But it served nevertheless to encourage the International Committee of the Red Cross to continue its labours.

Strengthened by these expressions of opinion, the International Committee proceeded to complete Article 2 of the revised and new Draft Conventions for the Protection of War Victims which it submitted to the XVIIth International Red Cross Conference at Stockholm, by the addition of a fourth and last paragraph worded as follows:

> In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The

[1] See *Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of various Problems relative to the Red Cross* (Geneva, July 26-August 3, 1946), Geneva, 1947, pages 14 ff. and 51.

[2] See *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* (Geneva, April 14-26, 1947), Geneva, 1947, page 8.

application of the Convention in these circumstances shall in no wise depend on the legal status of the Parties to the conflict and shall have no effect on that status.

The first part of this paragraph gave effect to the recommendation of the Red Cross Societies, and even omitted the condition which the latter had contemplated. The second sentence embodied a wish expressed at the Conference of Government Experts. Its object was, first, to prevent the *de jure* Government from pleading non-recognition of its opponents as a reason for refusing to apply the Convention and, secondly, to prevent the other party from basing a claim for recognition as a regular Government on the respect it had shown for the Convention.

The proposal gave rise to lengthy discussion at the Stockholm Conference, at which Governments were represented as well as Red Cross Societies. All the arguments for and against it found expression, but there is no need to reproduce them here, since they were all to be repeated at the Diplomatic Conference of 1949. In the end the draft text submitted by the International Committee of the Red Cross was approved with the exception of the words "especially cases of civil war, colonial conflicts, or wars of religion" which were omitted. The omission of these words, far from weakening the text, enlarged its scope.

It was in this form that the proposal came before the Diplomatic Conference of 1949.

2. *The discussions at the Diplomatic Conference of 1949*

From the very outset, in the course of the first discussions of a general character, divergences of view became apparent.[1] A considerable number of delegations were opposed, if not to any and every provision in regard to civil war, at any rate to the unqualified application of the Convention to such conflicts. The principal criticisms of the Stockholm draft may be summed up as follows. It was said that it would cover in advance all forms of insurrection, rebellion, anarchy, and the break-up of States, and even plain brigandage. Attempts to protect individuals might well prove to be at the expense of the equally legitimate protection of the State. To compel the Government of a State in the throes of internal convulsions to apply to these internal disturbances the whole body of provisions of a Convention expressly concluded to cover the

[1] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, on Article 2, pages 9-15.

case of war would mean giving its enemies, who might be no more than a handful of rebels or common brigands, the status of belligerents, and possibly even a certain degree of legal recognition. There was also a risk of common or ordinary criminals being encouraged to give themselves a semblance of organization as a pretext for claiming the benefit of the Conventions, representing their crimes as "acts of war" in order to escape punishment for them. A party of rebels, however small, would be entitled under the Conventions to ask for the assistance and intervention of a Protecting Power. Moreover, it was asked, would not the *de jure* Government be compelled to release the captured rebels as soon as the troubles were over, since the application of the Convention would place them on the same footing as prisoners of war? Any such proposals giving insurgents a legal status, and consequently increased authority, would hamper and handicap the Government in its perfectly legitimate measures of repression.

The advocates of the Stockholm draft, on the other hand, regarded the proposals in that instrument as an act of courage. Insurgents, said some, are not all brigands. It sometimes happens in a civil war that those who are regarded as rebels are in actual fact patriots struggling for the independence and the dignity of their country. Others argued that the behaviour of the insurgents in the field would show whether they were in fact mere brigands, or, on the contrary, genuine soldiers deserving of the benefit of the Conventions. Again, it was pointed out that the inclusion of the reciprocity clause in all four Conventions, and not merely (as had been proposed at Stockholm) in the Third and Fourth Conventions, would be sufficient to allay the apprehensions of the opponents of the Stockholm proposals. It was not possible to talk of "terrorism", "anarchy" or "disorders" in the case of rebels who complied with humanitarian principles. Finally, the adoption of the Stockholm proposals would not in any way prevent a *de jure* Government from taking measures under its own laws for the repression of acts judged by it to be dangerous to the order and security of the State.

Faced with such widely varying opinions, the Conference referred the study of the Article to a small Committee [1], the first meeting of which

[1] This was the Special Committee of the Joint Committee. The provision in question was discussed, first as Article 2, fourth paragraph (*i.e.* with the numbering it had in the Stockholm draft), and later as Article 2 A. See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, pages 40-48, 75-79, 82-84, 90, 93-95, 97-102.

produced a whole series of amendments and proposals. Only one amendment proposed the rejection *en bloc* of the Stockholm text. On the other hand there was only one proposal in favour of its acceptance as it stood. Between these two extremes there were six amendments which proposed limiting the application of the Conventions to conflicts which, though internal in character, exhibited the features of real war. The amendments in question suggested a number of alternative or cumulative conditions, which one or other of the Parties to the conflict must fulfil for the Convention to be applicable.

A Working Party was instructed to prepare two successive drafts. It will be of interest to give here the text of the second draft, which it was proposed to insert in the First, Second and Third Conventions. In this text, pains were taken to take all views and suggestions into account and, as a result, it represents a very fair summary of the different trends of opinion at the Diplomatic Conference. The text was as follows:

(1) In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply the provisions of the present Convention, provided:

(a) that the *de jure* Government has recognized the status of belligerency of the adverse party, even for the sole purposes of the application of the present Convention, or

(b) that the adverse party possesses an organized civil authority exercising *de facto* governmental functions over the population of a determinate portion of the national territory, an organized military force under the direction of the above civil authority, and the means of enforcing the Convention and the other laws and customs of war; application of the Convention in these circumstances shall in no wise depend on the legal status of the Parties to the conflict.

(2) This obligation presupposes, furthermore, that the adverse party likewise recognizes its obligation in the conflict at issue to comply with the present Convention and the other laws and customs of war.

(3) The provisions relating to the Protecting Powers shall, however, not be applicable, except in the instance of special agreement between the Parties to the conflict. In the absence of such agreement, an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

(4) In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, but which does not fulfil the conditions as set out above, the Parties to the conflict should endeavour to bring

into force, by means of special agreements, all or part of the provisions of the present Convention, and in all circumstances shall act in accordance with the underlying humanitarian principles of the present Convention.

5) In all cases foreseen in the foregoing provisions, total or partial application of the present Convention shall not affect the legal status of the Parties to the conflict.

Before it was discussed, this text gave rise to new amendments and provoked criticism. Some delegations wished to add further conditions. Others objected that the text would lead, at the beginning of each conflict, to interminable discussion as to the nature of that conflict. There was no provision for any kind of judicial authority to decide whether the conditions stipulated were fulfilled, or not. In practice they would rarely all be fulfilled. In short, the application of the Conventions, and consequently the greater or lesser degree of cruelty of the hostilities, would depend solely on the whim of the *de jure* Government.

The French Delegation must take the credit for having put an end to the deadlock in the Committee. Reverting to an idea previously put forward by the Italian Delegation for the case of conflicts not of an international character, which failed to fulfil the stipulated conditions, the French Delegation suggested that in all cases of non-international conflict the principles of the Convention should alone be applicable. The following text was proposed:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall apply the provisions of the Preamble to the Convention for the Protection of Civilian Persons in Time of War.

Faced with almost universal opposition to the application of the Convention, with all its provisions, to all cases of non-international conflict, the Committee had until then tried to solve the problem by limiting the number of cases in which the Convention was to be applicable. The French proposal now sought a solution in a new direction, namely in the limitation of the provisions applicable.

The idea was a good one. But the suggested text had one fault. It referred to a draft Preamble which had not yet been adopted, and was, incidentally, never to be adopted.[1] Moreover, this draft Preamble

[1] See above, page 20.

did no more than specify certain prohibitions. It alluded to principles, but did not define them.

After discussion, a second Working Party was appointed with instructions to draw up a text containing a definition of the humanitarian principles applicable to all cases of non-international conflicts, together with a minimum of imperative rules. The Working Party produced a definition based on the principles of the Preamble which the International Committee of the Red Cross had itself proposed for all four Conventions [1], together with certain imperative rules based on the draft Preamble to the Fourth (Civilians) Convention.[2] The Working Party's draft, with certain minor modifications, was the text finally adopted. But it was not immediately accepted unanimously. Certain delegates still supported the previous draft. On the other hand, the USSR Delegation took the view that it was not possible to sum up in so few lines such important provisions as those of the Convention which were to be equally applicable to civil and to international wars. Accordingly the said delegation proposed a new text which reads as follows:

> In the case of armed conflict not of an international character occurring in the territory of one of the States parties to the present Convention, each Party to the conflict shall apply all the provisions of the present Convention guaranteeing:
> — humane treatment for the wounded and sick;
> — prohibition of all discriminatory treatment of wounded and sick practised on the basis of differences of race, colour, religion, sex, birth or fortune.

The Soviet proposal was based on the same idea as the French proposal—namely, limitation of the provisions applicable, but differed from it insofar as it preferred a general provision specifying the particular provisions of the Convention which were to be applicable.

As no one text commanded a majority, the three proposals were put to the Joint Committee.[3] The proposal of the second Working Party obtained a clear majority over the others, and was finally adopted, in the form in which it appears at the beginning of the commentary on this Article, at a plenary meeting of the Conference, though not without lengthy discussion, during which delegates who were opposed to it on

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[1] See above, page 21.
[2] See above, page 20.
[3] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, pages 34-37.

principle or were in favour of the other proposals, had ample opportunity for expressing their points of view[1].

General

To borrow the phrase of one of the delegates, Article 3 is like a "Convention in miniature". It applies to non-international conflicts only, and is only applicable to them until such time as a special agreement between the Parties has brought into force between them all or part of the other provisions of the Convention. It is very different from the original draft produced by the International Committee of the Red Cross and adopted at Stockholm, the latter providing for the application of the Conventions in their entirety. But, as the representative of the International Committee at the Diplomatic Conference remarked, since the text originally adopted at Stockholm had no chance of being accepted by the Governments and it was necessary to fall back on an intermediate solution, the text finally adopted was the one which was to be preferred amongst the various drafts prepared during the Conference. It has the merit of being simple and clear. It at least ensures the application of the rules of humanity which are recognized as essential by civilized nations and provides a legal basis for charitable interventions by the International Committee of the Red Cross or any other impartial humanitarian organization—interventions which in the past were all too often refused on the ground that they represented unfriendly interference in the internal affairs of a State. The text in question has the additional advantage of being applicable automatically, without any condition of reciprocity. Its observance does not depend upon preliminary discussions as to the nature of the conflict or the particular clauses to be respected, as would have been the case with the other drafts discussed. It is true that it merely provides for the application of the principles of the Convention and not for the application of specific provisions, but it defines those principles and in addition lays down certain imperative rules. Finally, it has the advantage of expressing, in each of the four Conventions, the common principle which governs them.

[1] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, on Article 2 A, pages 325-339.

PARAGRAPH 1 — APPLICABLE PROVISIONS

1. *Introductory sentence — Field of application of the Article*

A. *Cases of armed conflict.* — What is meant by "armed conflict not of an international character"?

That was the burning question which arose again and again at the Diplomatic Conference. The expression was so general, so vague, that many of the delegations feared that it might be taken to cover any act committed by force of arms—any form of anarchy, rebellion, or even plain banditry. For example, if a handful of individuals were to rise in rebellion against the State and attack a police station, would that suffice to bring into being an armed conflict within the meaning of the Article? In order to reply to questions of this sort, it was suggested that the term "conflict" should be defined or, which would come to the same thing, that a certain number of conditions for the application of the Convention should be enumerated. The idea was finally abandoned —wisely, we think. Nevertheless, these different conditions, although in no way obligatory, constitute convenient criteria, and we therefore think it well to give a list of those contained in the various amendments discussed; they are as follows:[1]

(1) That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.

(2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.

(3) *(a)* That the *de jure* Government has recognized the insurgents as belligerents; or

(b) that it has claimed for itself the rights of a belligerent; or

(c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or

[1] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, p. 121.

(d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.

(4) *(a)* That the insurgents have an organization purporting to have the characteristics of a State.

(b) That the insurgent civil authority exercises *de facto* authority over persons within a determinate territory.

(c) That the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war.

(d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

The above criteria are useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection.

Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfil any of the above conditions (which are not obligatory and are only mentioned as an indication)? We do not subscribe to this view. We think, on the contrary, that the Article should be applied as widely as possible. There can be no reason against this. For, contrary to what may have been thought, the Article in its reduced form does not in any way limit the right of a State to put down rebellion. Nor does it increase in the slightest the authority of the rebel party. It merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and enacted in the municipal law of the States in question, long before the Convention was signed. What Government would dare to claim before the world, in a case of civil disturbances which could justly be described as mere acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to inflict torture and mutilations and to take hostages? However useful, therefore, the various conditions stated above may be, they are not indispensable, since no Government can object to respecting, in its dealings with internal enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact respects daily, under its own laws, even when dealing with common criminals.

B. *Obligations of the Parties.* — The words "each Party" mark the great progress which the passage of a few years has sufficed to bring about in international law. For until recently it would have been considered impossible in law for an international Convention to bind a non-signatory Party—a Party, moreover, which was not yet in existence and which was not even required to represent a legal entity capable of undertaking international obligations.

Each of the Parties will thus be required to apply Article 3 by the mere fact of that Party's existence and of the existence of an armed conflict between it and the other Party. The obligation is absolute for each of the Parties, and independent of the obligation on the other Party. The reciprocity clause has been omitted intentionally. It had already been omitted in the Stockholm draft [1] in spite of the fact that the latter provided for the application of the Convention as a whole to cases of non-international conflict; for it was considered that the First and Second Conventions, unlike the Third and Fourth, set no difficult problems and implied no complicated material obligations. There was even less reason for including such a clause now that the obligation resting on the Parties was limited to the observance of the principles underlying the Conventions and of a few essential rules.

The obligation resting on the Party to the conflict which represents established authority is not open to question. The legality of a Government involved in an internal conflict suffices to bind that Government as a Contracting Party to the Convention. On the other hand, what justification is there for the obligation on the adverse Party in revolt against the established authority? At the Diplomatic Conference doubt was expressed as to whether insurgents could be legally bound by a Convention which they had not themselves signed. But if the responsible authority at their head exercises effective sovereignty, it is bound by the very fact that it claims to represent the country, or part of the country. The "authority" in question can only free itself from its obligations under the Convention by following the procedure for denunciation laid down in Article 63.[2] But the denunciation would not be valid, and could not in point of fact be effected, unless the denouncing authority was recognized internationally as a competent Government.

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[1] It was included in the case of the Third and Fourth Conventions only.

[2] See below, on Article 63, page 411.

It should, moreover, be noted that under Article 63 denunciation does not take effect immediately.

If an insurgent party applies Article 3, so much the better for the victims of the conflict. No one will complain. If it does not apply it, it will prove that those who regard its actions as mere acts of anarchy or brigandage are right. As for the *de jure* Government, the effect on it of applying Article 3 cannot be in any way prejudicial; for no Government can possibly claim that it is *entitled* to make use of torture and other inhumane acts prohibited by the Convention, as a means of combating its enemies.

Care has been taken to state, in Article 3, that the applicable provisions represent a compulsory minimum. The words "*as a minimum*" must be understood in that sense. At the same time they are an invitation to exceed that minimum.

2. *Sub-paragraphs (1) and (2) — Extent of the obligation*

A. *Sub-paragraph (1) : Humane treatment.* — We find expressed here the fundamental principle underlying the four Geneva Conventions. It is most fortunate that it should have been set forth in this Article, in view of the decision not to have a Preamble, or prefatory Article, in which it would normally have been placed. The sub-paragraph defines the principle which, not then expressed, led to the founding of the Red Cross movement and to the conclusion of the original Geneva Convention.

The value of the provision is not limited to the field dealt with in Article 3. Representing, as it does, the minimum which must be applied in the least determinate of conflicts, its terms must *a fortiori* be respected in the case of international conflicts proper when all the provisions of the Convention are applicable. For "the greater obligation includes the lesser", as one might say.

In view of the fact that four Conventions were being drawn up, each providing protection for a particular category of war victims, one might think that the paragraph should have been divided up, the relevant portion only being included in each Convention. (In the First Convention, for example, one might have spoken only of members of armed forces placed *hors de combat* by sickness or wounds). It was thought preferable, however, in view of the indivisible and inviolable nature of the principle proclaimed, and its brevity, to enunciate it in

its entirety and in an absolutely identical manner in all four Conventions. In this Commentary we shall confine ourselves to points which more particularly concern persons protected under the Convention with which we are dealing.

Taken literally, the phrase "including members of armed forces who have laid down their arms" may be understood (in the French version) in one of two ways, depending on whether the words "who have laid down their arms" are taken to apply to *members* or *armed forces*. The discussions at the Diplomatic Conference brought out clearly that it is not necessary for an armed force as a whole to have laid down its arms, for its members to be entitled to protection under the Article. The Convention refers to individuals and not to bodies of troops, and a man who has surrendered individually is entitled to the same humane treatment that he would receive if the whole army to which he belongs had capitulated. The important thing is that the man in question will be taking no further part in the fighting.[1]

What Article 3 guarantees such persons is *humane treatment*.

Lengthy definition of expressions such as "humane treatment" or "to treat humanely" is unnecessary, as they have entered sufficiently into current parlance to be understood. It would therefore be pointless and even dangerous to try to enumerate things with which a human being must be provided for his normal maintenance as distinct from that of an animal, or to lay down in detail the manner in which one must behave towards him in order to show that one is treating him "humanely", that is to say as a fellow human being and not as a beast or a thing. The details of such treatment may, moreover, vary according to circumstances—particularly the climate—and to what is feasible.

On the other hand, there is less difficulty in enumerating things which are incompatible with humane treatment. That is the method followed in the Convention when it proclaims four absolute prohibitions. The wording adopted could not be more definite: "To this end, the following acts *are* and *shall remain prohibited at any time and in any place whatsoever*..." No possible loophole is left; there can be no excuse, no attenuating circumstances.

[1] In the English text of the Article, the Conference deliberately adopted the wording "who had laid down their arms" (since "who" can only relate to persons) after rejecting a proposal to replace "who" by the word "which". The latter rendering would have made the clause apply to "armed forces". See *Final Record of the Diplomatic Conference, 1949*, Vol. II-B, on Article 2, fourth paragraph, page 100.

Items *(a)* and *(c)* concern acts which world public opinion finds particularly revolting—acts which were committed frequently during the Second World War. One may ask if the list is a complete one. At one stage of the discussions, additions were considered—with particular reference to the biological "experiments" of evil memory, practised on inmates of concentration camps. The idea was rightly abandoned, since biological experiments are among the acts covered by *(a)*. Besides, it is always dangerous to try to go into too much detail—especially in this domain. However much care were taken in establishing a list of all the various forms of infliction, one would never be able to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording adopted is flexible and, at the same time, precise. The same is true of item *(c)*.

Items *(b)* (taking of hostages) and *(d)* (sentences and executions without a proper trial) prohibit practices which are fairly general in wartime. But although they were common practice until quite recently, they are nevertheless shocking to the civilized mind. The taking of hostages, like reprisals, to which it is often the prelude, is contrary to the modern idea of justice in that it is based on the principle of collective responsibility for crime. Both strike at persons who are innocent of the crime which it is intended to prevent or punish.

Sentences and executions without previous trial are too open to error. "Summary justice" may be effective on account of the fear which it causes—though this has yet to be proved; but it adds too many further innocent victims to all the other innocent victims of the conflict. All civilized nations surround the administration of justice with safeguards aimed at eliminating the possibility of errors. The Convention has rightly proclaimed that it is essential to do this even in time of war. We must be very clear about one point: it is only "summary" justice which it is intended to prohibit. No sort of immunity is given to anyone under this provision. There is nothing in it to prevent a person presumed to be guilty from being arrested and so placed in a position where he can do no further harm; and it leaves intact the right of the State to prosecute, sentence and punish according to the law.

Reprisals, to which we have just referred, do not appear here in the list of prohibited acts. Does that mean that reprisals, while formally

prohibited under Article 46 [1], are allowed in the case of non-international conflicts, that being the only case dealt with in Article 3? As we have seen, the acts referred to under items *(a)* to *(d)* are prohibited absolutely and permanently, no exception or excuse being tolerated. Consequently, any reprisal which entails one of these acts is prohibited, and so, speaking generally, is any reprisal incompatible with the "humane treatment" demanded unconditionally in the first clause of sub-paragraph (1).

Any person to whom sub-paragraph (1) applies is entitled to humane treatment, without distinction of any sort. Article 6 of the 1864 Convention reads as follows: "The wounded and sick shall be collected and cared for, *whatever the nation to which they belong*" whereas the Conventions of 1906 and 1929 use the expression "*without distinction of nationality*".[2] What the authors of those Conventions had in mind was the traditional type of warfare between two States or groups of States, in which the opposing sides are of different nationalities. The above two phrases indicated clearly enough at that time that when faced with suffering no distinction should be drawn between brothers-in-arms, the enemy and allies. But the memory of acts perpetrated during the last World War and of the racial and ideological wars which raged in conjunction with wars between Powers, prompted the authors of the 1949 Conventions to include an expanded version of the above formula in Article 12, which corresponds to Article 1 of the 1906 and 1929 Conventions.[3] It was even more necessary to do so in Article 3, in view of the fact that the latter dealt exclusively with conflicts which were not international, *i.e.* where factors other than nationality—such factors as religion, political ideology, race, etc.—divided the belligerent parties. The formula used ("without any adverse distinction founded on...") is cumbersome. But in view of past atrocities the authors felt it desirable to enter into detail in order to leave no possible loophole. Hence the enumeration, ending, to make sure that nothing was overlooked, with the words "or any other similar criteria".

It will be noted that the criterion of nationality, which reappears in Article 12 below and was the only criterion to be considered in previous Conventions, has disappeared. As we have just pointed out, it is of

[1] See below, page 341.
[2] Geneva Conventions of 1906 and 1929, Article 1.
[3] See below, on Article 12, page 133.

less importance in this Article which is only concerned with non-international conflicts. Aliens may, however, be implicated in a civil war. And it is that very idea which has led, not to the inclusion of nationality among the criteria mentioned in the Article, but to its exclusion. The Working Party which prepared the draft of the final text considered that in cases where aliens took part in an insurrection, the Government should be free to regard them either as more guilty or as less guilty than nationals [1]. This view was a perfectly reasonable one, but it would not appear to have any bearing on the point at issue. As we have pointed out on numerous occasions, Article 3 is strictly humanitarian in character. It does not limit in any way a State's essential right to suppress an insurrection, nor its powers of trial and sentence, nor, again, its right to appraise aggravating or attenuating circumstances. It is not a question here of *legal* treatment, but of *humane* treatment, of ensuring that every man taking no part in hostilities, or placed *hors de combat*, receives the minimum standard of treatment which the law of the country itself accords to the worst of criminals, even those awaiting execution, when it clothes and feeds them in its prisons and gives them medical treatment when they are sick.

To treat aliens in a civil war in a manner incompatible with humanitarian requirements, or to believe that one was justified in letting them die of hunger or in torturing them, on the grounds that the criterion of nationality had been omitted, would be the very negation of the spirit of the Geneva Conventions. It is certainly not what the Diplomatic Conference intended. In judicial matters, nationality may, perhaps, be regarded as an aggravating or attenuating circumstance, but it cannot be regarded as affecting in any way the "humane treatment" referred to in the Article. It will therefore be classed among the "other similar criteria".

B. *Sub-paragraph (2) : Care of the wounded and sick.* — Article 3 here reaffirms, in generalized form, the fundamental principle underlying the original Geneva Convention of 1864. The clause, which is numbered separately, does not form part of the preceding provision, although it completes it; it is concise and particularly forceful. It expresses a categorical imperative which cannot be restricted and needs no explanation. There is every reason to be satisfied with it.

[1] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, page 94.

But why does Article 3 not add that the wounded and sick are to be "respected and *protected*", using an expression which has been accepted since the 1929 Convention and which appears again in Article 12 [1] of the present Convention?

The answer is that if Article 3 was to be adopted at all, it had to be short—no more than a statement of principle, together with a few rules regarded as a minimum acceptable to all, even when dealing with rebels. What had to be carefully avoided—and this was the main difficulty throughout the discussions at the Diplomatic Conference—was anything which might appear, even in the slightest degree, either to limit the right of the State to put down a rebellion, or to encourage discontented elements, or even common bandits, to rise in revolt against the State in the fallacious belief that the Conventions would "protect" them, or in other words, save them from being duly punished for their misdoings. It was therefore necessary to avoid using an expression about whose meaning there might be some doubt, particularly as it was not in any way essential. A formal order allows of no freedom which conflicts with it. When a superior orders a subordinate to go to the right, he automatically deprives him of the option of going to the left, without having to say so. In the same way, since the obligation to collect and care for the wounded and sick is absolute and unconditional, any act incompatible with the duty imposed by that obligation is prohibited. Moreover, the obligation in question is reinforced by the general obligation under sub-paragraph (1) (humane treatment) and by the prohibitions which result from it. In actual fact, therefore, the Article certainly provides the wounded and sick with "respect and protection" within the meaning of Article 12.

Paragraph 2 — Right of humanitarian initiative

It is obvious that any organization can "offer its services" to the Parties to the conflict at any time, just as any individual can. To offer one's services costs nothing and, which is more important, in no way binds the recipient of the offer, since the offer need not be accepted. The International Committee of the Red Cross, for its part, has not failed to offer its services for humanitarian purposes during various civil wars, whenever it considered that this was in the interests of

[1] See below, on Article 12, page 134.

those suffering as a result of hostilities, just as it has offered them when any international conflict has broken out. This paragraph may therefore appear at first sight to be merely decorative and without any real significance. Nevertheless, it is of great moral and practical value. Although it is extremely simple, it is adequate, and the International Committee itself asks for nothing more. It is a reduction, to the scale of the "Convention in miniature" represented by Article 3, of the provision contained in Article 9 below, which applies to international conflicts, when the whole Convention is applicable.

Although the International Committee of the Red Cross has been able to do a considerable amount of humanitarian work in certain civil wars, in others the doors have been churlishly closed against it, the mere offer of charitable services being regarded as an unfriendly act—an inadmissible attempt to interfere in the internal affairs of the State. The adoption of Article 3 has placed matters on a different footing, an impartial humanitarian organization now being legally entitled to offer its services. The Parties to the conflict can, of course, decline the offer if they can do without it. But they can no longer look upon it as an unfriendly act, nor resent the fact that the organization making the offer has tried to come to the aid of the victims of the conflict.

It is obvious that outside help can only, and must only, be supplemental. It is for the Parties to the conflict to apply Article 3 and ensure the observance of all its provisions. It is also obvious that it is, in the first place, for the National Red Cross Society of each country, in its capacity as an auxiliary organization, to help in this, and, by its words and actions, win recognition for the requirements of humanity throughout the national territory. But the national authorities and National Red Cross Society of a country may not always be able to cope with requirements; nor may the National Red Cross always be in a position to act everywhere with the necessary efficiency. Additional help will then be necessary. The Party to the conflict which in such cases refuses offers of charitable service from outside its frontiers will incur a heavy moral responsibility.

For offers of service to be legitimate, and acceptable, they must come from an organization which is both *humanitarian* and *impartial*. And the services offered and rendered must also be *humane* and *impartial*. The International Committee of the Red Cross is mentioned here for two reasons—firstly on its own account, as an organization called, by

its statutes and traditions, to intervene in cases of conflict, and, secondly, as an example of what is meant by a humanitarian and impartial organization. The reader should refer, for further remarks on the subject, to the commentary on Article 9 below.[1]

PARAGRAPH 3 — SPECIAL AGREEMENTS

If the Convention was to include provisions applicable to all non-international conflicts, it was necessary, as we have seen, to give up any idea of insisting on the application to such conflicts of the Convention in its entirety.

Legally, therefore, the Parties to the conflict are only bound to observe Article 3 and may ignore all the other Articles. It is obvious, however, that each one of them is completely free—and should be encouraged—to declare its intention of applying all or part of the remaining provisions. Another possibility is that an internal conflict may, as it continues, turn into a real war. The situation of thousands of sufferers is then such that it is no longer enough for Article 3 to be respected. It becomes desirable to settle in detail the treatment they are to receive, the relief which is to be brought to them, and other matters as well. A time may come when it is as much in the interest of the Parties to the conflict as of the victims that this should be done. And surely the most practical way of doing it is not to negotiate special agreements in great detail, but simply to refer to the Convention as it stands, or at all events to certain of its provisions.

The provision does not merely offer a convenient possibility, but makes an urgent request, points out a duty: "*The Parties to the conflict should further endeavour...*" Although the only provisions which the individual Parties are bound to apply unilaterally are those contained in Article 3, they are nevertheless under an obligation to try to bring about a fuller application of the Convention by means of a bilateral agreement.

Is there no danger of the paragraph becoming inoperative as a result of the fear of increasing the power of the rebel party—a fear which was so often expressed during the discussions? Will a *de jure* Government

[1] See below, pages 107 ff.

not be afraid that the conclusion of such agreements may increase the authority of those who have risen in revolt against it, by constituting an implicit recognition of the legal existence and belligerent status of the party concerned? It should be remembered that although the *de jure* Government must endeavour to conclude such agreements, it remains free in regard to its final decision. It is also free to make the express stipulation that its adherence to the agreement in no way constitutes recognition of the legality of the opposing party. Besides, in practice the conclusion of the agreements provided for in paragraph 3 will be controlled by circumstances. They will generally only be concluded because of an existing situation which neither of the parties can deny, no matter what the legal aspect of the situation may in their opinion be.

Lastly, it must not be forgotten that this provision, like all those which precede it, is governed by the last clause of the Article, to which we now come.

PARAGRAPH 4 — LACK OF EFFECT ON THE LEGAL STATUS OF THE PARTIES TO THE CONFLICT

This clause is essential. Without it neither Article 3, nor any other Article in its place, would ever have been adopted. It meets the fear —always the same one—that the application of the Convention, even to a very limited extent, in cases of civil war may interfere with the *de jure* Government's lawful suppression of the revolt, or that it may confer belligerent status, and consequently increased authority, upon the adverse Party. The provision was first suggested at the Conference of Government Experts convened by the International Committee of the Red Cross in 1947 [1] and has been reintroduced with very little change in all the succeeding drafts. It makes it absolutely clear that the object of the Convention is a purely humanitarian one, that it is in no way concerned with the internal affairs of States, and that it merely ensures respect for the few essential rules of humanity which all civilized nations consider as valid everywhere and under all circumstances and as being above and outside war itself.

[1] See *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* (Geneva, April 14-26, 1947), Geneva, 1947, page 9.

Consequently, the fact of applying Article 3 does not in itself constitute any recognition by the *de jure* Government that the adverse Party has authority of any kind; it does not limit in any way the Government's right to suppress a rebellion using all the means—including arms—provided for under its own laws; it does not in any way affect its right to prosecute, try and sentence its adversaries for their crimes, according to its own laws.

In the same way, the fact of the adverse Party applying the Article does not give it any right to special protection or any immunity, whatever it may be and whatever title it may give itself or claim.

Article 3 resembles the rest of the Convention in that it is only concerned with the individual and the physical treatment to which he is entitled as a human being without regard to his other qualities. It does not affect the legal or political treatment which he may receive as a result of his behaviour.

ARTICLE 4 — APPLICATION OF THE CONVENTION BY NEUTRAL POWERS

Neutral Powers shall apply by analogy the provisions of the present Convention to the wounded and sick, and to members of the medical personnel and to chaplains of the armed forces of the Parties to the conflict, received or interned in their territory, as well as to dead persons found.

Although this Article is new in the Geneva Convention, it is not new in international law. Article 15 of the Fifth Hague Convention of 1907 respecting the rights and duties of neutral Powers and persons in case of war on land stated: "The Geneva Convention applies to sick and wounded interned in neutral territory."

In the Draft Convention which was submitted to the Stockholm Conference in 1948, the International Committee of the Red Cross thought well to introduce the text which, without any notable change, has become Article 4. The Committee had several reasons for doing this.

Firstly, it seemed logical to insert into the Geneva Convention itself a provision which concerned its application.

Moreover, the Hague text referred to the 1906 Geneva Convention. As the latter had already been revised in 1929, and was now being recast once again, the reference should obviously be to the most recent version. A general reference covering the whole Convention eliminated the need for special references in certain Articles.

Lastly, if there was a need to confirm a humane principle already admitted in international law and respected by neutrals during two world wars, its completion was no less needed. There was an obvious gap in Article 15 of the Fifth Hague Convention: it mentions only the wounded and sick and ignores medical and religious personnel and the dead. Even though it may be admitted that by implication the 1907 provision covers all of them, it was preferable to say so clearly.

A similar provision to the one we are examining was introduced into the 1949 Prisoners of War Convention (Article 4 B (2)). It stipulates, with certain reservations, that personnel belonging to the armed forces of a belligerent who are interned by a neutral Power shall be given the benefit of the treatment which the Third Convention lays down for prisoners of war.

Further, a clause in the Convention which we are studying allows medical aircraft of Parties to the conflict to fly over the territory of neutral Powers and deals with the treatment of wounded persons who, under these conditions, arrive on neutral soil.[1]

* * *

Let us now examine the contents of Article 4 in greater detail.

The wounded and sick referred to are those mentioned in Article 13: they must belong to the armed forces of a belligerent or to categories of persons considered as being on the same footing as members of such armed forces.

The medical and religious personnel referred to are those dealt with in Chapter IV of the Convention; they comprise not only the medical personnel proper but also, for example, the administrative personnel of medical units. The phrase "received or interned" in the territory of neutrals was deliberately selected in order to cover all cases which might arise through the application of the Fifth Hague Convention of 1907. The latter Convention provides for the internment of troops

[1] See below, page 294.

who seek refuge in a neutral country (Article 11) and of the wounded who are brought into its territory (Article 14, paragraph 2). It does not, however, require the internment of escaped prisoners or of prisoners brought by troops taking refuge in such territory (Article 13). In certain cases the neutral Power may authorize the passage of the wounded over its territory (Article 14, paragraph 1).[1]

Medical personnel need not necessarily be interned. According to the spirit of the Geneva Convention, they may be called upon for medical duty and allowed more or less complete freedom to enable them to perform it. If their presence is not or is no longer necessary to the wounded, they shall be returned to the belligerent on whom they depend.

The present Article introduces the principle of the application "by analogy" of the Geneva Convention by neutral Powers. The Convention, having been drawn up with a view to determining the treatment of enemies, contains a number of provisions which could only apply to belligerents—as, for example, Article 14 dealing with capture, Articles 33, paragraph 2, and 35, paragraph 2, dealing with the seizure of property, and Article 8 dealing with the appointment of a Protecting Power.[2]

Some delegations at the 1949 Conference would have preferred an enumeration of the Articles which do not apply to neutral States, as was done in Article 4 B (2) of the 1949 Prisoners of War Convention. An enumeration is justified in the Third Convention, whose object is to lay down regulations for the treatment of men who are interned; in the First Convention it would necessarily have been somewhat rigid and arbitrary, some of the Articles being partially applicable. The application of the Convention by neutral Powers is primarily a question of common sense, guided by a humane spirit. The interests of the wounded themselves will provide a touchstone in cases of doubt. The very fact of having employed an enumeration in the Third Convention made it unnecessary to do so in the First, as the wounded interned in neutral countries can claim the benefit of most of the provisions of the Third Convention.

The arrangement adopted has much in common with that which prevailed during the Second World War in regard to civilians of enemy

[1] See also Article 37 of the First Geneva Convention, below, page 294.

[2] Nevertheless, in cases where diplomatic relations between a belligerent State and a neutral State have been broken off, a third Power may act in a capacity similar to that of a Protecting Power.

nationality in belligerent territory. On the proposal of the International Committee of the Red Cross, such persons were in most countries given the benefit of the 1929 Prisoner of War Convention, applied "by analogy".

Article 4 of the 1949 Prisoner of War Convention leaves the door open for "any more favourable treatment which these Powers (neutrals) may choose to give" to internees. This reservation is so obvious that it may be considered as being implicit in Article 4 of the First Convention. In general, the Conventions represent minimum safeguards to be accorded to war victims, and the Powers are invited to act more generously.

ARTICLE 5 — DURATION OF APPLICATION OF THE CONVENTION

For the protected persons who have fallen into the hands of the enemy, the present Convention shall apply until their final repatriation.

This Article originated in two provisions introduced in 1949: Article 5 of the Third and Article 6 of the Fourth Convention. Their object is to determine from what moment, and until when, the Conventions in question are applicable.

Grave disputes on the subject during the Second World War made the stipulation necessary in the Prisoners of War and Civilian Conventions. Certain belligerents, denying sovereignty, or even any legal existence, to the defeated enemy, claimed the right to deal as they wished with prisoners from the defeated country and to deprive them of their treaty safeguards.

For the sake of uniformity and with the idea of having each Convention complete in itself so far as possible, the International Committee of the Red Cross proposed to the Diplomatic Conference of 1949 that the First Convention should have a similar stipulation, in simplified form.

There was no need for a clause saying from what moment the Convention would apply. The persons it protects already enjoy its protection while they are with their own armed forces: combatants, as soon as they are wounded or sick, and medical personnel, as soon as they comply with the prescribed conditions.

It was therefore sufficient to decide when it would cease to apply, and even this was only necessary in respect of those who fell into enemy hands.[1] It was not the close of hostilities that was taken as the decisive date, but the final repatriation of the protected persons. It is indeed quite possible that some wounded and medical personnel will be retained by their captors after military operations have ended.[2] The word "final" excludes the subterfuge of releasing the wounded as prisoners of war and replacing them in captivity under some other name.

It is clear, however, that the Convention will cease to apply to the wounded and sick from the moment they are cured. This does not result from the actual Article under review, but from the general structure of the Convention. While in enemy hands, the wounded and sick—who are also prisoners of war—enjoy protection under both the First and the Third Conventions. Once they have regained their health, only the Third Convention, relative to the treatment of prisoners of war, applies.[3]

ARTICLE 6 — SPECIAL AGREEMENTS [4]

In addition to the agreements expressly provided for in Articles 10, 15, 23, 28, 31, 36, 37 and 52, the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of the wounded and sick, of members of the medical personnel or of chaplains, as defined by the present Convention, nor restrict the rights which it confers upon them.

Wounded and sick, as well as medical personnel and chaplains, shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict.

[1] The provisions which are bound up with the actual existence of hostilities (protection of the wounded in their own armed forces or on the battlefield, protection of medical establishments against bombardment, etc.) will, by reason of that very fact, have no further application once hostilities have ended.

[2] Article 118 of the Third Convention provides that "prisoners of war shall be released and repatriated without delay after the cessation of active hostilities".

[3] See below, page 147.

[4] Article common to all four Conventions. Cf. Second Convention, Article 6; Third Convention, Article 6; Fourth Convention, Article 7.

GENERAL

War is accompanied by the severance of diplomatic relations between the belligerents. On the other hand, it does not entail the cessation between them of all legal relationships. According to a pertinent remark by a delegate to the Diplomatic Conference of 1949, "The legal phenomenon persists throughout war and despite war, testifying thereby to the perennial nature of international law".

Among agreements concluded between belligerents, the best known are those which put an end to hostilities.[1] But they are not the only ones. The agreements concluded by belligerents in the actual course of hostilities are perhaps as numerous and are equally deserving of attention.

These latter agreements generally deal with the treatment to be accorded to nationals of either Party detained by the adversary. It is therefore natural that the Geneva Conventions, the primary object of which is to improve that treatment, should devote considerable space to these legal instruments.

The Geneva Convention of 1864 (Article 6) already adumbrated the possibility of agreements being concluded between the Parties with a view to the mutual return of wounded. The Convention of 1906 (Article 2) expressly provided for possible agreements designed to establish the conditions of internment of wounded and sick combatants captured by the enemy. And we are not considering here the stipulations binding the Parties to send each other certain communications, which might also be considered as implying a kind of legal bond.

During the last two years of the 1914-1918 war, detailed agreements relating to the treatment of prisoners of war and wounded combatants were concluded between Germany, on the one hand, and France and Great Britain, on the other.[2] It is understandable that, influenced by that example, the authors of the two Geneva Conventions of 1929

[1] See R. MONACO, *Les Conventions entre belligérants* in *Recueil des cours de l'Académie de droit international de La Haye*, 1949-II (Vol. 75), page 277.

[2] Convention between Germany and Great Britain concerning prisoners of war and civilians, concluded at The Hague on 2 July 1917; Conventions between Germany and France concerning prisoners of war, concluded at Berne on 15 March 1918 and 26 April 1918.

should more than once have left it to the Parties at war themselves to come to an agreement supplementing certain provisions of the Conventions. The Convention relating to the wounded and sick contained various references of this kind in Articles 2, 3, 12 and 13. The Prisoners of War Convention went even further. The authors of that Convention had realized that, detailed though it was, it would have to be adapted to the peculiar circumstances of wartime, and deal at greater length with various points which could not as yet be foreseen. They were therefore wise enough, after having provided for special agreements in certain specific cases, to indicate to the Contracting States that, in order to amplify and complete the rules established by the Convention, *general and collective* regulations were not necessary, and they were free to settle these questions *separately* by special agreements. Thus Article 83 stipulated that "The High Contracting Parties reserve to themselves the right to conclude special conventions on all questions relating to prisoners of war concerning which they may consider it desirable to make special provision."

During the discussions which took place in connection with the revision of the Conventions of 1929, it seemed appropriate to formulate in the four Geneva Conventions the general principle contained in Article 83 above, but with an amended wording taking into account various necessities which will be considered further on. This proposal met with the practically unanimous approval of the Diplomatic Conference of 1949 .[1]

PARAGRAPH 1 — NATURE, FORM AND LIMITATION OF THE SPECIAL AGREEMENTS

1. *First sentence — Nature and form of the special agreements*

A preliminary indication of the nature of the special agreements is supplied by the enumeration contained in Article 6. Care has been taken—and this is a considerable improvement on the 1929 text—to

[1] The British Delegation, however, considered that it would be dangerous to embody this general rule in the first two Conventions. They were afraid that if this were done the belligerents might be able to alter by agreement essential stipulations, such as the clauses referring to the emblem. The new wording used avoids this danger, as will be seen further on. *See Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, page 16.

recall the various provisions of the Convention, which already expressly mention the possibility of agreements being concluded between the Parties concerned. These provisions refer to the following points:

(a) designation of an impartial organization as a substitute for the Protecting Power (Article 10, paragraph 1);

(b) removal, exchange and transport of the wounded left on the battlefield (Article 15, paragraph 2);

(c) evacuation of the wounded and sick from a besieged area, and passage of medical personnel and equipment on their way to that area (Article 15, paragraph 3);

(d) establishment and recognition of hospital zones and localities (Article 23, paragraphs 2 and 3);

(e) relief of retained medical personnel (Article 28, paragraph 3);

(f) determination of percentage of medical and religious personnel to be retained (Article 31, paragraph 2);

(g) protection of medical aircraft (Article 36, paragraphs 1 and 3);

(h) protection of medical aircraft flying over the territory of neutral Powers (Article 37, paragraph 1);

(i) determination of the manner of carrying out an enquiry requested by one of the Parties concerning any alleged violation of the Convention (Article 52).[1]

This enumeration alone shows at once that the term "agreement" embraces a very wide variety of acts. In some cases, it refers to purely local and provisional agreements (evacuation of the wounded), in others to what amounts to veritable regulations (medical personnel), in others again to diplomatic agreements (substitute for the Protecting Power, enquiry).

The notion of special agreements ought, in the same way, to be interpreted in a very broad sense, and to be without any limitation as to form and time of conclusion. It is only the ground covered, extensive though it may be, which is subject to limitations, formulated in the interest of the protected persons, as will be seen when the second sentence of paragraph 1 comes up for consideration.

[1] In addition, Article 32, paragraph 2, contains the words "unless otherwise agreed".

A. *Form of the agreements.* — To be considered as a "special agreement" in the sense of Article 6, it is not necessary for an agreement between two belligerents to concern exclusively the subjects dealt with by the First Convention. The expression of agreement relating to these subjects may be included in an agreement of much wider scope. If, for instance, an armistice agreement contains, in addition to its military or territorial clauses, one or more provisions dealing with the situation of retained medical personnel or equipment, such provisions are subject to the stipulations contained in Article 6 and, in particular, to the limitations specified in the second sentence.

Nor would it be correct to consider that, to be valid, special agreements must conform to the conditions and forms of procedure, e.g. in regard to signature and ratification, which are normal in the case of international treaties. Special agreements clearly fall into the category of what are known as "Conventions in simplified form". [1] During a war it is sometimes necessary to adopt measures to take effect immediately without there being the material possibility of complying with the formalities required in normal times; but, provided the contracting military bodies do not exceed their competence, the agreement concluded will be valid. This would be the case, for instance, with the local and temporary arrangements which are made to ensure the safety of the wounded.

Where there is no urgency, the absence of formalities is nevertheless justifiable by the fact that the special arrangements provided for under Article 6 are always in the last resort, as will be seen later on, in execution of the Convention. The Convention has received the general approval of the supreme authority of the nation, and special agreements, being measures in execution of the Convention, can be validly concluded by the executive bodies on their own authority.

This lack of formalism is also manifest in another connection. Mutual and concordant declarations of intent may be made orally without other formality—a condition which international law considers adequate for all treaties. Very often they may be exchanged, not directly between the parties concerned, but through a third party [2]. In the absence of

[1] See R. MONACO, *Les Conventions entre belligérants* in *Recueil des cours de l'Académie de droit international de La Haye*, 1949-II (Vol. 75), page 294.

[2] A clear example of this is the instance of the special agreements between Italy and the United Kingdom, the only ones relating to the war of 1939-1945 which to our knowledge have been published. They appeared in Italy under the title: *Testo delle Note Verbali che integrano e modificano la Convenzione di Ginevra del 1929...*, Rome, 1941 and 1942.

diplomatic relations, the organizations called upon to supervise the application of the Convention, such as the Protecting Power or its substitute, or the International Committee of the Red Cross, will frequently play the part of third party, and may even contribute actively to the conclusion of such agreements, as was shown by experience in the Second World War.

B. *Time of conclusion.* — The special agreements enumerated in the Convention, and the function which they are called upon to fulfil, show that Article 6 applies mainly to agreements concluded in the course of hostilities. It may, however, be deduced from various indications that Article 6 also extends to agreements concluded by the Parties after the close of hostilities or even independently of the war.

For example, an agreement under Article 10 relating to a substitute for the Protecting Power may be concluded in peacetime. Moreover, the words "The Parties to the conflict may conclude", which were contained in the draft Article 6, have been replaced by "The High Contracting Parties may conclude".[1] Consideration has thus been given to the position of neutral States. They too may be called upon to conclude special agreements with the belligerents (in the cases provided for under Articles 32 and 37, for instance). By this latter amendment, the Diplomatic Conference recognized also that special agreements were not necessarily limited to the period of hostilities, although it rejected an Italian proposal to add the words "during or after hostilities".[2] It thus left the way open to the conclusion in peacetime of all sorts of special agreements under which the standard of treatment of protected persons would exceed the minimum provided for in the Convention.

In conclusion it may be said that the provisions of Article 6, and in

[1] *See Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, page 76. It is obvious that that expression does not exclude the application of Article 6 to Parties to the conflict who are not " Contracting Parties ", but who have agreed to be bound by the Convention. The fact that they have so agreed places them on the same footing as Contracting Parties.

[2] By this addition Italy wished to subject to the stipulations of Article 6 the clauses of the peace treaties relating to matters dealt with in the Geneva Convention. In her opinion a victor should be prevented from imposing on its adversary, in the peace treaty, conditions which would flout the rules contained in the Geneva Conventions. The Italian proposal, as worded above, was rejected, but was considered again under another form, and this time adopted as part of Article 51. See below, on Article 51, page 373.

particular the guarantees for the individual contained in the second sentence, apply to any special agreement concluded between the Contracting Parties, whether in war or in peace, on subjects concerning the Convention.

2. *Second sentence — Prohibited special agreements*

This sentence, which did not appear in Article 83 of the 1929 Convention, is of paramount importance. It affects the underlying character of the Convention, and at the same time the position *vis-à-vis* it of the Contracting States, on the one hand, and of the individuals which it protects, on the other. We shall be mainly concerned here with the position of the States, that of individuals being examined in connection with Article 7.

A. *The problem of "derogatory agreements"*. — May the High Contracting Parties by special agreements modify as they see fit the stipulations of the Convention? Is their contractual liberty complete with regard to the subject of such agreements? Such was the problem which faced the authors of the revision of the 1929 text.

During the Second World War there were belligerent Governments—some of them undoubtedly trammelled in their freedom of action by reason of the occupation of their territory—which concluded agreements depriving prisoners of war of their protection under the Convention under various headings, such as supervision by the Protecting Power [1], prohibition of labour connected with military operations, or safeguards in regard to penal and disciplinary sanctions. [2] These measures, which were put to those concerned as a benefit, resulted for most of them in what were sometimes very serious disadvantages.

Article 83 of 1929 [3], interpreted literally, certainly appeared to leave the belligerents entire contractual freedom, and therefore to authorize the conclusion of agreements which would modify the status of the

[1] Agreements depriving protected persons of the services of a Protecting Power are now expressly prohibited by Article 10, paragraph 5, a provision which is common to all four Conventions of 1949. See below, on Article 10, page 124.

[2] See R.J. WILHELM, *Le caractère des droits accordés à l'individu dans les Conventions de Genève*, in the *Revue internationale de la Croix-Rouge*, August 1950, pages 575 and 576.

[3] See the tenor of the Article in question, above, page 67.

persons protected. But examination of the text in the spirit and framework of the Conventions of 1929 at once invalidated the above theory and supplied a clear answer to the problem.

The authors of the above Conventions, as well as those of the Conventions of 1906 and 1949, always had as their objective the establishment of rules of universal bearing and the embodiment in legal form of a standard system—e.g. for wounded and sick combatants—which would correspond to the practice of States and to the demands of the conscience of civilized peoples. How then could it be alleged that at the very moment when the authors of these instruments were endeavouring to set up universal rules which would be applicable in all circumstances, their intention was to give the Contracting Parties the option of modifying those rules by mutual agreement? No! Article 83 was merely intended to enable the Parties to supplement those rules and, in the interests always of the individuals protected, to adapt their methods of application to unforeseen circumstances.

Other indications in the texts of 1929 confirm this interpretation —for example, the placing of Article 83 in the Chapter "*Execution* of the Convention", the expression, in the same Article, "*to enjoy the benefits* of these agreements", and lastly Article 2 of the Convention on the wounded and sick which, while leaving the belligerents free to make arrangements for wounded and sick prisoners, was careful to add: "beyond the limits of the existing obligations".

When the time came for revision, the International Committee of the Red Cross recommended that Article 83 should be clearly defined in the sense indicated above. Their proposal to complete it by a provision to the effect that special agreements should "in no circumstances reduce the standard of treatment" of protected persons, was approved by the Conference of Government Experts in 1947. [1]

But certain experts were opposed to this solution. In their view, such a limitation conflicted with the idea of the sovereignty of States and might lead to the Conventions being more frequently violated. Moreover, it would often be very difficult to say at the outset whether or not a special agreement involved drawbacks for the persons protected. These argu-

[1] See *Report on the work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* (Geneva, April 14-26, 1947), Geneva, 1947, page 259.

ments were repeated at the Diplomatic Conference of 1949. [1] But the Conference by a large majority declared itself categorically in favour of maintaining the "saving clause" (*clause de sauvegarde*) proposed by the International Committee of the Red Cross—such was the term used to describe the second sentence of paragraph 1—and by so doing emphasized the inviolable character of the rules of protection which it had established. [2]

B. *Scope of the "saving clause"*. — The final wording of the "saving clause" goes further than the first proposal by the International Committee, in particular owing to the addition of the words "nor restrict the rights which it (the Convention) confers upon them". It is these words, in fact, which most accurately interpret the underlying intention of Article 6.

It is not always possible to determine immediately whether or not a special agreement "adversely affects the situation of protected persons". What happens when the situation is improved in certain respects and adversely affected in others? Certain of the agreements to which reference was made above could have appeared at first to be advantageous; the drawbacks did not become apparent until later. The condition relating to "adverse effects on the situation" is not, therefore, in itself a sufficient safeguard. Accordingly, in the text proposed to the XVIIth International Red Cross Conference in 1948 we see a second condition appearing—namely the prohibition of any restriction of the rights which the Convention confers upon persons protected by it.

What interpretation should be placed upon the phrase "rights conferred by the Convention"—considered, not from the standpoint of the individual protected (that will be examined under Article 7), but in relation to special agreements between belligerents? Should the words be taken to refer only to the provisions dealing directly with the wounded and sick and with medical personnel?

The answer is "No". At the Diplomatic Conference a proposal to prohibit only those agreements which restricted *fundamental* rights was rejected because "the Conventions lay down a minimum standard of treatment for protected persons and ..... it would be difficult to draw a distinction between rights which were fundamental and those which

[1] See *Memorandum by the Government of the United Kingdom* (Document No. 6), Point 9, page 5.

[2] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, pages 55, 56, 73 and 74.

were not".[1] The conclusion of that debate proves that the principle in question applies not to certain specific rights, but to the whole of the safeguards which the Convention provides for those it seeks to protect.

These safeguards reside likewise in all the arrangements which are stipulated in the interest of these persons, such as the distinctive emblem, protection of members of the population who aid war victims, supervision by the Protecting Powers, or penalties in cases of violation. In short, it may be said that the principle applies to all the rules of the Convention—except perhaps the purely formal provisions contained in the last section—since the application of any one of these rules represents, directly or indirectly, a benefit for the protected persons, and a guarantee to which they are entitled.

To interpret the "saving clause" in any other way would lead to inadmissible consequences. For instance, the provisions with regard to the emblem, which are perhaps even more essential for the protection of the wounded and sick than some of the rules which refer to them directly, might be modified by agreement, whereas the said rules could not be so altered.

In the last analysis, since each rule of the Convention represents an obligation on the States parties to the Convention, the sense of the expression "restrict the rights" becomes clear. The States may not by special agreement restrict, i.e. waive, their obligations under the Convention. On the other hand, nothing prevents them from undertaking further and wider obligations in favour of protected persons (e.g. by allowing retained personnel to enjoy greater freedom than is prescribed in the Convention). Obligations under the Geneva Convention must often be considered as representing a minimum, which the Powers are invited to exceed.

It is thus the criterion of "derogation", rather than that of "adverse effect", which provides the best basis for deciding whether a special agreement is, or is not, in conformity with the Convention. In the majority of cases deterioration in the situation of the persons protected will be an immediate or belated consequence of derogation.

When the Governments which met in Geneva in 1949 expressly prohibited any derogatory agreement, they did so because they were aware of a great danger—namely, that the product of their labours,

[1] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, pages 73 and 74.

which had been patiently drafted in the best possible conditions (viz. in peacetime) might be at the mercy of modifications dictated by chance or under the pressure of wartime conditions. They were courageous enough to recognize this possible eventuality, and to set up safeguards against it. In that sense Article 6 is a landmark in the process of the renunciation by States of their sovereign rights in favour of the individual and of a superior juridical order.

C. *Special problems.* — (a) If, as a result of a far-reaching change in conditions, the application of a provision under the Convention entailed serious disadvantages for the persons protected, would the "saving clause" debar the Powers concerned from endeavouring to remedy the situation by an agreement departing from the provision?

Certain States might be tempted, if the Convention hampered them on a particular point, to declare that on the point concerned the Convention adversely affected the persons protected, even though such adverse effect was not as general, objective and serious as the situation we had in mind when speaking of disadvantages due to a far-reaching change. It would therefore appear that the neutral organizations responsible for looking after the interests of these persons, are in the best position to decide whether a provision is fundamentally unsuited to achieve the protection which it was designed to provide. The organizations in question, conscious of their responsibility for the maintenance of rules which have been formally adopted in peacetime, should insist on the strict observance of this principle.

Nevertheless, if the situation envisaged should, exceptionally, arise, these organizations might then base their judgment on the principle (also inherent in the "saving clause") of the non-aggravation of the situation of protected persons. That would enable them to tolerate such measures waiving the defective provision as the States concerned might take, either separately or after mutual agreement, with a view to remedying the situation.

(b) Have not the organizations entrusted with the supervision of the regular application of the Convention also a duty to perform with regard to the other question which should be dealt with here—the question, namely, of penalties in cases of special agreements which violate the "saving clause"?

If two belligerents agree to subject their nationals to treatment

which is contrary to the Convention, one essential element in the defence of the rules of the Convention—intervention by the State of Origin of the persons protected—will be lacking. Moreover, no matter what part those persons can themselves take in the defence of the "rights" conferred on them by the Convention—the point will be considered under Article 7—, they will find difficulty in opposing the conclusion and consequences of such an agreement.

Other factors will therefore have to come into play to prevent the conclusion of derogatory agreements—such factors as the pressure of third Powers or of public opinion, the fear of the Government in power of being subsequently disavowed or even punished, and court decisions. If need be, the neutral organizations mentioned above may also forewarn the Parties concerned which are contemplating the conclusion of derogatory agreements, intervene against such as are concluded and refuse to recognize them when carrying out their activities on behalf of persons protected by the Convention.

Paragraph 2 — Duration of special agreements

This provision reproduces almost literally, *mutatis mutandis*, the second paragraph of Article 83 of the 1929 Convention relative to the treatment of prisoners of war. It is true that the words "until their repatriation has been effected" have been replaced by the words "as long as the Convention is applicable to them"—but this is merely a modification of form, since under Article 5 such application is to apply until the final repatriation of the persons protected.

The clause had been introduced in 1929 at the request of Germany [1]. The Armistice of November 1918 had abrogated (Article 10) the agreements concluded between belligerents to supplement the summary stipulations of the Hague Regulations in regard to prisoners of war; and as a result, all prisoners whose repatriation had been delayed lost the benefits of the progress which these agreements represented in comparison with the Hague Regulations. That was the origin of the provision, its object being to prevent a rescinding clause, such as that mentioned above, from being imposed on a defeated Party.

The presence of a provision of this nature was less imperative in the

[1] See *Actes de la Conférence diplomatique de 1929*, page 511.

Convention of 1949 which regulates the situation of protected persons very fully, stipulates that it shall apply in its entirety until their final repatriation and, as we have seen, prohibits derogatory agreements.

Nevertheless, the reproduction of this provision, which was agreed to without comment or objection by the Diplomatic Conference, entails certain consequences. On the one hand, should the standard of treatment accorded to the wounded, the sick or to medical personnel under the Convention be improved in certain respects as a result of an agreement passed between belligerents, the disappearance of one of the Contracting Parties cannot be taken as authorizing the other Contracting Party to waive those agreements, or deprive protected persons of the benefits they confer.

Again, the paragraph contains a valuable indication of the meaning of the Convention, in the expression "where more favourable measures have been taken with regard to" wounded and sick, as well as medical personnel and chaplains, "by one or other of the Parties...". This expression confirms what was pointed out above. The obligations incumbent on the belligerents with regard to those persons are considered in the majority of cases as a minimum which may always be increased. Thus, the rules regarding the status of retained medical personnel imply that the Detaining Power may accord to such personnel treatment more favourable than that accorded to prisoners of war, quite apart from the advantages already expressly stipulated under Article 28. Wounded and sick, who fall into the hands of the enemy and thus become prisoners of war, also deserve special advantages, formally authorized under Article 16 of the Third Convention. Among these may be mentioned release on parole, internment in a neutral country, facilities for correspondence, relief consignments and facilities in matters of food and clothing.

ARTICLE 7 — NON-RENUNCIATION OF RIGHTS [1]

Wounded and sick, as well as members of the medical personnel and chaplains, may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.

[1] Article common to all four Conventions. Cf. Second Convention, Article 7; Third Convention, Article 7; Fourth Convention, Article 8.

This Article, although entirely new, is closely linked with the preceding Article, and has the same object—namely, to ensure that protected persons in all cases without exception enjoy the protection of the Convention until they are repatriated. It crowns the edifice which gives this protection its inviolable character—an edifice already made up of Article 1 (application in all circumstances), Article 5 on the duration of application, and Article 6 prohibiting derogatory agreements.

1. *Renunciation of protection under the Convention*

The successive Conferences which prepared the revision of the Convention of 1929 had to consider the difficult situation sometimes encountered by nationals of States which as a result of war undergo profound modifications in their legal or political structure (occupation, capitulation, change of government, civil war).[1] We quoted earlier the example of an occupied country concluding with its enemy an agreement which might adversely affect its nationals in the enemy's hands. Article 6 should now obviate that danger.

But certain derogatory agreements may, as the last World War showed, appear on the surface to be "licit". There is the example of an authorization by their home Government to prisoners of war to choose at their discretion a status differing from that laid down in the Convention; this would appear to make those concerned responsible for deciding their own status.

This situation may be compared with the case of persons who are nationals of a State which, as a result of a war, has legally ceased to exist, either temporarily or finally. In such a case the Detaining Power, having no partner with whom to agree to modifications in the status laid down in the Convention, might be even more strongly tempted to justify such changes by basing them on the will of the persons concerned.

When a State offers to persons detained by it the choice of another status, such a step is usually dictated by its own interest. Experience has proved that such persons may be subjected to pressure in order to influence their choice. The pressure may vary in its intensity and be either more or less apparent; but it nevertheless constitutes a violation

[1] See, in particular, *Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of various Problems relative to the Red Cross* (Geneva, July 26 - August 3, 1946), Geneva, 1947, page 70.

of their moral and sometimes even of their physical integrity. The inevitable result of such practices is to expose the protected persons to a two-fold series of what may on occasion be very serious drawbacks, first from the fact that they are under pressure, and secondly, as already indicated, from their partial or total renunciation of the protection accorded to them by the Convention.

To meet those dangers, the International Committee of the Red Cross, interpreting the general desire, proposed in its draft Conventions that it should be stipulated that "wounded and sick, as well as members of the medical personnel and chaplains, may in no circumstances be induced by constraint or by any other means of coercion, to renounce in part or in entirety the rights secured to them by the present Convention".

In their proposal, the International Committee emphasized what appeared to them to be the greatest risk—namely, the pressure exerted to obtain renunciation. But the text might have been interpreted as implying that protected persons might renounce the benefits of the Convention, provided their choice was made completely freely and without any pressure. The Diplomatic Conference, like the XVIIth International Red Cross Conference, wished to avoid that interpretation and accordingly adopted the more categorical wording of the present Article 7, thus intimating to States parties to the Convention that they could not release themselves from their obligations towards protected persons, even if the latter showed expressly and of their own free will that that was what they desired.

A. *Reasons for absolute prohibition.* — Such an absolute rule was not agreed to without resistance. Some quoted the example of combatants enrolled more or less by force in the armed forces of a State, of which they refuse in their inner conscience to recognize that they are subjects. After falling into the hands of the enemy, they have fought side by side with the latter, taking part in the "liberation" of their country. Others wondered whether Conventions designed to protect the individual should be carried to a point where in a sense they deny him the essential attribute of liberty.

But in the end the Diplomatic Conference unanimously adopted the present wording—mainly for the reasons given above [1], that is to say,

[1] The Norwegian representative, who stated these motives the most forcibly, said amongst other things : " The question is being examined of prisoners of war or civilians in the hands of a Power being able, through an agreement concluded with the

the danger of allowing the persons concerned the choice of renouncing their rights, and the difficulty, and even impossibility, of proving the existence of duress or pressure.

Among the reasons given in favour of the present Article 7, two points call for notice.

The Conference did not overlook the fact that the absolute character of the rule drafted might entail for some persons what one delegate termed "unfortunate" results. It adopted the rule, because it seemed to safeguard the interests of the majority. If provision were made for exceptions in the case of certain individuals, would that not at once open a breach which others, in much greater numbers, would, perhaps, have cause to regret? Faced with this dilemma, the Conference felt that an integral application of the Convention would be the lesser evil, if we may be allowed to use such an expression in describing the effects of a humanitarian Convention. When considering the disadvantages which the application of the absolute principle of Article 7 would appear to entail for certain protected persons, the profound reasons for such a rule should always be borne in mind.

The second point is this. In adopting the above principle the Conference accepted the view that in wartime protected persons who fall into the hands of the enemy are not really in a sufficiently independent and objective moral position to realize fully the implications of a renunciation of their rights under the Convention. It would be wrong to speak of "liberty" in this connection.

B. *Will of protected persons in the application of the Conventions.* — The Conventions do not, however, entirely ignore the will of protected persons. The Prisoners of War Convention, for instance, lays down in several places that on certain specific points the treatment accorded

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latter, to renounce finally for the whole duration of the war the rights conferred on them by the Convention. To say that such agreements will not be valid if they are obtained by duress is not sufficient in our view; we all know that it is extremely difficult to produce proof of there having been duress or pressure. Generally, the Power which obtains the renunciation has no difficulty in asserting that it was obtained with the free consent of those concerned, and the latter, for their part, may be induced to to declare that this corresponded to their own desire. I consider that the only genuine means of ensuring the protection we are seeking will be to lay down a general rule that any renunciation of rights conferred by the Convention shall be deemed completely devoid of validity".

(See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, pages 17 and 18.)

will depend on the choice of the persons concerned. [1] But in these instances the expression of the will of the protected persons contributes towards the application—a more elastic application—of the Convention; it never results in the suppression of the Convention, either in its entirety or in part.

It should further be noted that this prohibition by the authors of the Conventions of 1949 of any renunciation of rights followed logically from their desire to establish rules representing the minimum required by human dignity. Rules of this kind were *in the common interest*, and could be renounced by the beneficiaries only under pressure of external circumstances, against which it was the precise purpose of the Convention to protect them. In this connection the example has been cited of certain social laws which apply to the persons concerned independently of their will. [2] Reference might also be made in municipal law to the rules for the protection of the person, some of which, considered as being in the common interest, can in no case be waived by the individuals concerned. [3]

Nor does Article 7 express an entirely novel principle as compared with the former Geneva Conventions. As in the case of the provision on special agreements, it embodies the reasonable interpretation which is apparent in those Conventions. States which are parties to them are required to apply them when certain objective conditions exist; but there is nothing in the texts which would justify their taking refuge behind the will of the "protected persons" to withhold application either in entirety or in part. The authors of those solemn instruments were prompted by a keen desire to ensure complete protection for war victims; had they wished to lay down the will of the latter as a condition of application, they would not have failed to provide safeguards and lay down forms of procedure permitting that will to be expressed freely, knowing as they did how great the possibilities of misrepresentation were in wartime. But this they did not do.

Should it therefore be concluded that such a conception reflects

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[1] This is the case, for instance, with release on parole (Article 21, paragraph 2), assembly in camps (Article 22), organization of leisure (Article 38) and dangerous labour (Article 52).

[2] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, page 17.

[3] Thus Article 27 of the Swiss Civil Code lays down that "None can renounce, even in part, the exercise or enjoyment of his rights".

greater interest in the rights and duties of States than in the situation of the individual within the legal order set up by the Convention? That would be a completely erroneous conclusion, as we shall show.

2. *Nature of the rights conferred upon protected persons*

A. *The basic concepts.* — In the comments on Article 6 we indicated the meaning to be attached to the expression "rights which the Convention confers upon protected persons" in relation to the Contracting States. It is now necessary to define its meaning in relation to the individual, the expression in question recurring in the same form in Article 7, except for the term "confer" which is here replaced by "secure", a still stronger term.

In the development of international law the Geneva Convention occupies a prominent place. For the first time, with the exception of the provisions of the Congress of Vienna dealing with the slave-trade, which were themselves still strongly coloured by political aspirations, a set of international regulations was devoted, no longer to State interests, but solely to the protection of the individual.[1] The initiators of the 1864 and following Conventions wished to safeguard the dignity of the human person, in the profound conviction that imprescriptible and inviolable rights were attached to it even when hostilities were at their height.

At the outset, however, the treatment which belligerents were required to accord to persons referred to in the Convention was not presented, nor indeed clearly conceived, as constituting a body of "rights" to which they were automatically entitled. In 1929 the principle was more clearly defined, and the term "right" appeared in several provisions of the 1929 Convention relative to prisoners of war. It was not, however, until the Convention of 1949 (in particular, in Articles 6 and 7) that the existence of rights conferred on protected persons was affirmed.

The affirmation is explicit. Faced with a proposal to replace the phrase "confers upon them" in Article 6 by the phrase "stipulates on their behalf", thus implying that the rights in question represented for those concerned more of an *indirect* benefit resulting from the attitude

[1] See Max HUBER, *The Red Cross, Principles and Problems*, page 15, and Jean S. PICTET, *La Croix-Rouge et les Conventions de Genève*, lectures delivered before the Academy of International Law of The Hague, 1950, page 30.

prescribed to the States, the Diplomatic Conference decided to maintain the word "confer", which figured in the draft prepared by the International Committee of the Red Cross.[1]

In selecting this term the International Committee had doubtless been influenced by the concomitant trend of doctrine, which also led to the universal proclamation of Human Rights, to define in concrete terms a concept which was implicit in the earlier Conventions. But it had at the same time complied with the unanimous recommendation of the Red Cross Societies, meeting in conference in Geneva in 1946, to confer upon the rights recognized by the Conventions "a personal and intangible character allowing" the beneficiaries "to claim them irrespective of the attitude adopted by their home country". [2]

B. *Concrete aspect of the rights.* — As has already been seen in connection with Article 6, "rights conferred by the Convention" should be interpreted to mean the whole system of rules under the Convention. We shall not repeat what was said, but refer readers to the explanations given above.[3]

On the other hand, the question arises of whether the fact of considering those rules as "rights conferred upon protected persons" corresponds to an intrinsic reality. From the practical standpoint, and no longer in the field of ideas, to assert that a person has a right is to say that he possesses ways and means of having that right respected, and that any violation thereof entails a penalty.

In that respect a study of the Geneva Conventions from 1864 to 1949 shows a distinct evolution. Let us take the case of penalties. The Convention of 1864 contains nothing on the subject. The Conventions of 1906 (Articles 27-28) and of 1929 (Articles 28-30) lay the emphasis mainly on the legislative measures to be taken, should the penal laws prove inadequate. It is only the Convention of 1949 that indicates in Articles 49 to 53, with all requisite precision, the obligation incumbent on all States parties to the Conventions, belligerent or neutral, to seek out those who are guilty and to repress breaches of the Convention, which is tantamount to saying, breaches of the rights of persons protected.

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[1] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, page 76.

[2] See *Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of various Problems relative to the Red Cross* (Geneva, July 26-August 3, 1946), Geneva, 1947, page 71.

[3] See above, page 73.

There is a further evolution in connection with the means open to such persons for the defence of their rights. The First Convention now gives official sanction to the role of the Protecting Power (Article 8). Wounded and sick or medical personnel will be able through the intermediary of the latter to arrange with more certainty for intervention by their home State. Should such intervention prove impossible—as in the instances quoted above—they may then have recourse to neutral bodies (i.e. to a neutral State replacing the Protecting Power, or to the International Committee of the Red Cross), to find a champion of their cause (Article 10). They may even, either personally or through their prisoners' representative (or whoever performs those duties amongst retained medical personnel) [1], put their claim directly to the detaining authorities. This is the practical application of the concept of rights which the individual may invoke, independently of the State.

The foregoing comments have dealt only with violations committed by the enemy. But the problem also arises with regard to violation of the rights of protected persons by their own Governments. Although the Convention contains no formal indication in this respect, it is justifiable to consider that the terms of Article 7 may entail an important consequence. It should be possible in States which are parties to the Convention and which recognize that any violation of individual rights is justiciable, for the rules of the Convention, which are assimilable with those rights, to be evoked before an appropriate national court by the protected person who has suffered the violation.

Undoubtedly, owing to the immature character of current international law, the guarantees surrounding the rights conferred on persons referred to in the Convention are by no means as complete, effective or automatic as those of national legislations. Nevertheless, Article 7 supplies invaluable help to all protected persons. It allows them to claim the protection of the Convention, not as a favour, but as a right, and enables them to employ any procedure available, however rudimentary, to demand respect for the terms of the Convention in case of violation. Hence the importance of the dissemination of the Convention in accordance with Article 47, with special reference to the individual character of the rights which the Convention confers.

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[1] For prisoners of war, Article 78 of the Third Convention, and for retained medical personnel, Article 28 of the First Convention. See below, on Article 28, page 249.

C. *Obligation on persons protected.* — One last question remains to be considered. Rights entail obligations. With the focus on the individual under Article 7, can the rules of the Conventions, or certain of them, be considered as obligations which are directly incumbent on the persons protected? There can be no doubt that certain stipulations, such as the respect due to the wounded and sick, are also incumbent on persons who can claim protection under the Convention. For example, a member of the medical personnel who, profiting by his duties, plundered the wounded or dead on the battlefield, would be liable to the punishment which the law of his country or of the enemy stipulates in execution of the obligation by which every contracting State is bound to repress such breaches.

This question arises in connection with Article 7, which appears to take the form of an obligation on the persons protected, stating, as it does, that the latter "may in no circumstances renounce ...". It was for this reason that, in their "Remarks and Proposals" submitted to the Diplomatic Conference, the International Committee of the Red Cross pointed out that the general effect of the Conventions was to impose obligations on the States parties to the Conventions rather than on individuals, and proposed to draft Article 7 in that sense.

The Diplomatic Conference preferred to keep to the present wording. Various delegates pointed out that even in that form Article 7 was addressed first and foremost to the contracting States, and meant that *for such States* a declaration by protected persons regarding the changing of their status could have no legal effect.[1]

However that may be, Article 7 may be interpreted as implying, if not an obligation, at least a direct indication or even warning to the wounded and sick and to medical personnel. As a counterpart to the character of individual rights which has been given to the rules of the Convention in the interest of protected persons, the latter should by their own attitude contribute to the maintenance and reinforcement of the inalienable character of their rights, abiding loyally by the provisions regarding their status as laid down in the Convention, and refusing to accept any derogation, even if they lose by so doing. Here again is a point to which attention should be drawn in a well-planned dissemination of the Geneva Conventions.

[1] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, page 56.

ARTICLE 8 — PROTECTING POWERS [1]

The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

The Parties to the conflict shall facilitate to the greatest extent possible, the task of the representatives or delegates of the Protecting Powers.

The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties. Their activities shall only be restricted as an exceptional and temporary measure when this is rendered necessary by imperative military necessities.

General

1. *Historical background*

This provision is new in the present Convention. It is derived from Article 86 of the 1929 Convention relative to the treatment of prisoners of war, the contents of which were introduced in considerably strengthened form into all four Conventions of 1949.

The idea of employing a third Power to cooperate in the application of a treaty and to check its faithful observance is still sufficiently new to call for a brief summary of its history.

The Protecting Power is of course a State instructed by another State (known as the Power of Origin) to safeguard its interests and those of its nationals in relation to a third State (known as the State of Residence). Protecting Powers are not a deliberate creation of international law. They are not so much an institution as an old practice, a time-

[1] Article common to all four Conventions. Cf. Second Convention, Article 8; Third Convention, Article 8; Fourth Convention, Article 9.

honoured practice (it is true) with fine achievements to its credit, but a practice which, though tending to a certain standardization, is far from being codified.

The origin of the concept Protecting Power goes back to the 16th century. Only the larger States then had Embassies. The nationals of medium-sized or small countries, when living abroad, were not protected in any way by their country of origin. That had certain disadvantages, especially where the national customs, laws or standards of civilization were very different from those of their home countries. Certain great Powers, from motives of prestige and influence as well as interest, claimed, and asserted by treaties concluded with the countries of residence, the right to take under the protection of their Embassies foreign nationals without national representation of their own.

Later, the initiative passed from the Protecting Power to the Power of Origin, which, as it became progressively more alive to its rights and to its duties towards its nationals abroad, began of its own initiative to have recourse to the good offices of a third Power. This practice spread, but was in no way uniform. The protection exercised might be of the most varied nature, ranging from temporary representation, limited to certain specified functions, to general representation of the interests of the Power of Origin in all countries where the Protecting Power maintained diplomatic or consular staff. Even the juridical position of the Protecting Power was differently regarded by different countries. Some countries considered themselves as deputizing for the Power of Origin, and negotiated officially in its name: others restricted themselves to authorizing their consuls in the State of Residence to lend their good offices to nationals of the Power of Origin.

Whatever the nature, duration or importance of the Protecting Power's position, it could never under modern law shield protected persons from the laws of the State of Residence. The most it could do was to ensure that the latter treated them in accordance with its laws and with international treaties and customs.

All this should be borne in mind: for the safeguarding of foreign interests in wartime is merely one case of protection among others. But there is this difference that the lapse of so many international treaties and the proclamation of so many laws of exception as a result of the war render this particular form of protection more essential, while they at the same time restrict its effectiveness. Indeed the role

of the Protecting Power in wartime has often been limited to the custody of the diplomatic and consular premises and archives of the Power of Origin, and to the forwarding of occasional documents.

Such, in brief, was the situation at the outbreak of the First World War in 1914. There was during the conflict a particular problem which drew the world's attention and led to the expansion of the idea of the Protecting Power—the problem, namely, of prisoners of war. Never had there been so many prisoners. Never had such multitudes of captives remained so long in enemy hands. There were of course the Hague Regulations of 1907.[1] But the summary rules they contained on the treatment of prisoners of war were not always respected as they should be. The world was roused. The International Committee of the Red Cross, acting on past precedents, founded at the outset the Central Information Agency, which with its 7 million index cards secured an extensive measure of publicity. The Committee did more than this. Basing itself on the Hague Regulations, which authorized the distribution of relief, it sent missions to visit the camps.

If a purely private institution could in this way exercise unofficial but not ineffective control over the application of the Hague Regulations, why should not the Protecting Powers (one of whose tasks is to ensure the treatment in accordance with international customs and treaties of the persons they protect) be able to do the same? In actual fact the representatives of several Protecting Powers were able to accomplish a great deal under this heading, in spite of many difficulties, and in spite of the unpopularity of duties which tended to make the general public regard them as enemy agents. They too visited the camps, and frequently obtained great improvements in the treatment of prisoners of war. They also intervened for the conclusion of special agreements between the adverse Parties with a view to making good deficiencies in the Hague Regulations.

The war had revealed the inadequacy of the Geneva Convention of 1906 and of the Hague Regulations. As soon as it was over, the International Committee of the Red Cross began to study, in the light of the experience gained, the revision of the former and the drawing up of a new Convention, a veritable prisoners of war code, to supplement the latter.

[1] *Regulations respecting the Laws and Customs of War on Land.* Annex to the Fourth Hague Convention of 18 October 1907.

The supervision which visits to camps by representatives of the International Committee of the Red Cross, and also by those of the Protecting Powers, implied, had proved so useful (albeit inadequate) that it was felt to be desirable to give it legal form in the future. Accordingly, in implementation of a Resolution of the Xth International Red Cross Conference, the International Committee included in its draft of the new Convention a provision enabling Governments in wartime to entrust the Committee with the application of the Convention. This meant nothing less than organized supervision—official this time. Protecting Powers were not mentioned because, in theory at any rate, they already had power to exercise supervision under their terms of reference. Furthermore, as private representatives of the enemy Power, acting in its name and on its instructions, they did not necessarily have the same neutral and impartial character as an organization independent of any Government. But the two controls could exist simultaneously, the one in the particular interests of the belligerents, the other in the general interest of humanity.

The Diplomatic Conference of 1929, however, after considering the drafts of the International Committee of the Red Cross, decided otherwise. Representatives of Governments which had assumed the role of Protecting Powers, asked for a clear-cut definition of their functions and powers. This attitude was only natural. It reflected the difficulties encountered by those Protecting Powers which had taken their duties seriously, and had tried to concern themselves with the condition of the prisoners of war. The system of Protecting Powers was governed by no international law: it was merely a practice which different countries regarded very differently. The extent of a Protecting Power's activities depended, therefore, not only on the instructions of the appointing Power, but also on its own acceptance, and above all on the Detaining Power's agreement—and the latter could hardly be expected to look with favour upon the activities of the representatives of the enemy State's interests, or willingly grant them access to its camps.

The Diplomatic Conference of 1929 agreed, but its competence was limited: for the Protecting Power was the private representative of a third party—a voluntary representative, moreover—and it was not for the Convention to dictate duties which were carried out solely at the behest of the appointing Power. The most that could be done was to recognize the activities of the Protecting Power, provide them with a legal basis,

and require the Detaining Power to tolerate and even to facilitate them. After lengthy discussion and much redrafting, the text of Article 86 of the 1929 Convention relative to the treatment of prisoners of war was drawn up.[1] It reads as follows:

> The High Contracting Parties recognize that a guarantee of the regular application of the present Convention will be found in the possibility of collaboration between the Protecting Powers charged with the protection of the interests of the belligerents; in this connection, the Protecting Powers may, apart from their diplomatic personnel, appoint delegates from among their own nationals or the nationals of other neutral Powers. The appointment of these delegates shall be subject to the approval of the belligerent with whom they are to carry out their mission.
>
> The representatives of the Protecting Power or their recognized delegates shall be authorized to proceed to any place, without exception, where prisoners of war are interned. They shall have access to all premises occupied by prisoners, and may hold conversation with prisoners, as a general rule without witnesses, either personally or through the intermediary of interpreters.
>
> Belligerents shall facilitate as much as possible the task of the representatives or recognized delegates of the Protecting Power. The military authorities shall be informed of their visits.
>
> Belligerents may mutually agree to allow persons of the prisoners' own nationality to participate in the tours of inspection.

As far as it went, the Article was excellent. It paid tribute to the work achieved by certain Protecting Powers in the past, while at the same time legalizing such work in the future. It eliminated many material or political obstacles in the path of the Protecting Powers, and mitigated the ill-will which they had so often encountered. Henceforward their representatives would be less likely to be suspected of sympathy or collaboration with the enemy. On the contrary, their intervention would be welcome.

The drawback to the Article was that it abandoned—though it did not altogether exclude—the idea of obligatory control by a neutral and independent agency.

It was not only Article 86 of the Prisoners of War Convention that mentioned the Protecting Powers. They were expressly referred to in a dozen special provisions, which did not, however, impose any duties on them, but merely gave them rights of inspection, or indicated that

[1] See *Actes de la Conférence diplomatique de 1929*, pages 512 ff.

they were to receive or forward documents—tasks which naturally fell to them as representatives of third parties.

The Second World War afforded striking proof of the value of this Article. It is true there were neutral States which took a high view of their protecting mission. It is also true that various circumstances facilitated their task. In this war many belligerents, departing from former practice, chose one and the same Protecting Power to represent them in relation to *all* their enemies. Furthermore, the extension of the conflict greatly reduced the number of neutral Powers with the result that a great many Protecting Power mandates came to be concentrated in the hands of those remaining, and it became more and more common for these neutral Powers to find themselves responsible for representing the respective interests of two opposing Parties at one and the same time.[1] This gave them additional authority, and incidentally altered their role; for once a Power represented the interests of two opposing belligerents, it became not so much the special representative of each of them, as the common agent of both, or a kind of umpire. This enabled it to bring directly into play that powerful instrument, the argument of reciprocity, to obtain the improvements desired.

The value of the supervision envisaged and authorized by Article 86 of the Prisoners of War Convention had thus proved itself. But so far it had only benefited prisoners of war; and the existence of a Protecting Power was still necessary. Millions of prisoners had been without its help owing to non-recognition of their State of Origin by the Detaining Power, or had been suddenly deprived of it through circumstances. The outrageous nature of some of the violations committed where there had been no control modified the conception of what that control should be. It was no longer merely a question of recognizing a belligerent's right to supervise the application of the Convention by his enemy and of facilitating his task in so doing. The idea of the private interest of each of the belligerents was replaced by the conception of the overriding general interest of humanity, which demanded such control, no longer as a right, but as a duty.

The International Committee of the Red Cross, bearing all these considerations in mind, and encouraged by the opinions of the preliminary Red Cross Conference in 1946 and the Conference of Govern-

[1] At one time Switzerland alone was the Protecting Power of no fewer than 35 belligerent countries.

ment Experts in 1947, both of which it had convened [1], directed its attention to three points:

1. The extension of the principle of supervision by the Protecting Power to all the Conventions.
2. Arrangements for the replacement of Protecting Powers no longer able to act.
3. Making supervision obligatory.

The draft resulting from the study of these questions, as approved and completed by the XVIIth International Red Cross Conference at Stockholm, served as a basis for the work of the Diplomatic Conference of 1949. It read as follows:

> The present Convention shall be applied with the co-operation and under the supervision of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. To this effect, the Protecting Powers may appoint, apart from their diplomatic staff, delegates from amongst their own nationals, or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power in whose territory they are to carry out their duties. The said Power may only refuse its approval if serious grounds are adduced.
>
> The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

It will be seen that this draft reproduced the essential features of Article 86 of the Prisoners of War Convention of 1929—with the exception of the provisions dealing with visits to the camps, which, as they only concern prisoners of war and civilian internees, are dealt with separately in the Conventions protecting these two categories of war victims. But it increased the scope of the 1929 text:

(1) by embodying it in all four Conventions;

(2) by replacing its optional form ("possibility of collaboration between the Protecting Powers"), by an imperative form ("The present Convention *shall be* applied *with the co-operation and under the supervision* of the Protecting Powers...");

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[1] See *Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of various Problems relative to the Red Cross* (Geneva, July 26-August 3, 1946), Geneva, 1947; and *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* (Geneva, April 14-26, 1947), Geneva, 1947.

(3) by adding a separate draft Article for the obligatory replacement of Protecting Powers which ceased to function.[1]

2. *Discussions at the Diplomatic Conference of 1949*

Surprisingly enough, the Stockholm draft gave rise to hardly any objections at the Diplomatic Conference.[2] The new form proposed: "The Convention *shall be* applied with the co-operation and under the supervision..." was not so much as discussed, the necessity for increased supervision being evident to everyone. The English translation of the word "contrôle" formed the subject of the longest discussion both in the Joint Committee and in its Special Committee. As previously at Stockholm, the English-speaking delegations were all, without exception, opposed to the adoption of the English word "control" on the ground that it was by no means an exact translation of "contrôle", being much stronger and implying domination. It must, however, be admitted that the French word "contrôle" is being increasingly used with the English meaning. It is not uncommon to hear that a company controls ("contrôle") a business when it possesses the major part of its shares and consequently directs it, or that a regiment controls ("contrôle") a crossing of which it has taken possession. Four translations were in turn suggested, and discussed at length, before agreement was finally reached on the word "scrutiny". The discussion was not purely academic: for it enabled the Conference to define precisely the powers which it intended to confer upon the Protecting Power.[3]

The need for increased control being once admitted, there was no further difficulty. No one thought of contesting the Protecting Power's right to appoint additional staff. On the contrary, as the Protecting Power was no longer merely authorized but instructed to exercise supervision, the importance of its disposing of a sufficiently large and qualified staff was admittedly increased. It was to this end that the Conference adopted a new proposal which placed the consular staff

[1] See below, on Article 10, pages 112 ff.

[2] In the Stockholm draft the provision under study figured as Article 6 (Article 7 in the Second, Third and Fourth Conventions). It was therefore discussed by the Diplomatic Conference of Geneva as Article 6/7/7/7 before becoming Article 8/8/8/9 in the final text.

[3] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, on Article 6/7/7/7, pages 19-20 and 57.

of the Protecting Power on the same footing as its diplomatic staff, the draft having only referred to the latter. On the other hand, the Conference could not bring itself to adopt the last sentence of the first paragraph ("The said Power may only refuse its approval if serious grounds are adduced"), which the Stockholm Conference had added, in a burst of hasty generosity, to the International Committee's original draft. Most delegations took the view that a Protecting Power was not entitled to impose anyone it pleased on a belligerent State. In normal times—and with even more reason in wartime—a Government can withhold its consent or *exequatur* from diplomats or consuls without being obliged to state its reasons for doing so. It would hardly be understood if officials appointed for temporary and auxiliary services were given a privileged status in this respect.

The second paragraph of the Stockholm draft, which follows logically from the first, was adopted without discussion.

A very satisfactory Article was thus evolved. Unfortunately, it ran the risk of being considerably weakened by the following additional amendment:

> With regard to their co-operation in the application of the Conventions, and the supervision of this application, the activity of the Protecting Powers or of their delegates may not infringe the sovereignty of the State or be in opposition to State security or military requirements.

The purpose of this amendment was to prevent a Power from being accused of violating the Convention on account if its having temporarily restricted the activities of the Protecting Power in exceptional cases for reasons of military requirements or security.[1] The amendment was keenly opposed. Some delegates wished to reject it; others felt that although it might temporarily be necessary to restrict the activities of the Protecting Power, it would be better for the restriction to apply to a particular provision rather than to the general Article. A compromise formula was then proposed [2], and was finally adopted, as paragraph 3, after a slight but important alteration had been made, the words "the limits of their mission *as defined in* the present Convention" being replaced

[1] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, on Article 6/7/7/7/, page 59.

[2] *Ibid.*, page 74.

by a more general form, "their mission *under* the present Convention". It was pointed out that the Convention did not, strictly speaking, define the mission of the Protecting Powers.[1]

PARAGRAPH 1 — GENERAL ROLE OF THE PROTECTING POWERS

A. *First sentence: "The present Convention shall be applied with the co-operation . . . ".* — This is a command. The English text, which is authentic equally with the French, makes this absolutely clear.[2] It is no longer merely a case of collaboration being possible and of supervision being authorized, as it was under the 1929 Prisoners of War Convention.

This command is addressed to the Parties to the conflict in the first place, since the responsibility for application is theirs. They are ordered to accept the co-operation of the Protecting Power. If necessary, they must demand it. This is fully established by the whole development of the idea and by the clear intention, which was constantly manifested during the discussions, to increase the degree of supervision and make it obligatory under the Convention; this tendency is carried to the point of making provision, under Article 10 below, for the case of the Protecting Power ceasing to function.

But the command is also addressed to the Protecting Power, if the latter is party to the Convention. The Protecting Power is not obliged to wait until the Party to the conflict, in relation to whom it safeguards the interests of the Power which appointed it, demands its co-operation; it must take the first step. The Protecting Power is obliged to participate, so far as it is concerned, in the application of a Convention by which it is bound.

What does the role of a Protecting Power involve, and what should be understood by "cooperation" and "scrutiny"?

It should be noted first of all that it is not only Article 8 that mentions the intervention of the Protecting Power. The following five Articles make express provision for it :

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[1] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, on Article 6/7/7/7, page 28.

[2] The French text reads: "*La Convention sera appliquée avec le concours...*". The words "*shall be*" in the English text show that the future imperative has been used and not the simple future.

(a) Among the general provisions common to all four Conventions:

Article 11: loan of good offices in cases of disagreement as to the application or interpretation of the Conventions;

Article 48: communication of translations of the Conventions during hostilities.

(b) Among the provisions peculiar to the First Convention:

Article 16: forwarding of information about wounded, sick and dead persons;

Article 17, paragraph 2: (referring to Article 16);

Article 23: loan of good offices for the creation of hospital zones and localities.

It may also be noted in passing that the Second Convention only contains one provision of its own in which the Protecting Power is mentioned, whereas the Third and Fourth Conventions contain respectively 27 and 33 such provisions.

The following question then arises: do the cooperation and the scrutiny laid down in principle in Article 8 consist solely of the activities referred to in Articles 11, 16, 17, 23 and 48, or is the Protecting Power assigned a general mission in Article 8 giving it the right—and the duty—to intervene in cases other than these particular ones?

The reply to this question emerges clearly enough from the general desire, expressed during the discussions at the Diplomatic Conference, to establish a genuine control organization, and to give it extensive powers. The only restrictions—and they are temporary and exceptional—imposed on the activities of a Protecting Power are those which can be justified by imperative military necessities. The reason why this possibility of restriction has been maintained in the First and Second Conventions, and left out of the Third and Fourth, which deal with prisoners of war and civilians, is that the first two Conventions are mainly intended to be applied "on the battlefield". It is therefore understandable that the case of imperative military necessities should be the subject of a reservation [1]. But none of the provisions just mentioned involves activities endangering military operations. Consequently, the restriction at the end of the Article must refer to activities

[1] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, on Article 6/7/7/7, pages 344 ff.

it only concerned camp visits. In Article 8 it is quite general, and applies to *all* the activities of the Protecting Power.

PARAGRAPH 3 — LIMITS

This paragraph is a compromise formula. It was adopted to give partial satisfaction to the supporters of an amendment which, in the opinion of the majority, was too restrictive and would indeed make it possible to paralyse all activity by the Protecting Power.[1] While trying to give the fullest possible scope to the needs of humanity, the delegates at the Conference could not, in their capacity as representatives of Governments, completely overlook the requirements of national sovereignty. In the paragraph we accordingly find a reminder of the existence of this national sovereignty, which has, incidentally, been seriously encroached upon in many of the provisions of the different Geneva Conventions, beginning with the original Convention of 1864 — not to mention all the other international Conventions or institutions which tend more and more to restrict it in favour of a higher interest.

The first sentence, with its appendix "they shall, in particular, take account...", makes no provision for sanctions. What happens if the agents of the Protecting Power exceed their mission, and, while carrying out their duties, engage in acts harmful to the security of the State? The text is silent on this point, so that the situation is the same as if the provision did not exist. Even so, a Government which had good reason to complain of the activities of one of the Protecting Power's agents, would not be without a remedy. It could make the necessary representations; it could ask for the recall of the offending agent or designate him as a *persona non grata*; it could refuse him the necessary facilities.

In these circumstances one cannot but wonder whether, with such a provision ready to hand, a belligerent Power will not be tempted to resort to it lightly and so, in one way or another, restrict the activities of the Protecting Power, even where such activities are purely humanitarian. As, however, the Conference thought fit to adopt this provision —not so much because it was necessary as because it was a means of

[1] See above, page 94.

combating an amendment which was still more restrictive—let us try to see what positive elements it has to offer.

Without sanctions, it serves none the less as a solemn reminder to the Protecting Power of the nature of its mission, which will in future take the form of co-operation with the belligerent Power as the party primarily responsible for the application of the Convention. The Protecting Power, as the authorized agent of the enemy, is no longer merely entitled to exercise the right of supervision of the latter as co-contracting party. Not only *must* the Protecting Power exercise this right of supervision: it must also *co-operate* in applying the Convention, the whole purpose of which is to ensure respect for a higher principle—the principle, namely, that the wounded and sick must be collected and cared for, without distinction. They have the right to be protected and respected for the sole reason that they are wounded and sick. Thus, when instructing its agents, the Protecting Power should not forget to bring this provision to their attention. It should remind them that, as its representatives under the Convention, all their efforts should be directed exclusively towards the achievement of the above purpose, and that their task is too noble a one—one which is too essentially necessary to mankind—to admit of the slightest irregularity which, by throwing suspicion on the officials in question, and perhaps on their colleagues and Government, might compromise or even simply restrict the work; for that would be equivalent to increasing the suffering due to the war.

The last sentence, which gave rise to keen opposition, was omitted in the Third and Fourth Conventions. The reason for including it here was, as we have seen above, that the First Convention mainly applies to the battlefield or its immediate surroundings. Behind the lines, the wounded and sick in enemy territory are protected by the Convention relative to the treatment of prisoners of war. It must be admitted that at the front, and sometimes even behind the lines, a belligerent Power has an imperative interest in taking exceptionally strict measures of prohibition, in order to keep military operations secret. There are occasions when the representative of a Protecting Power might, in all innocence and ignorance, overhear and circulate some military secret, which by changing the course of the battle might increase the number of its victims. But the belligerent Powers must never lose sight of the purpose of the activities of the Protecting Power as

laid down in the Conventions—namely, the protection of the wounded and sick—a purpose so lofty that even war, since 1864, has had to respect it. They must therefore avoid curbing these activities by invoking "imperative military necessities" without due consideration or merely for convenience' sake.

Who is to determine the validity of the reasons adduced by the belligerent Power to justify exceptional restriction? Will it be the belligerent himself? But he would be judging his own case. Only the Protecting Power as supervising agent can decide if military necessities are sufficiently imperative; and this is precisely what it would, in such a case, be debarred from doing. It will only be possible to show after the event whether or not the restriction was justified.

The provision in question should not be considered as authorizing the restriction of the activities of the Protecting Power, but rather, if one may say so, as a restriction of the possibilities of limiting them. It indicates—and that is the essential point—that in principle the activities of the Protecting Power cannot be reduced.

A Protecting Power's activities can only therefore be restricted, if there are reasons for so doing, exceptionally, temporarily, and partially. The rule is that a Protecting Power's activities must not be restricted, and only *imperative* military necessities can modify that rule; restrictions may therefore apply only for the duration of the military necessities which justify them, and they may, moreover, only apply to those of the Protecting Power's activities which come up against these necessities. The belligerent Power may temporarily prohibit agents of the Protecting Power, for example, from inspecting the medical establishments in a particular area. But it could not make a pretext of military necessities, however imperative, for suspending the whole of the Protecting Power's activities under the Conventions.

CONCLUSIONS

As it stands Article 8 is not perfect, far from it. But we have to consider the huge advance which it represents in international humanitarian law. We have to realize that, to achieve this much, the diplomats assembled in Geneva had to cope with divergent opinions; they had to reconcile the claims of the sovereignty of their respective countries with the claims of humanity; and they had to harmonize two opposed

conceptions of the role of the Protecting Power, viewed by some as their agent (of whom one demands the maximum), by others as the agent of the enemy (to whom one accords the minimum). When we remember, finally, that the legal relations between the Protecting Power and the Power of Origin on the one hand, and then again between the Protecting Power and the State of Residence, are of the most varied nature, it must surely be admitted that this Article is on the whole satisfactory.

Article 8 presupposes the existence of a Protecting Power appointed by the Power of Origin. It does not make this appointment obligatory, and in no way modifies the status of the Protecting Power as determined by international usage. The Protecting Power therefore remains the special representative of one of the Parties to the conflict—first of all for the exercise of political, administrative or other functions arising either out of its appointment or out of international usage, and secondly for the application of the Convention. But in the latter case it also has a higher mission, automatically entrusted to it, by reason of its duties, by the whole body of the Contracting Parties, including the Power in whose territory it carries out its task.

By making a duty out of what formerly was merely the optional exercise of a right, Article 8 reinforces the supervision of a sane application of the Convention, and consequently, increases the latter's efficacy. It does more than that: it calls in a third Power, a neutral Power and *pro tanto* immune from the exacerbation of opposed opinions which war provokes, so often leading to false appreciation of the most firmly established moral values, and invokes the aid of this third Power in respecting those fundamental principles.

If the Protecting Power is not a party to the Convention, this mission under the Convention is only obligatory in so far as the Protecting Power explicitly accepts it. If, on the other hand, the Protecting Power is bound by the Convention, the mission is obligatory from the mere fact of the State in question having accepted the role of Protecting Power.

Article 1 of the Convention reads as follows: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." This engagement applies just as much to a Protecting Power which is a party to the Convention as it does to the belligerent Powers. For just as it assisted in the conclusion of the Convention, so it must assist in its application, its responsibility being

measured by the extent of the demands made on it. It has no doubt less responsibility than the Parties to the conflict, owing to its inability to act except through the intermediary of its representatives in foreign countries, its means being thus very limited as compared with those which the belligerent Powers have at their disposal for meeting their obligations. But within the limits of its means the Protecting Power's responsibility exists. It is right that this should be so. It illustrates the joint responsibility of nations in the defence of the protective barrier which they have raised against war, and if necessary against their own shortcomings, by signing the Geneva Conventions.

ARTICLE 9 — ACTIVITIES OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS [1]

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of wounded and sick, medical personnel and chaplains, and for their relief.

HISTORICAL BACKGROUND

This provision reproduces the former Article 88 of the 1929 Prisoners of War Convention in a more complete and general form applicable to all four 1949 Conventions. Its origin goes back to the activities of the International Committee of the Red Cross during the First World War. During the first days of hostilities in 1914, the International Committee, following earlier precedents, opened an Agency which, by collecting and centralizing information on prisoners of war, helped to trace those who were missing and reestablished contact between the prisoners and their families. In addition, taking advantage of the fact that the Hague Regulations authorized approved relief societies to carry out their charitable activities, the Agency sent delegates to visit internment camps. These visits did not only enable it to ascertain the needs of the

[1] Article common to all four Conventions. Cf. Second Convention, Article 9; Third Convention, Article 9; Fourth Convention, Article 10.

prisoners of war and bring them relief and moral comfort, but also served as a means of checking the application of the Hague Regulations of 1907 [1]. Incomplete as it was, this spontaneous and gratuitious supervision often helped to bring about considerable improvements.

Therefore, when a new Convention relative to the treatment of prisoners of war was drawn up, care was taken to provide the International Committee of the Red Cross with a legal basis for renewing activities which had proved of such value. The 1929 Convention did not do this by means of mandatory provisions, but simply by recognizing, in two different places, the right of the International Committee to take action. Article 79 provided for the setting up of a "Central Agency of information regarding prisoners of war", the organization of which could be proposed to the Powers concerned by the International Committee of the Red Cross if it considered it necessary. In order that this should not appear to exhaust all possibilities of intervention by the International Committee, the final paragraph of the above Article laid down that the provisions should not be interpreted as restricting the humanitarian work of the International Committee of the Red Cross.[2]

In the matter of the organization of supervision, the 1929 Conference limited itself, as we have seen above,[3] to recognizing the right of the Protecting Power to visit prisoners of war, and to granting it facilities for exercising that right. But in order to show that such right did not exclude either a repetition of the unofficial supervision which the International Committee had exercised during the 1914-1918 War or any other humanitarian action, it stipulated in Article 88 that the "foregoing provisions"—that is to say Articles 86 and 87 dealing with the organization of supervision—did not constitute any obstacle to the humanitarian work which the International Committee of the Red Cross might perform for the protection of prisoners of war with the consent of the belligerents concerned.

These terms of reference were wide from one point of view and restricted from another. Wide because they did not specify the tasks to be carried out by the International Committee of the Red Cross, and so did not limit them. Restricted because this vagueness, and the fact that the provisions were not mandatory in character, meant that the

[1] See above, on Article 8, page 88.
[2] See Article 79 of the 1929 Convention relative to the treatment of prisoners of war.
[3] See above, on Article 8, page 89.

International Committee of the Red Cross could not refer to any order or specific mission in order to impose the action it wished to take upon the Parties concerned.

Reflection showed, however, that that was all that was necessary. In the first place, it would at that time have been almost inconceivable to entrust official duties to an organization which, far from being an international juridical institution of an intergovernmental or supra-governmental character, was in law nothing more than a private association of a number of Swiss citizens. But the mere fact of referring to it in a Convention gave the International Committee of the Red Cross added authority and was not simply a hommage paid to its past activities.

In the second place, had specific duties been entrusted to the International Committee of the Red Cross and its activities imposed on the belligerent parties, the latter might have been tempted to shift to the Committee the responsibility for carrying out their own obligations.

Finally, the wording adopted did not bind the International Committee of the Red Cross in any way and so did not affect its independence.

It was on this fragile basis that the International Committee of the Red Cross undertook and successfully carried out a considerable amount of work during the Second World War. There is no point in describing that work here, even briefly, the information being available in the Report submitted by the International Committee of the Red Cross to the XVIIth International Conference at Stockholm in 1948.[1] A few figures from the Report will be enough:

Central Prisoners of War Agency: approximately 40,000,000 cards;

Number of visits to prisoner of war camps: 11,000;

Relief for prisoners of war transported by the International Committee of the Red Cross and distributed in the camps: 450,000 tons (equivalent to 90,000,000 parcels of 5 kilogrammes each).

And above all let us remember that this work—with all that it involved in the way of initiative, effort, and negotiations with the belligerent Powers, even including the formation of a fleet to carry the relief, through a strict blockade, from one side of the front to the other—

[1] See *Report of the International Committee of the Red Cross on its activities during the Second World War* (September 1, 1939-June 30, 1947), in three volumes, Geneva, 1948. Vol. I—General activities, 767 pages; Vol. II—The Central Agency for Prisoners of War, 344 pages; Vol. III—Relief activities, 583 pages.

was only possible, with rare exceptions, in places where the 1929 Prisoners of War Convention was in force [1]. Thus, at a time when certain prisoner of war camps were being visited daily by its delegates and received whole trainloads of relief stores, access to other camps or sections of camps was barred to the International Committee of the Red Cross, and it could not secure the entry into them of a single gramme of food, owing to the fact that those camps or sections of camps contained prisoners of war whose countries of origin were not bound by the Conventions in their relations with the Detaining Power.[2]

Although it was only in the 1929 Prisoners of War Convention that its right of initiative was recognized, the International Committee of the Red Cross tried to intervene on behalf of other categories of war victims. There again, its unceasing efforts on behalf of those detained in concentration camps met with constant refusal and even hostility,[3] although it was successful, in certain cases, in protecting thousands of human beings and, alone or in conjunction with others, was able to carry out some major projects in connection, more particularly, with the supply of foodstuffs for civilian populations.

All this is a striking illustration of the value of Article 88 of the 1929 Prisoners of War Convention, and it was natural that the idea should be taken up again in the four revised or new draft Conventions. The 1947 Conference of Government Experts having noted that the Article did not cover the activities of the International Committee of the Red Cross in the field of relief, the provision was expanded to read as follows in the draft Convention:

> The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross may undertake for the protection of wounded and sick, medical personnel and chaplains, and *for their relief*, subject to the consent of the Parties to the conflict concerned. [4]

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[1] See *Report of the International Committee of the Red Cross on its activities during the Second World War* (September 1, 1939-June 30, 1947), Geneva, 1948, Vol. I, Part III, Chapters XI and XII.

[2] See *op. cit.*, especially Vol. I, Part III, Chapters XI and XII. See also *Inter Arma Caritas*: The Work of the International Committee of the Red Cross during the Second World War, Geneva, 1947.

[3] See *Documents sur l'activité du Comité international de la Croix-Rouge en faveur des civils détenus dans les camps de concentration en Allemagne (1939-1945)*. See also *Inter Arma Caritas*, Geneva, 1947, Chapter VIII.

[4] The description of the persons protected was adapted to suit each Convention.

At the Diplomatic Conference the discussion on this provision was very short.[1] Nobody contested the principle involved. The draft was, on the contrary, extended to include a reference to "any other impartial humanitarian organization" after the words "the International Committee of the Red Cross". This was for fear that a reference to the International Committee alone might close the door to other organizations capable of contributing to the protection of war victims. There was ample justification for such a fear, and the Article, with the above addition, was accordingly adopted in Plenary Assembly without discussion or opposition.

COMMENTS ON THE ARTICLE

As we have seen above[2], in the 1929 Prisoner of War Convention the right of initiative of the International Committee of the Red Cross was only reserved in connection with certain specific activities—those referred to in Articles 79 (Central Prisoners of War Agency), 86 and 87 (organization of supervision). Its insertion in Article 9 of the new Conventions, among the general Articles, as well as the wording adopted, give it much greater scope. They mean that *none* of the provisions of the Convention exclude humanitarian participation on the part of the International Committee of the Red Cross or another similar organization. That is of particular importance in the case of the Third and Fourth Conventions in which there is a danger that the specific Articles mentioning the International Committee may, because they are so numerous, appear restrictive. In the present Convention, apart from the Article with which we are dealing and Article 3, which in itself serves as a convention for non-international conflicts, only three Articles refer to intervention by the International Committee of the Red Cross—namely, Articles 10 (Substitutes for Protecting Powers), 11 (Conciliation Procedure), and 23 (Hospital Zones and Localities).[3]

Thus, all humanitarian activities are covered in theory, and not only those for which express provision is made. They are, however,

[1] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, pages 20-21, 29, 60, 111 and 346.

[2] See above, page 104.

[3] See below, Article 10, page 112, Article 11, page 126, and Article 23, page 206. Article 16 (and with reference to it Article 17) may also be included, since, without actually naming the International Committee of the Red Cross, it refers to the work

covered subject to certain conditions with regard to the character of the organization undertaking them, their own nature and object and, lastly, the will of the Parties to the conflict.

1. *Approved organizations*

The humanitarian activities authorized must be undertaken by the International Committee of the Red Cross or by any other *impartial humanitarian* organization. The International Committee is mentioned in two capacities—firstly on its own account, by reason of its special character and its earlier initiatives, which it is asked to renew should occasion arise, and which it is desired to facilitate; and secondly, as an example of what is meant by an "impartial humanitarian organization". It must be remembered that the International Committee of the Cross is today, as it was when it was founded, simply a private association with its headquarters at Geneva, composed solely of Swiss citizens recruited by co-optation. It is therefore neutral by definition and is independent of any Government and of any political party. Being the founder body of the Red Cross and the promoter of all the Geneva Conventions since 1864, it is by its tradition and organization better qualified than any other body to help effectively in safeguarding the principles of which the Conventions are the expression.

It is necessary for the organization to be *humanitarian*; in other words it must be concerned with the condition of man, considered solely as a human being without regard to the value which he represents as a military, political, professional or other unit. And the organization must be *impartial.* Article 9 does not require it to be international. As the delegate representing the United States at the Conference remarked, it would have been regrettable if welfare organizations of a non-international character had been prevented from carrying out their activities in time of war [1]. The International Committee of the Red Cross is not itself international so far as its membership is concerned. In its action, however, it is international, whence its name. Nor does the Convention require the organization to be neutral.

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of the Central Prisoners of War Agency which is, in principle, formed by the International Committee of the Red Cross.

[1] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, page 60.

2. *Activities authorized*

It is not enough that the organization which offers its services should be humanitarian and impartial. Its activities are subject to certain conditions.

They too must be purely humanitarian in character; that is to say they must be concerned with human beings as such, and must not be affected by any political or military consideration. The whole Convention is designed to facilitate the implementation of the principle contained in Article 12. Consequently, any subsidiary activity which helps to achieve this, and only this, is not only authorized but desirable under Article 9. Such activities may consist of:

1. Representations, interventions, suggestions and practical measures affecting the *protection* accorded under the Convention;
2. The sending of medical personnel and other staff, and also equipment;
3. The sending and distribution of relief (foodstuffs, clothing and medicaments), in short, anything which can contribute to the humane treatment and care provided for under Article 12.

It follows directly from the text that the above activities must also be *impartial.* It should be noted in this connection that impartiality does not necessarily mean mathematical equality; in actual fact it hardly ever does. If a rescuer has only ten dressings to distribute to a hundred wounded the condition of impartiality certainly does not mean that he must divide each dressing into ten equal but unusable fragments, and even less that he must not distribute them for fear of being unfair. It means that he must not allow his choice to be dictated by prejudice or by considerations regarding the person of those to whom he gives or refuses assistance. The condition of impartiality is fulfilled, when the hundred wounded persons are dispersed, if the rescuer gives the dressings to the first ten wounded he is able to reach, irrespective of who they are, or, when he can reach any of them, if he is guided in his choice by the apparent gravity of the wounds, making no distinction between friends, allies and enemies. The ideal would be to be able to base the distribution of relief entirely on the actual needs.

During the Second World War the action of the International Committee of the Red Cross itself, although impartial, was in actual fact very unequal. Should the International Committee have refrained from making its 11,000 visits to camps to which it had access, on the grounds that other camps were closed against it? Of course not. Its impartiality resided in the fact that it had offered its services equally to all the belligerent Powers. In the same way the 450,000 tons of relief sent to prisoner of war camps and distributed under the Committee's auspices were very unequally divided amongst prisoners of different nationalities. The reason in this case was that the International Committee of the Red Cross was not the donor, but merely an intermediary—the only channel by which the parcels could pass through the blockade. Should it then have refused to transmit parcels which mothers had prepared for their sons, or the generous packages which a certain National Red Cross Society was sending to compatriots captured by the enemy, simply because other mothers could not send such parcels or because those sent by other National Societies were more meagre? The answer again is no. The action of the International Committee of the Red Cross was impartial in that it was equally available as an intermediary to *all* mothers and *all* National Societies. But that did not prevent it from drawing the attention of the donor Societies, on several occasions, to inequalities which it had noted or, when whole camps in Germany were hurriedly evacuated to the interior of the country during the last days of the conflict, from obtaining authority to distribute the parcels, whatever their origin or destination, to convoys of prisoners of war who were dying of hunger and cold by the roadside.

Humanitarian activities are not necessarily concerned directly with the provision of protection or relief. They may be of any kind and carried out in any manner, even indirect, compatible with the sovereignty and security of the State concerned.

All these humanitarian activities are subject to one final condition —the consent of the Parties to the conflict concerned. This condition is obviously a harsh one. But one might almost say that it follows automatically. A belligerent Power can obviously not be obliged to tolerate in its territory activities of any kind by any foreign organization. That would be out of the question. The Powers do not have to give a reason for their refusals. The decision is entirely theirs. But being

bound to apply the Convention, they alone must bear the responsibility if they refuse help in carrying out their engagements.

The "Parties concerned" must be taken to mean those upon which the possibility of carrying out the action contemplated depends. For example, when consignments of relief are forwarded, it is necessary to obtain the consent not only of the State to which they are being sent, but also of the State from which they come, of the countries through which they pass in transit and, if they have to pass through a blockade, of the Powers which control the blockade.

3. *Scope of the Article*

It is obvious that the practical scope of Article 9 is infinitely less, in the Convention under consideration, than that of the corresponding Articles in the Third and Fourth Conventions. [1] It is mainly on behalf of prisoners of war and civilians that the International Committee of the Red Cross and other impartial humanitarian organizations can usefully propose carrying out charitable activities. As we have already said, the First Geneva Convention is mainly applied on the battlefield. A wounded or sick person who is picked up or captured by the enemy becomes a prisoner of war. He is protected as such—subject to Article 12 below—by the Third Convention, and it is principally under the provisions of the latter that international charitable action may be taken on his behalf.

Nevertheless, the Article in the present Convention has its own practical value. No one can foretell what a future war will consist of, under what conditions it will be waged and to what needs it will give rise. It is therefore right that a door should be left open to any initiative or action, however unforeseeable today, which may help effectively in protecting, caring for and aiding the wounded and sick.

Article 9 is also of considerable value from the legal point of view. For faced with the barbarous realities of war, the law remains realistic and humane. It keeps in mind the object of the Convention—namely, human life, and peace between man and man, conscious that it is only a means—and a ridiculously weak one when compared with war—of attaining this object. Therefore, when all had been settled by legal

[1] Third Convention, Article 9; Fourth Convention, Article 10.

means—ordinary and extraordinary—by assigning rights and duties, by obligations laid upon the belligerents and by the mission of the Protecting Powers, a corner was still found for something which no legal text can prescribe, but which is nevertheless one of the most effective means of combating war—namely charity, or in other words the spirit of peace.

And that is where Article 9 is, finally, of immense symbolic value. Through it the Conventions—all four Geneva Conventions of 1949—are linked to their true origin—Henry Dunant's gesture on the field of battle. Article 9 is more than a tribute paid to Henry Dunant. It is an invitation to all men of good will to perpetuate his gesture.

ARTICLE 10 — SUBSTITUTES FOR PROTECTING POWERS [1]

The High Contracting Parties may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.

When wounded and sick, or medical personnel and chaplains do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organization provided for in the first paragraph above, the Detaining Power shall request a neutral State, or such an organization, to undertake the functions performed under the present Convention by a Protecting Power designated by the Parties to a conflict.

If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.

Any neutral Power or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient

[1] Article common to all four Conventions. Çf. Second Convention, Article 10; Third Convention, Article 10; Fourth Convention, Article 11.

assurances that it is in a position to undertake the appropriate functions and to discharge them impartially.

No derogation from the preceding provisions shall be made by special agreements between Powers one of which is restricted, even temporarily, in its freedom to negotiate with the other Power or its allies by reason of military events, more particularly where the whole, or a substantial part, of the territory of the said Power is occupied.

Whenever, in the present Convention, mention is made of a Protecting Power, such mention also applies to substitute organizations in the sense of the present Article.

GENERAL

This Article supplements Article 8, and cannot be considered except in conjunction with the latter, on which see the commentary above [1].

Protecting Powers are not, we must repeat, a creation of the Geneva Conventions. They constitute an institution—or more exactly, just a practice—of international law, much older than the Conventions. The appointment of a Protecting Power is a private matter between the Power of Origin, which appoints, the Protecting Power, which is appointed, and the State of Residence, in which the functions of the Protecting Power are to be exercised. The 1949 Conventions do not come into these arrangements. All they do is to designate, in the person of the Protecting Power, the third party entitled to be entrusted, not by the Power of Origin alone, but this time by all the High Contracting Parties, with a higher mission—that of participating in the application, and supervising the observance, of the Conventions.

The exercise of the Protecting Power's functions accordingly presupposes the juridical existence and the capacity to act of the three parties to the contract. In the event of one of the parties ceasing to exist, or merely ceasing to be recognized by one of the other two, or again, in the event of its losing its capacity to act, the Protecting Power's mandate comes to an end automatically.

This occurred on numerous occasions in the Second World War. When the Protecting Power itself ceased to function, the gap could be filled by the Power of Origin appointing another neutral State to take its place. Thus, towards the end of the war Switzerland and

[1] See above, pages 86 ff.

Sweden between them were acting as Protecting Powers for practically all the belligerent States. But, when it was one of the two belligerents whose legal or actual existence, or capacity to act, ceased, millions of individuals in the hands of the enemy were left for good or evil at the mercy of the latter.

The International Committee of the Red Cross for its part could not allow its interest in the victims of war to be overridden by juridical considerations. Juridical considerations were a matter for Governments. In the eyes of the International Committee on the other hand soldiers who were sick, wounded, or prisoners of war were always suffering human beings, whether the country for which they fought was, or was not, recognized by its opponent. The urgency of the need for treatment of their sickness or their wounds did not depend on the entry into force or the lapsing of a Convention. Accordingly the International Committee set itself with varying, and generally limited, success to make its traditional humanitarian assistance available to prisoners of war whose title to protection under the 1929 Convention was contested [1]. It did more. In certain cases, where there was no Protecting Power, the Committee was able, either on its own initiative or at the request of one of the Parties, to engage in certain activities reserved to the Protecting Power [2].

The International Committee of the Red Cross took all these points into consideration when it embarked on the study of the revision of the existing Conventions and the draft of a new one. After considering various solutions and consulting the Conference of Government Experts of 1947 [3], the Committee drafted an Article, common to all four Conventions, which was approved by the Stockholm Conference and taken as the basic text of the Diplomatic Conference of 1949. It ran as follows:

The Contracting Parties may at any time agree to entrust to a body which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.

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[1] See *Report of the International Committee of the Red Cross on its activities during the Second World War* (September 1, 1939 — June 30, 1947), Vol. I, Part III, Chapter XIII, pages 515 ff.

[2] *Ibid*, Vol. I, Part III, Chapter VII, pages 353 ff.

[3] See *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* (Geneva, April 14-26, 1947), Geneva, 1947, pages 263-298.

Furthermore, if wounded and sick, or members of the medical personnel and chaplains do not benefit, or cease to benefit, by the activities of a Protecting Power or of the said body, the Party to the conflict in whose hands they may be, shall be under the obligation to make up for this lack of protection by inviting either a neutral State or an impartial humanitarian body such as the International Committee of the Red Cross, to assume in their behalf the duties devolving by virtue of the present Convention on the Protecting Powers.

Whenever the Protecting Power is named in the present Convention, such reference also designates the bodies replacing it in the sense of the present Article.

This text was the occasion of arduous, and frequently confused, discussions. To the principle there was little opposition; but the wording gave rise to numerous amendments [1].

Some felt that the second paragraph was not sufficiently precise. There should, they said, be a clearer distinction between the different cases in which a substitute was to be found for a Protecting Power. A neutral State and a humanitarian organization could not be placed on the same footing for service as substitutes. The International Committee of the Red Cross itself said that it could hardly act as a substitute for a Protecting Power in the full and true sense of the word. The independence, by which all its activities were conditioned, would not permit of its acting as the agent of a particular Power. It might be able, within the measure of its means, to take over the humanitarian duties of the Protecting Power; but there were other duties of an administrative, or even a political, character, which it could not carry out. The discussion was now tending towards the idea of making a distinction between substitutes proper of Protecting Powers and recourse, in the event of the substitute itself ceasing to function, to a humanitarian organization.

Other delegations were afraid that the substitute, being appointed by the Detaining Power, would not have the requisite independence, or would lose sight of the interests of the Power of Origin. Others again were apprehensive of an Occupying Power evading the provisions of the Article by the conclusion of a special agreement with the Government of the occupied country, where that Government was dominated, and perhaps even set up, by the occupant.

Another view, first expressed by the Conference of Government Experts in connection with the new Civilians Convention, was put forward on several occasions by the French Delegation. It was to the

[1] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B (on Article 8/9/9/9 of the Stockholm draft).

effect that, in the event of a general war in which there were no neutral States left, the provisions of the Article would remain inoperative, unless some special organization was set up in peacetime.

These various standpoints found embodiment in three main amendments or proposals, as follows:

1. An elaborate amendment of the United Kingdom, proposing to split up the second paragraph of the Stockholm draft into three separate parts, dealing with three possible ways (conceived as successive, and not alternative possibilities) of replacing the Protecting Power [1].

2. A French proposal to insert in all four Conventions the provision adopted at Stockholm for prisoners of war only. The object of the amendment was to prevent the conclusion of special agreements between the Occupying Power and the adverse Government, since the latter's liberty of action would be restricted.

3. Another French proposal for a new Article setting up a "High international Committee", consisting of 30 persons of established impartiality, to replace the Protecting Power.

The United Kingdom amendment was discussed line by line. Parts of it were adopted; others were rejected. It was then redrafted, and led ultimately to the division of the second paragraph of the Stockholm text into two distinct parts, which became paragraphs 2 and 3 of the Article in its final form. The United Kingdom amendment also led to the adoption of the new paragraph 4.

The first French proposal, which was adopted, resulted in the insertion, in all four Conventions, of paragraph 5, which was originally meant to figure only in the Third (Prisoners of War) Convention. The second French proposal was accepted by some; but others pointed out the various practical difficulties which it would involve. It was accordingly given the form of a simple recommendation, and adopted as such as Resolution 2 [2].

In the end paragraphs 1, 5 and 6 were approved unanimously in the Joint Committee, while paragraphs 2, 3 and 4, and the Article as a whole,

[1] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, pages 65-66.

[2] See below, page 431. See also *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, on Article 7A, especially pages 27, 30 and 487.

were approved only by a majority. At the plenary meeting of the Conference the Article was finally adopted by 30 votes to 8. Opposition, which was persistent and recurred at every stage of the discussion, was confirmed by reservations at the time of signature [1]. It was directed above all against paragraphs 2 and 3. Numerous delegations were unwilling to allow a Detaining—that is to say, an enemy—Power to appoint a substitute of its own choice without the agreement of the Power of Origin. It may have been due to the confused nature of the discussions, or to inevitable defects in the translation of oral discussions, but this view was founded on a misunderstanding of the purport of paragraphs 2 and 3. The opponents of the text based their contentions on the idea that if the Protecting Power chosen by the Power of Origin ceased to function, it would follow automatically that the adverse Power would alone be qualified to find it a successor [2].

It is true that, in the enumeration of the successive cases of absence of protection, the Conference omitted to state that where the Protecting Power ceased to function, it would rest with the Power of Origin to appoint a substitute. But this was an omission which it did not rest with the Conference to make good. It was not for the Conference to create or to regulate the system of Protecting Powers, which is governed by international usage. All that the Conference was called upon to do was to determine the particular duties of co-operation and supervision to be assigned to the Protecting Power and, in the event of the absence of any Protecting Power, to decide to whom, and in what manner, the duties of the latter should be transferred.

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[1] Ten delegations made reservations on this point when signing the Convention. Reservations do not take effect—if they are maintained—until after ratification of the Convention. The reservations of Czechoslovakia and Yugoslavia, both of which countries have ratified the Convention, are as follows. The wording of both is identical.

"The Government of the Czechoslovakian Republic (The Government of the Federal People's Republic of Yugoslavia) will not consider as legal a request by the Detaining Power that a neutral State or an international organization or a humanitarian organization should undertake the functions performed under the present Convention by the Protecting Powers, on behalf of the wounded and sick, or medical personnel and chaplains, unless the Government whose nationals they are has given its consent."

[2] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, especially page 351.

PARAGRAPH 1 — SPECIAL INTERNATIONAL ORGANIZATION

By the mere fact of choosing a Protecting Power, in accordance with international usage, a belligerent State appoints the latter to play the part indicated in Article 8, and to perform the duties which the part entails.

The first paragraph of Article 10 gives the High Contracting Parties the option of entrusting this high mission to a special organization.

The provision relates only to the duties envisaged by the Convention. It does not in any way affect the right of the Power of Origin to appoint an ordinary Protecting Power; nor does it affect the normal duties of a Protecting Power, such as the safeguarding of the diplomatic, commercial and financial interests of the Power of Origin *vis-à-vis* its adversary, or the protection of individuals and their property over and above the protection provided by the Conventions. All that remains a private matter between the parties concerned.

Accordingly a belligerent Power may quite well appoint simultaneously:

(a) a neutral State as ordinary Protecting Power, to perform the usual duties of a Protecting Power, other than the duties for which the Convention provides;

(b) (by agreement with the enemy) an organization as described in paragraph 1, to perform the duties for which the Convention provides.

The belligerent cannot appoint any organization he pleases. Two conditions are essential: there must be agreement between both parties as to the appointment; and the organization appointed must offer every guarantee of *impartiality* and *efficacy*.

What is meant by "impartiality" has been already shown [1]. But it is difficult to define here the conditions for "efficacy", since they will depend on the nature, extent and degree of localization of the conflict. The guarantees of efficacy are to be sought mainly in the financial and material resources which the organization has at its command and, even more perhaps, in its resources in qualified staff. Its independence in

[1] See above, page 109.

relation to the Parties to the conflict, the authority it has in the international world, enabling its representatives to deal with the Powers on a footing of equality, and finally its accumulated experience—all these are factors calculated to weigh heavily in deciding the parties to agree to its appointment. Without such agreement the special organization to which paragraph 1 relates cannot be appointed; and in the absence of such agreement the duties for which the Convention provides fall automatically to the Protecting Powers.

Paragraph 1 is applicable *at any time*. There are three conceivable contingencies in which it may be applicable :

(a) In peacetime the High Contracting Parties may conclude an *ad hoc* agreement by which the role assigned by the Convention to the Protecting Powers is to be entrusted, in the event of armed conflict, to a special organization designated by name. In such a case, as soon as a conflict breaks out between two or more of the High Contracting Parties, the organization in question will be invested with the functions arising out of Article 8. The Protecting Powers appointed by the Parties to the conflict will thereupon be *ipso facto* freed of responsibility for performing the said functions.

Such was the original idea voiced at the Conference of Government Experts in 1947. But the agreement regarding the appointment of a special organization need not necessarily be concluded between all the Powers parties to the Convention. It may be the act of some of them only, in which case the special organization will not be invested with the functions arising out of Article 8 except in regard to relations between adversaries who are parties to the agreement. For all other purposes the Protecting Powers will continue to discharge these functions.

(b) At the outset of hostilities the Parties to the conflict, in appointing their respective Protecting Powers, may agree to have recourse to a special organization for the application of the Convention. An agreement of this kind, handing over to the special organization the functions for which Article 8 provides, relieves the Protecting Powers *eo ipso* of those functions, leaving them to pursue their other activities arising out of international usage.

(c) In the course of the conflict the opposing Parties may agree for some reason—in order, for example, to relieve the Protecting Powers —to entrust to a special organization a part of the functions exercised by those Powers under the Convention.

It may be noted that in any one of these three contingencies the Parties to the conflict are free to entrust to the special organization (if it agrees) the other duties, independent of the Conventions, of the Protecting Power. It was not for the Convention to lay down rules on the point. It was a matter falling within the exclusive competence of the Parties concerned.

The Diplomatic Conference refrained from any more precise indication, even by analogy, of the organization to which the paragraph relates. The organization may be one which is specially created for the sole purposes of Article 10, or it may be an organization already existing. The latter may be either specialized or not; it may be official or private, international or national. What matters is its impartiality.

Paragraph 2 — Absence of Protecting Power

We here come to the actual appointment of the substitute for the Protecting Power. Under what conditions and at what moment does the paragraph become applicable?

The text, as we have seen, gave rise to serious opposition, and even led to reservations [1]. It was feared that a Detaining Power might appoint a substitute of its own choice, not approved by the Power of Origin who is primarily concerned, by the simple process of inducing the Protecting Power appointed by the Power of Origin to renounce its functions.

These apprehensions were unfounded. In the first place the text does not speak of "the activities of *the* Protecting Power appointed at the outset of the conflict" but of "the activities of *a* Protecting Power". We can only repeat the essential point that the Convention does not affect the process of appointment of the Protecting Power, which is governed by international usage. The disappearance, renunciation or disclaimer of the Protecting Power originally chosen by the Power of Origin does not in any way deprive the latter of its freedom to appoint another neutral State to take the place of the first, or a third to take the place of the second, or a fourth to take the place of the third, and so on. These successive appointees are not "substitutes" for the first Protecting

[1] See above, page 117.

Power. They are Protecting Powers on precisely the same footing as the first Protecting Power. So long as there is a Protecting Power of some sort, and the adversaries have not had recourse to the possibility for which paragraph 1 provides, only Article 8 is applicable. The case is the same where, the Parties to the conflict having had recourse to paragraph 1 and appointed a special organization, the organization ceases for one reason or another to function. Its disappearance does not in any way deprive them of the right to appoint, each for himself, an ordinary Protecting Power. Better still, the Protecting Powers they appoint for the discharge of the ordinary representative functions will in such case become automatically responsible under Article 8 for the duties for which the Conventions provide.

The above considerations, the actual wording of paragraph 2, and the fact that it is the Detaining Power (that is to say, the Power which would appear to be the least suitable for the purpose) which is made responsible for ensuring the protection of enemy personnel fallen into its hands, all go to show that paragraph 2 cannot, and must not, be applied until all other possibilities of arranging for their protection by means of either a Protecting Power or a special organization—both of which solutions imply the express consent of the Power of Origin—have been exhausted.

In practice such an eventuality could hardly occur, unless the Power of Origin ceased to exist. The Detaining Power could not in such a case be blamed for choosing a substitute without the consent, or in defiance of the wishes, of the Power of Origin, since the latter would not be in a position to conclude a valid agreement or, in fact, to express an opinion of any sort. Better a protector appointed by the Detaining Power itself than no protector at all. The same argument would hold good if the Power of Origin persistently refrained from appointing, or refused to appoint, a Protecting Power.

The Detaining Power has not a completely free hand in the choice of the substitute. It has to "request a neutral State, or such an organization" to take the position. It cannot therefore appoint an allied Power. The State, if it is to be a State, must be neutral. It is, of course, possible for a State to be neutral (that is to say, not to be involved in the conflict on either side) and at the same time to be bound by a treaty of friendship with the Detaining Power. But its very neutrality will leave it a certain minimum of independence in relation to the Detain-

ing Power. It was hardly possible in the Convention to go into further detail. But it is obvious that a State which, while keeping out of the conflict, has previously broken off diplomatic relations with the camp opposed to the Detaining Power will be ineligible.

The text leaves no choice as to the organization to which recourse may be had. There can only be one such organization, if there is one at all. The words "or such an organization" do not mean any organization which offers all guarantees of impartiality and efficacy. They can only refer to the organization mentioned in the previous line as being "provided for in the first paragraph above", that is to say, an organization appointed by previous agreement between the Contracting Parties, and consequently accepted in advance by the Power of Origin.

The neutral State or organization thus appointed by the Detaining Power is not really a Protecting Power. Its appointment is exceptional, and is only made in order to apply the Convention. It entitles it to perform all the duties devolving upon a Protecting Power under the Convention, but no others.

PARAGRAPH 3 — IN DEFAULT OF SUBSTITUTES

We come to the final stage where, no organization having been appointed under paragraph 1, and the Power of Origin being no longer in a position to appoint a Protecting Power, the Detaining Power, having made every effort under paragraph 2, has failed to find a neutral State. There are no longer any possible substitutes. It is then that, as a last resource, the Convention calls upon a humanitarian organization.

The Convention's request in this case is no longer to "undertake the functions performed by a Protecting Power". It speaks only of "humanitarian functions". That is logical. There is no longer any question of a real substitute, and a humanitarian organization cannot be expected to fulfil all the functions devolving on a Protecting Power under the Conventions. What the humanitarian organization is asked to do, in the chaotic conditions which would exist if there were no longer any neutral States, is to undertake those activities, at least, which bring directly and immediately to the persons protected by the Convention, the care which their condition demands. This distinction has, moreover, the advantage of showing that the humanitarian organization referred

to in paragraph 3, unlike a Protecting Power or its substitute, does not act, as it were, as an agent or official, but rather as a voluntary helper. This is of great importance—to the International Committee of the Red Cross at any rate—in that it safeguards the independence of the organization; and that is an essential condition for its humanitarian work.

The Detaining Power must request the intervention of the humanitarian organization. And should the humanitarian organization anticipate its approaches with a spontaneous offer of services, the Detaining Power must accept them.

The obligation to ask for such services is unconditional. Consequently, a Detaining Power which was justified in declining the offer of services of a particular humanitarian organization, would not thereby be relieved of its obligation, but would have to ask for the co-operation of another organization. The same obligation would be operative in the event of the first organization which it approached, or which offered its services, ceasing to function for any reason.

On the other hand, the obligation to accept offers of services is qualified by the condition "subject to the provisions of this Article"; and these provisions can only be those of the present paragraph and paragraph 4. The Detaining Power cannot therefore decline these offers of service, unless it has already applied for, and obtained, the co-operation of another qualified humanitarian organization, or unless the organization making the offer fails to furnish "sufficient assurances" as required by paragraph 4.

It is obvious that the Detaining Power is always free to request, and accept, the simultaneous services of several humanitarian organizations.

PARAGRAPH 4 — REQUISITE QUALIFICATIONS

The Protecting Power is primarily the agent of the Power of Origin, whose interests it safeguards *vis-à-vis* the adverse Power. The Convention imposes on it in this capacity humanitarian duties, which it asks the Protecting Power to perform as impartially as possible. That postulate does not deprive the Protecting Power of its primary character as representative of the Power of Origin. The substitute, on the other hand, who takes the place of the Protecting Power in the event of the

latter ceasing to function, is appointed by the enemy of the Power of Origin; and fears were expressed in the course of the discussions at the Diplomatic Conference that the Detaining Power might tend to appoint a neutral State or an organization devoted to its (the Detaining Power's) cause. Hence the desire to bring it home to the substitute that, although he was chosen by the Detaining Power, this course was an exceptional one adopted for want of a better alternative, that it did not make him the agent of the Detaining Power, and that he is charged by all the Contracting Parties with loyal co-operation in the application of the Convention in relation to the adversaries of the Detaining Power. Was this reminder indispensable? It would have no effect on a substitute of deliberate bad faith; but is there not a risk of its appearing to an honest substitute as an offensive suspicion? Our own feeling is rather that the paragraph is not so much an admonition to the substitute as a weapon placed in his hands to enable him to insist on the Detaining Power according him the means and independence necessary for the performance of his duties with the impartiality required by the Convention.

As for the "sufficient assurances" required by the paragraph, reference is made to what was said above on the subject of paragraph 1 [1]. The matter is one on which the Detaining Power will in practice be the sole judge; and, as it will be the sole judge, so it alone will bear the responsibility for all such deficiencies in the application of the Convention as are due to incapacity or lack of impartiality on the part of a substitute invited or accepted by it in the place of one better qualified.

PARAGRAPH 5 — PROHIBITED DEROGATIONS

This paragraph, which was added to the drafts of the International Committee of the Red Cross by the Stockholm Conference, but only in the case of the Third Convention, was inserted by the Diplomatic Conference in all four Conventions. Its purpose is to ensure neutral and impartial scrutiny in all circumstances, including cases where one Party to the conflict has become subject to the domination of the other. An Occupying Power, temporarily or finally victorious, will not in future be able to evade the provisions of Article 10 by establishing, by agree-

[1] See above, page 118.

ment with an enemy Government fallen under its influence, or actually set up by it, a system in which a special substitute, at its beck and call, would in actual fact place the sick and wounded and the medical personnel at its mercy, rendering any sort of supervision illusory. So long as a Detaining Power has protected persons in its charge, no plea of an arrangement with the enemy can be valid. It is bound either to continue to accept the intervention of the Protecting Power or, if there is no longer a Protecting Power, to provide a substitute in accordance with the provisions of Article 10.

Paragraph 6 explains itself and calls for no comment.

CONCLUSION

It would be idle to deny that Article 10 is not all it might be. In spite of an obvious effort to carry matters to their logical conclusion, the Article remains incomplete and confused. It could hardly be otherwise in view of the difficulty of the subject-matter and the confused nature of the situations with which it deals. Its provisions may, perhaps, admit of different interpretations. But let us not go into them here. Let us rather consider the positive achievements of the Article.

Like the two Articles which precede it, Article 10 supplements and reinforces Article 1. The Convention is to be respected *in all circumstances*. That requirement is so essential that the absolute undertaking of the Parties to the conflict is not enough. Independent, impartial and effective supervision from outside is also necessary; and, where even that is impossible, a final possibility is provided.

The one thing that matters, the one thing that counts, is the principle set forth in Article 12, the Article on which all the other provisions of the Convention depend. Such is its significance that even war, which is the *raison d'être* of the Convention, cannot prevail against it. So there may be many interpretations of Article 10; but only one true one —that interpretation, namely, which is best fitted to give practical effect to the provisions of Article 12.

ARTICLE 11 — CONCILIATION PROCEDURE [1]

In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, in particular of the authorities responsible for the wounded and sick, members of medical personnel and chaplains, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict a person belonging to a neutral Power, or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

This Article is completely new in the First Geneva Convention, although its main principles were already embodied in a slightly different form in Article 83, paragraph 3, and Article 87 of the 1929 Convention relative to the treatment of prisoners of war. In the drafts which it submitted to the XVIIth International Red Cross Conference, the International Committee of the Red Cross had already proposed the amalgamation of these two provisions into a single Article to be placed among the general provisions at the beginning of the Convention. This proposal, together with a suggestion that it should be inserted in all four Conventions, was accepted.

There was little discussion on the Article, which was adopted almost without alteration by the Diplomatic Conference. It was submitted with others to the so-called Joint Committee charged with the study of Articles common to all four Conventions. The Joint Committee referred the Article to its Special Committee, and the latter appointed a Working Party to consider all the provisions concerning the settlement

[1] Article common to all four Conventions. Cf. Second Convention, Article 11; Third Convention, Article 11; Fourth Convention, Article 12.

of disputes which might arise in the application of the Conventions. The proposal, put forward by the Working Party, to insert this Article in all four Geneva Conventions was approved in turn by the Joint Committee and the Plenary Assembly.

The alterations made were in general intended to facilitate the action and extend the competence of the Protecting Powers in this domain.

PARAGRAPH 1 — GOOD OFFICES OF THE PROTECTING POWERS

It is no longer only in cases of disagreement between the Parties to the conflict as to the application of the Convention (as intended in 1929) that the Protecting Powers are to lend their good offices, but also in all cases where they deem it advisable in the interest of protected persons. Furthermore, it is explicitly laid down that the Protecting Powers shall act in this way when there is disagreement as to the interpretation of the provisions of the Convention. This latter provision is new.

The only indication which the Convention contains as to the form which such good offices will take, is the provision made in paragraph 2 of the present Article for a possible meeting between the representatives of the Parties to the conflict. The Protecting Powers may, however, resort to other methods. They will undoubtedly in most cases try to achieve a reasonable compromise reconciling the different points of view, and will do all they can to prevent the disagreement from becoming acute.

It may happen that one and the same State is responsible for safeguarding the interests of each of two belligerents *vis-à-vis* the other, or there may be two different Protecting Powers. In the latter case they can take action either severally or jointly. It is generally preferable to have an agreement concluded beforehand between the two Protecting Powers.

During the Second World War there were several cases of disagreement between belligerents as to the application of the provisions of the 1929 Conventions. The Protecting Powers were inclined more often than not to regard themselves as agents, acting only on the instructions of the Power whose interests they safeguarded. In its new form this

paragraph invites them to take a more active line. The general tendency of the 1949 Conventions is indeed to entrust Protecting Powers with rights and duties considerably more extensive than those which would devolve upon them as mere agents, as well as a certain power of initiative. They thus become, as it were, the agents or trustees of all the Contracting Parties and act in such cases solely according to their own consciences [1]. The task of countries which agree to play the part of Protecting Powers will naturally be much heavier now than it was under the 1929 Conventions.

PARAGRAPH 2 — MEETING OF REPRESENTATIVES OF PARTIES TO THE CONFLICT

This paragraph combines provisions already found in Article 83, paragraph 3, and Article 87, paragraph 2, of the 1929 Convention relative to prisoners of war. It has first to be borne in mind that henceforward Protecting Powers have the right to act on their own initiative, and are no longer dependent, as the 1929 text might seem to imply, on the initiative of the Party to the conflict whose interests they safeguard. This idea of arranging a meeting of the representatives of the Parties to the conflict on neutral territory suitably chosen is very largely the result of experience gained during the First World War, when such meetings, which were fairly frequent, resulted in the conclusion of special agreements on the treatment of prisoners of war and other problems of a humanitarian nature [2].

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[1] This extension of their powers is a logical consequence of the general mission entrusted to them under Article 8: "The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers". See above, page 000.

[2] M^me^ Frick-Cramer, in her article *Le Comité international de la Croix-Rouge et les Conventions internationales pour les prisonniers de guerre et les civils*, gives the following list of some of the principal agreements concluded: Copenhagen Agreement, in October-November 1917 (Germany, Austria-Hungary, Rumania, Russia, Turkey and various National Red Cross Societies); Agreements between Turkey, Great Britain and France, signed at Berne on 28 December 1917 and 23 March 1918; Franco-German Agreement, signed at Berne on 15 March 1918; Franco-German Agreement, signed at Berne on 26 April 1918; Austro-Serbian Agreement, signed at Berne on 1 June 1918; Agreement between Germany and Great Britain, signed at The Hague on 14 July 1918; Convention between Austria-Hungary and Italy, signed at Berne on 21 September 1918; German-American Agreement, signed at Berne on 11 November 1918. (*Revue internationale de la Croix-Rouge* Nos. 293 and 295, of 1943).

Several of these agreements were concluded, as will be seen, under the auspices

On the other hand, during the Second World War no meeting of this kind took place, so far at least as the International Committee of the Red Cross is aware. It is true—and deplorable—that the particularly bitter nature of the struggle made such meetings very difficult if not impossible. No matter how much care is given to the drawing up of the Geneva Conventions, situations calling for an adaptation of their provisions and unforeseen circumstances requiring special treatment, are always possible. The difficulty of coming to an agreement without direct contact between the belligerents, and the delays involved by such negotiations, are well known. In connection with the application of the First Geneva Convention such meetings might be of great value. They would for instance make it possible to select routes for the repatriation of the seriously wounded and sick. They would allow of arrangements being made for the relief of medical personnel, and would help to settle many other questions. There is reason to hope that the new role assigned to the Protecting Powers will often allow the condition of war victims to be improved considerably.

The other 1929 provisions have been little changed. The Parties to the conflict are bound to give effect to the proposals made to them by the Protecting Powers with a view to a meeting. And the Protecting Powers may suggest that a neutral personage, possibly appointed by the International Committee of the Red Cross, should be present at the meeting. It is hoped that these provisions will be applied in practice, for they are certainly calculated to facilitate to a great extent the application of the Geneva Conventions, and to ensure satisfactory treatment of the persons protected by those Conventions.

It may be added that during the Diplomatic Conference one delegation was against any reference in this Article to disagreements as to the interpretation of the Convention, on the ground that its interpreta-

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of the Swiss Government, of which one of the members at the time was M. Gustave Ador, President of the ICRC. In most cases the negotiators of the two Parties did not sit together. Each delegation was in a separate room, and a neutral personage went from one room to the other transmitting the proposals made and the replies received. This procedure slowed down the work to some extent; but it enabled extremely satisfactory results to be achieved, without enemies having to sit face to face. M. Georges Cahen-Salvador, one of the French negotiators, gives a humorous description of this form of negotiation in his book *Les Prisonniers de guerre*, pages 100 ff.

Provisions concerning the treatment of medical personnel and their assignment to the care of prisoners of war figure in the agreements concluded. Several of the agreements also deal at some length with the problem of the repatriation of seriously sick or seriously wounded prisoners of war.

tion was not a matter for the Protecting Powers but solely for the Contracting Parties. Several delegations pointed out in this connection that there was no question of entrusting the interpretation of the Convention to the Protecting Powers, but only of allowing them to adjust differences arising in regard to its interpretation.

Legal settlement of disputes. — A few words may well be said here concerning a provision whose insertion in the Convention was proposed by several delegations at the opening of the discussions of the Diplomatic Conference. These delegations asserted that, owing to the evolution of international law, it was no longer possible today to draw up a Convention without providing for the legal settlement of problems arising out of its application or interpretation. The point was studied by a Working Party of the Joint Committee's Special Committee which adopted the text of an Article 41 A, to be inserted immediately after the Article relating to enquiry procedure (Article 52 of the present Convention [1]).

The new Article read as follows:

> The High Contracting Parties who have not recognized as compulsory *ipso facto* and without special agreement, in relation to any State accepting the same obligation, the jurisdiction of the International Court of Justice in the circumstances mentioned in Article 36 of the Statute of the Court, undertake to recognize the competency of the Court in all matters concerning the interpretation or application of the present Convention [2].

This Article, though immediately subjected to violent criticism, was adopted first by the Special Committee and then by the Joint Committee itself. Further discussion took place in the Plenary Assembly of the Conference, in the course of which several delegates stressed the fact that such a provision was in opposition to Article 35 of the Statute of the International Court, which makes the United Nations Security Council responsible for laying down the conditions in which the Court is open to States not parties to its statutes. They considered that it was inadvisable for Conventions completely independent of the juridical system of the United Nations, to include a provision dealing with the competence of an organ of that organization. After a lengthy discussion

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[1] See below, page 374.

[2] *Final Record of the Diplomatic Conference of Geneva, 1949*, Volume II-A, p. 230.

the Conference decided to change the proposed Article into a Resolution [2], which was adopted without opposition. It reads as follows:

> The Conference recommends that, in the case of a dispute relating to the interpretation or application of the present Conventions which cannot be settled by other means, the High Contracting Parties concerned endeavour to agree between themselves to refer such dispute to the International Court of Justice.

The Diplomatic Conference no doubt acted wisely in eschewing a blend of two distinct juridical systems. It may indeed be desirable for a Convention to constitute a whole in itself, and to contain clauses laying down the procedure for the legal settlement of disputes; but it is none the less true that the Geneva Conventions, in virtue of their purely humanitarian nature, are exceptions to that rule. It is open to any and every State, whether or not a member of the United Nations, to ratify or adhere to them. Their keynote is universality. They are above and beyond all political and juridical problems.

Nevertheless, the pressing recommendation contained in the Resolution quoted has a definite value of its own, and constitutes a powerful incentive to belligerents, in the circumstances indicated, to appeal to the Hague Court.

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[1] Resolution 1, see below, page 431.

CHAPTER II

WOUNDED AND SICK [1]

This Chapter is one of the most important in the Convention. The Convention may even be said to rest upon it, since it embodies the essential idea which was championed by the founders of the Red Cross and has dominated the whole of the Geneva Convention since 1864—the idea, namely, that the person of the soldier who has been wounded or who is sick, and for that reason is *hors de combat*, is from that moment sacred and inviolable. He must be tended with the same care, whether he be friend or foe.

Any Convention must logically begin with a certain number of definitions, the object of which is to specify and delimit the subject matter. Such is the purpose of the present Chapter, which for practical purposes should be regarded as being the first in the Convention.

In addition to the great principle of inviolability stated above, the Chapter contains a definition of the military and other persons to whom, when they are wounded or sick, the Convention is to apply; their status is also defined, and there are a number of provisions which relate to them exclusively: to the search for them on the battlefield, their evacuation, their registration by the Power by which they are received, the transmission of particulars concerning them and provisions relating to the dead. The Chapter further contains a final Article (Article 18) dealing with the role of the population in regard to the wounded and sick.

If the present Chapter is compared with the corresponding provisions of 1929, 1906 and 1864, it will be found that there has, on the whole, been no radical change. On the other hand the form has been completely

[1] For brevity the word "wounded" will sometimes be used alone. But it is intended in such cases to cover the "sick" as well. The Convention accords the same status to both.

changed, and numerous additions have been made in matters of detail. The changes are particularly striking if reference is made to the original text of 1864, in which only one Article in ten related to the wounded and sick. The majority of the new provisions could have been regarded as implicit in the earlier texts; but their incorporation in the written law is none the less an important advance. By its attitude in developing and strengthening the former text the Diplomatic Conference of 1949 has indicated, in this as in other instances, its desire to accord to war victims even greater guarantees of humane treatment than in the past.

ARTICLE 12 — PROTECTION AND CARE

Members of the armed forces and other persons mentioned in the following Article, who are wounded or sick, shall be respected and protected in all circumstances.

They shall be treated humanely and cared for by the Party to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria. Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments; they shall not wilfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.

Only urgent medical reasons will authorize priority in the order of treatment to be administered.

Women shall be treated with all consideration due to their sex.

The Party to the conflict which is compelled to abandon wounded or sick to the enemy shall, as far as military considerations permit, leave with them a part of its medical personnel and material to assist in their care.

This Article, as the commentator on the 1929 Geneva Convention [1] very properly emphasized, is the keystone of the whole Convention. The principle of the inviolability of the wounded and sick, which figured

[1] Paul DES GOUTTES, *Commentaire de la Convention de Genève du 27 juillet 1929*, Geneva, 1930, page 11.

as Article 6 in 1864, had been transferred in 1906 to its natural and logical place at the beginning of the Convention, as Article 1. In 1949, however, the necessity of commencing the four Geneva Conventions with common general provisions caused it to become Article 12. It is none the less true that the Article opens the Convention proper and dominates it throughout. From the great principle laid down in that Article flow all the other obligations imposed upon Parties to a conflict in the subsequent Chapters—namely, the obligation to respect medical units and establishments (Chapter III), the personnel entrusted with the care of the wounded (Chapter IV), buildings and material (Chapter V), medical transports (Chapter VI) and, lastly, the emblem, which is to serve as the common visible symbol of immunity (Chapter VII).

PARAGRAPH 1 — RESPECT AND PROTECTION

A. *General.* — The 1864 Convention confined itself to stating the principle in all its simplicity, but at the same time with all its force, without developing its meaning in any way: "The military wounded and sick shall be collected and cared for, to whatever nation they may belong."

At the time of the first revision in 1906 the idea of *respect* for the wounded—implicit until then—was expressly added. At the second revision, in 1929, the formula was further extended by speaking of *protection* and *humanity*.

It should be pointed out in this connection that the notion of "neutrality", a term which in the 1864 text expressed the immunity enjoyed by ambulances, medical personnel, and by implication the wounded themselves, had already been dropped by 1906. The notion in question no doubt conveyed clearly enough that a combatant ceased to be an enemy once he was wounded and therefore harmless, and also the conception of medical personnel as being outside the conflict; but it did not correspond to reality, as the term "neutrality" refers essentially to the abstention of persons who are taking no part in the conflict. In place of this unsuitable and inexact expression it was thought preferable to substitute the notion of respect and protection in all circumstances. The word "respect" (*respecter*) means, according to the Dictionary of the French Academy, "to spare, not to attack"

(*épargner, ne point attaquer*) [1], whereas "protect" (*protéger*) means "to come to someone's defence, to lend help and support" (*prendre la défense de quelqu'un, prêter secours et appui*). The introduction of these words made it unlawful for an enemy to attack, kill, illtreat or in any way harm a fallen and unarmed soldier, while it at the same time imposed upon the enemy an obligation to come to his aid and give him such care as his condition required.

The Diplomatic Conference of 1949 very rightly considered that this great principle, the corner-stone of the Convention, must not be touched. It accordingly left intact the four imperatives which had in 1929 defined the inviolability of the wounded—namely, respect, protection, humane treatment and care. It was desired, however, to make the last two of these unconditional requirements more precise in certain respects. For greater clarity, and with a view to rendering more formal the absolute command regarding respect and protection, two separate paragraphs, which will be considered below, were devoted to these principles.

B. *Extent of the obligation.* — The obligation embodied in this paragraph (paragraph 1) is general in character: it is applicable "in all circumstances". The wounded are to be respected just as much when they are with their own army or in no man's land as when they have fallen into the hands of the enemy. The obligation applies to all combatants in an army, whoever they may be, and also to non-combatants. It applies also to civilians, in regard to whom Article 18 specifically states: "The civilian population shall respect these wounded and sick, and in particular abstain from offering them violence." A clear statement to that effect was essential in view of the special character which modern warfare is liable to assume (dispersion of combatants, isolation of units, mobility of fronts, etc.) and which may lead to closer and more frequent contacts between military and civilians. It was necessary therefore, and more necessary today than in the past, that the principle of the inviolability of wounded combatants should be brought home, not only to the fighting forces, but also to the general public. That principle is one of the fine flowers of civilization, and should be implanted firmly in public morals and in the public conscience.

The necessity of not confining the benefits of the Convention to

[1] The word "respect" has even a more active connotation: it comprises such action as is necessary to ensure respect, as in the phrase "respect of the human person".

officers and soldiers alone, but of extending it to include "other persons officially attached to the armed forces", had been recognized in 1906; but no attempt was made to specify who such persons might be, as it was desired to avoid encumbering the text and above all to avoid the drawbacks to a restrictive and possibly incomplete enumeration. It was felt that the fact of officially belonging to an army could be shown sufficiently clearly by an entry in the paybook of the man concerned or by some other authentic document. This attitude continued to be maintained by the 1929 Conference.

The Diplomatic Conference of 1949, on the other hand, took a different view for reasons which will be indicated below in connection with Article 13. It decided to incorporate in the Convention itself as complete a list as possible of the persons to whom the Convention was to be applicable. It is to this list that the paragraph under consideration (paragraph 1) refers.

C. *Definition of the wounded.* — No attempt has ever been made in the Geneva Convention to define what is meant by a "wounded or sick" combatant; nor has there ever been any definition of the degree of severity of a wound or a sickness entitling the wounded or sick combatant to respect. That is as well; for any definition would necessarily be restrictive in character, and would thereby open the door to every kind of misinterpretation and abuse. The meaning of the words "wounded and sick" is a matter of common sense and good faith. They cover combatants who have fallen by reason of a wound or sickness of any kind, or who have ceased to fight and laid down their arms as a consequence of what they themselves think about their health [1]. It is the fact of falling or laying down of arms which constitutes the claim to protection. It is only the soldier who is himself seeking to kill who may be killed. The abandonment of all aggressiveness should put an end to aggression.

PARAGRAPH 2 — TREATMENT AND CARE

A. *General.* — It is not sufficient to respect the wounded. They require *care*. If a soldier, who is *hors de combat*, is respected and

[1] Cases are frequent of soldiers who have heroically continued to fight in spite of serious wounds. It goes without saying that in so doing they renounce any claim to protection under the Convention.

protected against injury of any kind, but is at the same time left to struggle alone against the effects of his wound or his sickness, he runs a great risk of succumbing. There is therefore a positive, as well as a negative, obligation: the wounded and sick must be given such medical care as their condition requires. This fundamental principle has remained unchanged since 1864.

As in the case of protection, the work of relief must be impartial: that is to say, each belligerent must treat his fallen adversaries as he would the wounded of his own army. This duty falls on every individual. Any soldier coming upon a wounded enemy must give him such care as he has at his command, and must endeavour to hand him over to a medical unit.

The 1929 Conference was further anxious to include in the Convention a rule which had until then been implicit because of its obvious character—to the effect, namely, that wounded and sick must be treated with humanity. The word "treatment" in this connection is to be taken in its most general sense, as applying to all aspects of a man's existence, and not merely in a medical sense. A surgeon "treats" a wounded man by operating on him; but he would be treating him inhumanely, if he did not give him an anaesthetic first.

The Diplomatic Conference of 1949, as we have already seen, made a point of defining and developing certain terms in the existing text. The conceptions of respect and protection were left as they were in the 1906 text; but the conceptions of humane treatment and care were considerably expanded in paragraphs 2, 3 and 4.

The 1949 Conference sought in the first place to determine what distinctions might, or might not, legitimately be made in the treatment of the wounded or sick. It went on to illustrate its meaning by a list of particularly grave offences against the lives and persons of wounded individuals. Such offences were, of course, most strictly prohibited, and constitute "grave breaches" within the meaning of Articles 49 and 50 of the Convention [1].

B. *Distinctions.* — Paragraph 2 begins by laying down that *adverse* distinctions are prohibited. By this novel provision the Conference very rightly sought to make it clear that it was not intended to exclude distinctions made in favour of enemy wounded or sick and in order to

[1] See below, page 362.

take their physical attributes into account. Women, for example, must receive special consideration; (specific provision for this is made in the Convention); and special treatment in the matter of lodging, heating and clothing is naturally indicated in the case of wounded or sick accustomed to a tropical climate.

The paragraph goes on to enumerate the adverse distinctions which are, in particular, forbidden—such, namely, as are founded on sex, race, nationality, religion, political opinions or other similar criteria. In the successive versions of the Convention down to 1929, the only distinction which might not be made between wounded or sick picked up on the battlefield, was in respect of *nationality*. But the painful experience of the Second World War clearly showed the need for further definition and development of this conception. The Preliminary Conference of National Red Cross Societies was already urging in 1946 that the criteria of race, sex, religion and political opinions should be included in addition to that of nationality. This contention was supported by the Experts Commission of 1947 and by the XVIIth International Red Cross Conference in 1948; and the Diplomatic Conference of 1949 fully concurred, and even went further, adding the words "or any other similar criteria" in order to strengthen the prohibition and make it more general. Accordingly there is nothing now which can justify a belligerent in making any adverse distinction between wounded or sick who require his attention, whether they be friend or foe. Both are on a footing of complete equality in the matter of their claims to protection, respect and care. Only grounds of medical urgency can justify priority in the order of treatment, as will be seen in the next paragraph.

C. *Prohibited attempts.* — Paragraph 2 then proceeds to enumerate derelictions of duty considered as being the gravest a belligerent can commit in regard to the wounded and sick in his power. This decision of the 1949 Conference also finds its explanation in the recollection of barbarous acts of which the last World War furnished all too many examples. It is quite clear, however, that the heinous crimes in question were already prohibited in the 1929 text, which established the principle of respect and protection in all circumstances—a principle which is general and absolute in character.

The injunction begins with an imperative prohibition ("shall be

strictly prohibited"), first in general terms, of "any attempts upon their lives, or violence to their persons", the word "persons" meaning here the moral as well as the physical person. The enumeration proper follows after the general prohibition, and is not limitative: "they shall not be murdered or exterminated, subjected to torture or to biological experiments; they shall not wilfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created".

This enumeration calls for comment.

It was intended, by prohibiting the subjection of wounded and sick to biological experiments, to put an end for all time to criminal practices of which certain prisoners have been the victims, and also to prevent wounded or sick in captivity from being used as "guinea-pigs" for medical experiments.

But the provision refers only to "biological experiments". Its effect is not to prevent the doctors in charge of wounded and sick from trying new therapeutic methods which are justified on medical grounds and are dictated solely by a desire to improve the patient's condition. Doctors must be free to resort to the new remedies which science offers, provided always that such remedies have first been satisfactorily proved to be innocuous and that they are administered for purely therapeutic purposes.

This interpretation is in complete accordance with the corresponding provisions of the three other Geneva Conventions—in particular Article 13 of the Third Convention, which is the most explicit and lays down specifically that "no prisoner of war may be subjected to... medical or scientific experiments of any kind which are not justified by the medical treatment of the prisoner concerned and carried out in his interest".

The rule which forbids the creation of conditions exposing the wounded or sick to contagion or infection is bound up with the one just discussed.

PARAGRAPH 3 — ORDER OF TREATMENT

The first effect of paragraph 3 is to strengthen the principle of the equality of treatment of the wounded, which was embodied in the preceding paragraph. It indicates the *only* reasons which can justify

priority in the order of treatment—namely reasons of medical urgency.

The paragraph also indicates an exception to the above principle, but an exception which is perfectly justified. Let us suppose that the Medical Service in some place is overwhelmed by an influx of wounded, both friends and enemies. The doctors, in such a case, will attend first to those patients for whom delay might be fatal or at any rate prejudicial, proceeding afterwards to those whose condition is not such as to necessitate immediate attention.

PARAGRAPH 4 — TREATMENT OF WOMEN

Paragraph 4 is an example of a favourable distinction which is made compulsory. Its introduction by the Diplomatic Conference of 1949 merely made good an omission in the 1929 text. At that time it was already recognized as necessary that women taking part officially in military operations should be treated with the special consideration due to their sex; and a clause to that effect was introduced in the Convention relative to the treatment of prisoners of war, but not in the Geneva Convention properly so called. It was no doubt felt that this special consideration for wounded or sick women combatants was self-evident and implied. But in view of the continually increasing participation of women in military operations, and in view also of painful experiences during the Second World War, it seemed necessary to include a special injunction on the point.

The special consideration with which women must be treated is of course in addition to the safeguards embodied in the preceding paragraphs, to the benefits of which women are entitled equally with men.

What special consideration? No doubt that consideration which is accorded in every civilized country to beings who are weaker than oneself and whose honour and modesty call for respect. Apart from this, the principle of equality of treatment as between enemies and nationals is involved. Women of the enemy's side will be allowed to enjoy the same advantages as women patients who are nationals, as well as any other favourable distinctions to which they are entitled by reason of their race, or because of the climate or food to which they are accustomed, in the same way as men of the same origin as themselves.

PARAGRAPH 5 — CONTRIBUTION TO TREATMENT

A Party to a conflict may rightly expect his wounded to be cared for by the enemy, but he must nevertheless continue to assist in their treatment, and must accordingly leave with those whom he cannot withdraw within his own lines, and must abandon to his adversary, part of his medical personnel and equipment, as far as military considerations permit. This provision, which was introduced as far back as 1906, meets a humanitarian requirement so obviously necessary that it was not affected by the recasting of 1929 and 1949, with the single exception that in 1949 the expression "belligerent" was replaced by the more general expression "the Parties to the conflict"—a change which was, incidentally, introduced throughout the four Conventions.

The problem thus arising for the military commands concerned may no doubt in certain circumstances be a very difficult one; and the commentator on the 1929 Convention very properly observed as follows: "This obligation, natural and necessary as it is, may be a heavy charge if, for example, a retreating belligerent is compelled to abandon several groups of wounded in turn, leaving medical personnel and equipment with them each time. He runs the risk in such a case of having no medical personnel or equipment left for those of his troops who are the last to fall. That cannot be helped. It is his duty to provide for present needs without keeping back the means of relieving future casualties. If as a result he has no more medical personnel or equipment for subsequent casualties, he will have to do all he can to ensure that they receive relief, even appealing, in such a case, to the charity of the inhabitants, as he is entitled to do under Article 5 [1]"

But the rule laid down in this Article is not absolute. It is qualified by the reservation "as far as military considerations permit". The 1906 Convention used the expression "military circumstances". In 1929 the term "considerations" (in French, *exigences*) was preferred as being clearer and more restrictive; and the term has been retained.

It is not indeed feasible to impose upon a military command an obligation which circumstances may render impossible of fulfilment, or to place the commander before the alternative of failing in his duty

[1] Article 18 in the 1949 Convention. See Paul DES GOUTTES, *Commentaire de la Convention de Genève du 27 juillet 1929*, Geneva, 1930, page 15.

as a leader or violating a positive engagement. As Louis Renault wrote: "It may be necessary in certain cases to correct the rigidity of a particular provision by a reminder that commanders of troops may relax such rigidity where that appears to them to be compatible with the objects of the war." [1]

If this provision cannot, therefore, be considered imperative, it represents none the less a clear moral obligation which the responsible authority cannot evade except in cases of urgent necessity. It is, moreover, as the Secretary-General of the Diplomatic Conference of 1906 pointed out, "a serious warning to belligerents to make provision in advance for medical personnel and equipment sufficient to ensure the fulfilment of their obligations." [2] Today, as then, that warning holds good.

It should, moreover, be noted that this provision is in no way bound up with the obligation, imposed upon the Parties to the conflict by paragraph 2, to care for the wounded. A belligerent can never refuse to care for enemy wounded he has picked up, on the pretext that his adversary has abandoned them without medical personnel and equipment. On the contrary, he is bound to give to them the same care as he gives the wounded of his own army. Paragraph 2 imposes an absolute obligation, to which there are no exceptions; paragraph 5 is a recommendation, but an urgent and forcible one.

ARTICLE 13 — PROTECTED PERSONS

The present Convention shall apply to the wounded and sick belonging to the following categories:

(1) *Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.*

(2) *Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a*

[1] *Actes de la Conférence de 1906*, page 246.
[2] ROETHLISBERGER, *Die neue Genfer Konvention vom 6. Juli 1906*, Berne, 1908, page 20.

Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions :

(a) *that of being commanded by a person responsible for his subordinates ;*

(b) *that of having a fixed distinctive sign recognizable at a distance ;*

(c) *that of carrying arms openly ;*

(d) *that of conducting their operations in accordance with the laws and customs of war.*

(3) *Members of regular armed forces who profess allegiance to a Government or an authority not recognized by the Detaining Power.*

(4) *Persons who accompany the armed forces without actually being members thereof, such as civil members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany.*

(5) *Members of crews, including masters, pilots and apprentices of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions in international law.*

(6) *Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.*

The purpose of this Article is to specify to what persons, on their being wounded or falling sick, the Convention applies.

A. *Search for a definition.* — From the first the Geneva Convention accorded its protection to wounded and sick members of the armed

forces. But whereas in 1864 the only mention was of "officers and soldiers" (in French, "*militaires*"), in 1906 the wording adopted was "officers and soldiers and other persons officially attached to the armed forces".

In 1906 these terms might well appear clear and adequate. Whereas it was felt necessary to protect wounded officers and soldiers, civilians were regarded as being outside the struggle and enjoying general immunity.

But the idea of belonging to an army is a conception which gave rise to serious disputes during the Second World War, particularly when it came to determining the status of certain combatants who had fallen into the enemy's hands. It is common knowledge that national groups continued to take part in hostilities, whereas the enemy refused to acknowledge their belligerent status, and their members, or "partisans" as they were often called, fighting in more or less compact units in occupied territory or outside the mother country, were often not regarded by the enemy as being regular combatants.

This was one of the chief problems with which the experts and the International Committee of the Red Cross were concerned in dealing with the revision of the Geneva Conventions. It further engaged the full attention of the Diplomatic Conference of 1949.

It was in connection with the Convention relative to the treatment of prisoners of war that the problem called for consideration, and it was in connection with it that the solution was finally found. For it was in that Convention that the problem assumed its essential significance. It was necessary to determine what categories of persons falling into an enemy's hands were to be entitled to be treated as prisoners of war. Article 4 of the Third Geneva Convention of 1949 supplied the answer to this question.

When the Diplomatic Conference set out to define the categories of persons, to whom, on their being wounded or falling sick, the First Geneva Convention was to apply, it noted that the categories in question were precisely those which were entitled, on falling into the enemy's hands, to be treated as prisoners of war. The Conference was thus logically led to refer to the contents of Article 4 of the Third Convention. There were two ways of doing this in practice. It was possible merely to refer to the Article in question, or alternatively to repeat its substance in the First Convention. The second of these solutions was the one adopted, in accordance with the general principle, to which the Confer-

ence adhered wherever possible, of endeavouring to make each of the four Geneva Conventions an independent diplomatic instrument. The course thus adopted also covered the possible case of a Power being a party to the First Convention without having ratified the Third.

B. *Value of the definition.* — In the Convention now under consideration the enumeration of the persons belonging to the armed forces has none of the importance which it has in the Third Convention. Its value in the present Convention is purely theoretical.

Article 4 of the Third Convention is constitutive in character; and the enumeration which it gives is comprehensive. If an individual not belonging to one of the categories specified is captured after committing hostile acts, he may find himself denied the right to be treated as a prisoner of war, not to mention the punishments which may be inflicted on him.

On the other hand, this enumeration has not by any means the same significance in Article 13 of the First Convention. In virtue of a humanitarian principle, universally recognized in international law, of which the Geneva Conventions are merely the practical expression, any wounded or sick person whatever, even a *franc-tireur* or a criminal, is entitled to respect and humane treatment and the care which his condition requires. Even civilians, when they are wounded or sick, have the benefit of humanitarian safeguards (as embodied in Part II of the Fourth Geneva Convention of 1949) very similar to those which the First Convention prescribes in the case of members of the armed forces; and the applicability of these safeguards is quite general. In this respect the two Conventions are entirely complementary, and cover the whole field of human suffering.

Article 13 cannot therefore in any way entitle a belligerent to refrain from respecting a wounded person, or to deny him the requisite treatment, even where he does not belong to one of the categories specified in the Article. Any wounded person, whoever he may be, must be treated by the enemy in accordance with the Geneva Convention. When a wounded person falls into the enemy's hands, the latter will have ample time to consider, at the proper time and place, what his status is, and whether he is or is not a prisoner of war.

At most, Article 13 will serve to determine under what Convention the wounded man is to be respected and cared for. Moreover, since

Article 14 of the Convention stipulates that wounded and sick who fall into enemy hands are to be prisoners of war, it was desirable that the First and Third Conventions should be in exact concordance on the point. That does not, however, in any way alter the fact that the decision to expand Article 13 was taken in order to satisfy a desire for precision and not to meet a vital need.

C. *The different categories.* — As Article 13 has its origin, and finds its real significance, in the Convention relative to the treatment of prisoners of war, the different categories which it enumerates cannot usefully be considered except in connection with the Third Convention. It will suffice to say that Article 13 of the First Convention in its recapitulation of the categories specified in Article 4 of the Third Convention has not included those referred to in the latter Article under Part B. Part B relates to persons already in enemy hands or to persons coming under the control of a neutral Power; and such persons will not be found lying wounded or sick on battlefields.

ARTICLE 14 — STATUS

Subject to the provisions of Article 12, the wounded and sick of a belligerent who fall into enemy hands shall be prisoners of war, and the provisions of international law concerning prisoners of war shall apply to them.

This Article defines the status of a person who is wounded and then captured. The wounded soldier who falls into enemy hands is at one and the same time a wounded person who needs treatment, just as if he were not an enemy, and a combatant who is made a prisoner of war. In certain quarters in 1929 it was even desired to give a soldier captured solely by reason of his being wounded a special status more favourable than that of prisoner of war. But such a distinction, quite apart from the legal objections to which it would have given rise, would have involved clamant inequalities and practical difficulties of an insuperable nature. A wound entitles the wounded man to the necessary care and treatment, but one cannot conceive of its changing the status of a member of the armed forces who is captured. That is a principle which is

admitted in international law and which was already implicit in the Regulations annexed to the Fourth Hague Convention of 1907.

A. *Law applicable.* — That is why Article 14 states that "the provisions of international law"—that is to say, customary law, as well as the principles of the Conventions relating to prisoners—are to be applicable to the wounded who fall into enemy hands. These rules may vary, and have in fact already been amplified to a considerable extent. They are laid down in the first place in Chapter II of the Regulations on the Laws and Customs of War annexed to the Hague Conventions of 1899 and 1907, but have been amplified and rendered more explicit in the 1929 Convention relative to the treatment of prisoners of war, and improved still further in the Third Geneva Convention of 1949. They are applicable *ipso facto* to wounded prisoners. It is in fact the provisions of the Third Geneva Convention of 1949 which will usually be applicable. It is true, of course, that no express reference to that Convention occurs in the Article. But that is in order to make the provision more adaptable, especially where States which are parties to the First Convention are not parties to the Third, and also in the case of the latter Convention alone being revised.

It follows from the above considerations that a wounded or sick officer or soldier, who falls into the hands of an enemy who is a party to the First and Third Geneva Conventions, will enjoy protection under both Conventions until his recovery, the First Convention taking precedence over the other where the two overlap. After recovery, his lot will be governed solely by the Third Convention, even in the event of his again being wounded or falling sick. The point is one of academic rather than practical interest, since the safeguards which the Third Convention accords to prisoners of war are equivalent to those accorded by the First Convention, particularly in the matter of hygiene and medical treatment.

The position may be put in this way. There are two stages — that of the combat and of its direct sequel, when the wounded of both sides are mingled together, and the stage of captivity, when the State in whose hands the captives are has to make provision for a lengthy period of detention. General stipulations, appropriate to a temporary situation and capable of being put into immediate operation, are applicable to the first stage. In the second stage, the provisions which are applicable

are those dealing with long-term organization, which can only take form and shape behind the lines and is bound to take time before it can become efficient. The First Convention relates primarily to the wounded and sick in armed forces *in the field*, whereas the Third Convention regulates the treatment of prisoners of war, and includes a whole series of detailed provisions relating to the circumstances of their captivity. But the fact remains that the two stages overlap to a certain extent.

B. *Preferential clauses.* — The corresponding provision in the 1929 Convention (Article 2), the first paragraph of which was identical with the present Article 14, contained a second paragraph, which left belligerents free to prescribe, for the benefit of wounded or sick prisoners, such arrangements as they might think fit over and above the existing obligations. This clause does not form part of the present Article 14, but is nevertheless still part of the Convention, having been taken over and restated at greater length in Chapter I (General Provisions), Article 6[1]. The Diplomatic Conference of 1949, in fact, alive to the necessity of having such a clause for all the different categories of persons protected by the four Conventions, gave it an identical form in each Convention and accordingly incorporated it in Chapter I.

In the 1906 Convention this clause loomed particularly large, because it was followed by examples of preferential measures which the Parties to the conflict were invited to take. It suggested, for instance, that belligerents should:

(1) deliver to each other, after an engagement, the wounded remaining on the battlefield;

(2) send back to their country, after rendering them fit to travel or after their recovery, the wounded or sick whom they do not wish to retain as prisoners of war;

(3) transfer to a neutral State, with its consent, the wounded and sick of the adverse Party for internment by the neutral State until the close of hostilities.

These examples were dropped in 1929, not because they were thought unnecessary or inopportune, but because the development of humanitarian law called for a different solution. When once, namely, it had

[1] See above, page 65.

been decided in conjunction with the revision of the 1906 Convention to draft a separate Convention on the treatment of prisoners of war, it could be confidently left to the latter Convention to deal with a matter relating primarily to the lot of wounded prisoners.

The new Convention dealt at length, as the subject merited, with the repatriation of seriously wounded or seriously sick persons and their accommodation in neutral countries, giving to these arrangements an executory force which they had previously lacked. The provisions in question were still further developed in 1949 (Articles 109-117 of the Third Geneva Convention).

The first of the specific preferential measures suggested to belligerents in the 1906 Convention, namely the immediate exchange of wounded left on the battlefield, was dropped in 1929; but the idea was taken up again in 1949 and embodied in Article 15, paragraph 2 [1].

C. *Reservation with regard to Article 12.* — The 1929 text began with the words: "Except as regards the treatment to be provided for them in virtue of the preceding Article". This reservation has been replaced by the words: "Subject to the provisions of Article 12". The sense is similar; but the new wording is more general in character, and constitutes a reservation, not only with regard to the medical treatment which is to be provided prior to any other measure consequent upon the capture of the wounded person, but also with regard to the special protection to which all physically injured persons are entitled under Article 12 as a whole. This provision ensures that the First Convention shall take priority over the Third. The latter is to be applicable to the wounded and sick who are prisoners, only when all relevant obligations under the First Convention have been fulfilled. The reservation may thus be taken to refer, not only to Article 12, but also to the first paragraph of Article 15, which provides that the wounded and sick shall at all times, and particularly after an engagement, be searched for and collected, protected against pillage and ill-treatment, and given the requisite initial treatment. All these obligations must obviously be fulfilled before the provisions of the Third Convention become operative.

[1] See below, page 150.

ARTICLE 15 — SEARCH FOR CASUALTIES. EVACUATION

At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.

Whenever circumstances permit, an armistice or a suspension of fire shall be arranged, or local arrangements made, to permit the removal, exchange and transport of the wounded left on the battlefield.

Likwise, local arrangements may be concluded between Parties to the conflict for the removal or exchange of wounded and sick from a besieged or encircled area, and for the passage of medical and religious personnel and equipment on their way to that area.

With Article 15 the Convention quits the terrain of general principles, and enters the new domain of practical realization. Having proclaimed the inviolability of the wounded and sick, having defined who they are and given them a legal status, the Convention now proceeds to lay down the actual steps to be taken for their benefit from the moment they fall on the battlefield.

In this connection Articles 15, 16 and 17 may be said to form a single unit, covering as they do the search for casualties and for the dead, their removal, and the recording and forwarding of information about them. The 1929 Convention had already attempted, for the sake of clarity, to draw a distinction between these different stages by dealing first with the operations taking place at the front, and then with those in the rear where it is possible to have recourse to installations of a more permanent character. The 1949 Convention maintained this distinction, and at the same time dealt more fully with the whole subject, adding a considerable number of useful details.

Article 15 applies exclusively to operations which take place at the front—namely, the search for the wounded and dead and arrangements for their protection and evacuation and the possible exchange of the wounded.

PARAGRAPH 1 — SEARCH, PROTECTION AND FIRST AID

The wounded and dead lying out on a field of battle or between the

lines must all be searched for, collected and protected, and the wounded must receive attention. That is a bounden duty, which must be fulfilled as soon as circumstances permit.

A. *Extent of the obligation.* — The 1929 Convention made the obligation applicable only "after each engagement", and imposed it only on "the occupant of the field of battle", whereas henceforward both belligerents are required to comply, or to attempt to comply, with it *at all times.* The paragraph actually begins with the words: "At all times, and particularly after an engagement...". This wording is adapted to the conditions of modern war, in which hostilities are more continuous in character than they were in the past. The effect is to increase the obligations of the belligerents in respect of the wounded. Indirectly the task of the medical personnel may be rendered more arduous, and also more dangerous.

But there are times when military operations will make the obligation to search for the fallen impracticable. There will be cases which exceed the limits of what the medical personnel can be expected to do, however great their courage and devotion. It was not possible, therefore, to make the obligation absolute. It was accordingly provided that "Parties to the conflict shall, without delay, take all possible measures..." The obligation to act without delay is strict; but the action to be taken is limited to what is possible, and it is left to the military command to judge what is possible, and to decide to what extent it can commit its medical personnel.

B. *Search.* — The search for the fallen combatants and their collection may present different aspects according to circumstances. The commonest and the most important case will be that of enemy troops retiring in the face of an attack. The occupant of the battlefield must then, without delay, make a thorough search of the captured ground so as to pick up all the victims.

The dead must also be looked for and brought back behind the lines with as much care as the wounded. It is not always certain that death has taken place. It is, moreover, essential that the dead bodies should be identified and given a decent burial. When a man has been hit with such violence that there is nothing left of him but scattered remains, these must be carefully collected.

In all these different operations it is the undoubted duty of the com-

batants themselves to give the medical personnel all possible assistance.

When picking up the wounded and dead, care should be taken to collect all their belongings (which may be scattered about); for such objects may *inter alia* be of assistance in establishing their identity [1].

C. *Protection.* — It will not always be possible to evacuate the wounded at once, and it will be necessary to protect them in the meantime against pillage and ill-treatment, and also to prevent despoiling of the dead.

The purpose of this paragraph was not to assert the principle of the respect and protection of the wounded. That had already been done by Article 12. But provision had to be made for the effective application of the principle. Pillage of the dead had also to be prohibited [2]. In other words, the wounded and the dead must be guarded and, if necessary, defended against all parties, whether military or civilian, who may seek to lay hands on them. Combatants, like medical personnel, are called upon to prevent this, going, if necessary, to the length of using their arms for the purpose [3].

The presence of hordes of pillagers, who used to be called the "hyenas of the battlefield" may not seem likely today; but the possessions of the wounded and dead are still liable to excite the greed of soldiers or unscrupulous civilians. Such hateful spoliation must be prevented.

D. *First aid.* — The general obligation to care for the wounded irrespective of their nationality arises out of Article 12 of the Convention. The reason for repeating this idea in the present paragraph of the 1949

[1] See below, pages 162 and 172.

[2] Although this Article speaks only of measures to prevent the "despoiling" (French, *dépouillement*) of the dead, it incontestably involves a prohibition of "pillage" (French, *pillage*) of the dead. The 1906 Convention made mention (Article 28) of individual acts of pillage as an example of offences which Governments ought to stop. The reason why this passage did not reappear in either 1929 or 1949 was that the 1906 wording, instancing this particular offence as an example, was replaced by a more general provision for the punishment of "any act contrary to the provisions of the... Convention" (Article 29 of the 1929 Convention and the similar Article 49 of the 1949 Convention). Most military or ordinary criminal codes already penalize pillage on the battlefield, and countries which have not yet any provisions to that effect are obliged under Article 49 of the 1949 Convention to enact the necessary legislation.

[3] Article 22, sub-paragraph (1), of the Convention authorizes medical personnel to carry arms and to make use of them in their own defence or in that of the wounded and sick in their charge. See below, page 203.

Convention was to emphasize the necessity of immediately giving first aid to the wounded on the battlefield.

Recent developments of medical science have clearly shown that first aid, if given by qualified personnel and with the least possible delay, may exercise a preponderating influence on the cure of the patient. New techniques of a quick and simple character have been perfected, which not only induce a physical condition on the part of the wounded enabling them to support evacuation, but above all increase their chances of survival and even of complete recovery to an extent which even at the beginning of the Second World War would never have been thought possible [1]. The work of medical personnel in and near the front line thus assumes added importance. It will no longer be merely a case of moving the wounded to the rear in the condition in which they are picked up. They will have first to receive medical attention — blood transfusions, injections, etc. Medical Services will consequently have to give medical orderlies working in the front, who hitherto have often been no more than stretcher-bearers, a more advanced professional training of a semi-medical character.

PARAGRAPH 2 — SUSPENSION OF FIRE

This paragraph provides that, whenever circumstances allow, an armistice or a suspension of fire is to be arranged, or local arrangements made, to permit the removal, exchange and transport of the wounded left on the battlefield.

This provision, except for the idea of the exchange of the wounded which will be considered below, is not new. It was introduced in 1929 as a result of the painful experiences of the First World War, when the wounded, left lying between the lines, were condemned to a slow and painful death. Though the provision was from the first made optional, and retained that character in 1949, it was not adopted without hesitation. The commentator on the 1929 Convention wrote: "The majority no doubt put forward the objection of military requirements and the prac-

[1] It is estimated that 7.5% of the wounded in the First World War succumbed to their injuries. That percentage was brought down to 2.3%, by certain armies at any rate, in the Second World War, and to 2% in subsequent wars. In the Crimean War (1854-1856) 60% of the wounded died.

tical impossibility of meeting humanitarian wishes in this connection. But it was thought necessary nevertheless to insert an explicit assertion of the principle at least, while at the same time limiting its force by a reservation [1]."

Experience during the Second World War showed, however, that the provision was not impracticable, as some had feared it would be. It was accordingly inserted again in 1949 with two additions — the first with regard to local arrangements, the second with regard to the exchange of wounded on the spot.

A. *Local arrangements.* — The 1929 text provided only for local armistices or suspensions of fire. But such measures may not always be possible without previous negotiation and authorization by the staff of higher formations, involving a loss of time such as to deprive them of their *raison d'être* or practicability. Accordingly the Diplomatic Conference of 1949 sought to increase the practicability of such action by making provision for local arrangements which will in future allow the commanders of small units to approach the enemy, when circumstances are favourable, in the most direct way with proposals for a short truce for the collection of wounded.

The provision is not, and cannot be, imperative. Its implementation will depend upon circumstances, of which only the combatants and their immediate superiors can form an appreciation. It is none the less an urgent recommendation of great importance, from the humanitarian point of view, for the welfare and even for the lives of the wounded, as well as for their families. General Staffs are therefore urged to keep this possibility always in mind, and to bring it to the attention of their troops at all levels in the chain of command.

B. *Exchange of wounded.* — Whereas the 1929 text only contemplated suspensions of fire as a means of permitting the removal of the wounded, the 1949 text provides for the possibility of their being exchanged. The idea is not new. The 1864 Convention (Article 6, paragraph 2) had boldly provided that "Commanders-in-Chief shall have the option of handing over immediately to the enemy outposts, enemy combatants wounded during an engagement...". The 1906 Convention, in

[1] Paul DES GOUTTES, *Commentaire de la Convention de Genève du 27 juillet 1929*, Geneva, 1930, page 28.

its turn, reproduced the clause in its Article 2, paragraph 2, but only as an illustration of an exceptional concession which belligerents were always free to stipulate as between themselves [1]. The 1929 Convention omitted the clause, the commentator even emphasizing that "the immediate exchange of wounded on the battlefield appears Utopian in the conditions of modern war [2]."

The fact, however, that such exchanges could, and did, take place, though rarely it is true, in the 1939-1945 War shows clearly the progress which the 1949 text represented from the humanitarian point of view, within the limits always of practical realities.

It may be noted that the word "exchange" is not to be taken here in a narrow sense. It does not imply that the wounded on both sides are to be exchanged in equal numbers. It merely means that the wounded who have been collected may be exchanged, without regard to their numbers on either side. This rule may even lead, in certain cases, to the unilateral cession of wounded by one belligerent to the other.

PARAGRAPH 3 — EVACUATION OF A BESIEGED AREA

A. *General.* — This paragraph provides for the further conclusion of truces to allow of the removal or exchange of wounded and sick from a besieged or encircled area, and to allow medical personnel and equipment to be sent to that area.

This provision, representing a particular case of the more general provision set forth in the preceding paragraph, appeared in the Geneva Convention for the first time in 1949. The idea was not a new one, however. At the Conference of Experts in 1937, the Bulgarian Red Cross had urged its inclusion in the Convention; and a number of International Red Cross Conferences had passed Resolutions to the same effect [3]. The International Committee of the Red Cross for its part, strengthened by the approval of the Conferences of Experts which preceded the Diplomatic Conference of 1949, thought it advisable to include the provision in the draft submitted by it to the Diplomatic Conference, pointing out at

[1] See above, page 148.

[2] Paul DES GOUTTES, *Commentaire de la Convention de Genève du 27 juillet 1929*, Geneva, 1930, page 24.

[3] See in particular Resolution IX of the Hague Conference of 1928 and Resolution XXIV of the Brussels Conference of 1930.

the same time that during the Second World War certain localities or zones held out for months or even years, and that in several cases the Committee's delegates had been able to enter such areas, bringing relief and rendering useful service. The Diplomatic Conference approved the proposal as it stood except for the addition of a reference to the exchange of the wounded, an idea which it had already incorporated in the preceding paragraph.

Paragraph 3 cannot be separated from paragraph 2, to which it is linked by the opening word "Likewise". The use of that word clearly implies that the conditions indicated in paragraph 2 (i. e. "whenever circumstances permit") also apply in paragraph 3. Moreover paragraph 3 does not repeat the whole list of possible arrangements which is given in paragraph 2 ("an armistice or a suspension of fire ... or local arrangements"). It only mentions "local arrangements"; but it is clear that the other possible arrangements are implicitly included, and are omitted only for greater conciseness.

B. *Besieged or encircled area.* — The words "besieged or encircled area" are to be understood to mean, not only an open piece of country of more or less extended area occupied by an encircled army, but also a town or fortress offering resistance on all sides to an opponent besieging it.

Can that definition be extended to cover vast territories forming whole parts of a country and containing numerous towns? The answer is "Yes", except in so far as the encircled belligerent has sufficient hospitals and other necessary equipment within the encircled area to ensure the recovery and safety of the wounded.

C. *Evacuation and exchange.* — The commander of an invested place will no doubt be willing in most cases to agree to a truce which will allow him to evacuate his wounded and sick; for he may not always be in a position to provide them with proper treatment, and they will in any case be a burden on his hands—a burden which may on occasion be heavy. But that will not always be the attitude of the besieging party, who may be tempted to add to the material difficulties of the besieged party, so as to induce him to capitulate. It is therefore to the besieger that the present urgent recommendation is primarily addressed. As sieges generally last some time, and there will usually be some propitious mo-

ment in the course of them, it will not be easy to maintain that "circumstances" do not admit of action under this paragraph.

What exactly will evacuation of the wounded mean? That will depend on the terms of the arrangement concluded. It may merely mean handing over the wounded to the besieger, in which case the commander of the besieged place will have had to agree to his own nationals, whom he hands over, becoming prisoners of war, while the enemy wounded become free.

But evacuation may also mean returning nationals to a place where they will again meet their own troops, from whom they were cut off by the siege. They will in such a case pass through the enemy lines, which the enemy will have agreed to open to let them through. An evacuation of this kind may be combined with the handing over of such of the besieger's wounded as the besieged have in their hands.

This is, no doubt, the contingency which the Convention envisages when it speaks of "exchange". It is inconceivable that the besieging party should send back wounded they have captured to the besieged place, since the whole purpose of the truce will have been to free the besieged place from the presence of wounded who can no longer be given proper medical care there.

D. *Passage of medical and religious personnel and equipment.* — The commander of a besieged place may request permission to evacuate his wounded and sick, or ask the besieger to allow free passage of medical personnel and equipment to look after them. But it is conceivable that he will make both requests. The Convention does not treat them as alternatives. As for religious personnel, the most elementary sentiments of humanity and respect for the individual demand that they should always be allowed free access when their presence is required, in order that they may bring the consolations of religion to all, whether wounded or fit.

The nationality of the medical and religious personnel in question is not specified. That is a happy omission. The besieging Power must either permit the passage between the lines of enemy personnel of the same nationality as the wounded requiring attention, or, if such personnel are not available or other circumstances make it more desirable, send members of his own personnel into the besieged place, in conformity with the general principles of the Convention. The status of the besieger's per-

sonnel, where these are sent, and the conditions of their stay, may be specified in the arrangement concluded.

It may be noted, in connection with this provision, that in authorizing the passage of medical personnel and equipment through the enemy lines the clause is merely extending the principle, laid down in Article 12, paragraph 5, that a belligerent must leave medical personnel and equipment with the wounded he is forced to abandon.

It may, lastly, be noted that the Fourth Geneva Convention of 1949 makes provision (in Article 17) for very similar measures in favour of civilian wounded or sick in encircled areas.

ARTICLE 16 — RECORDING AND FORWARDING OF INFORMATION

Parties to the conflict shall record as soon as possible, in respect of each wounded, sick or dead person of the adverse Party falling into their hands, any particulars which may assist in his identification.

These records should if possible include:

(a) *designation of the Power on which he depends;*

(b) *army, regimental, personal or serial number;*

(c) *surname;*

(d) *first name or names;*

(e) *date of birth;*

(f) *any other particulars shown on his identity card or disc;*

(g) *date and place of capture or death;*

(h) *particulars concerning wounds or illness, or cause of death.*

As soon as possible the above mentioned information shall be forwarded to the Information Bureau described in Article 122 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, which shall transmit this information to the Power on which these persons depend through the intermediary of the Protecting Power and of the Central Prisoners of War Agency.

Parties to the conflict shall prepare and forward to each other through the same bureau, certificates of death or duly authenticated lists of the

dead. They shall likewise collect and forward through the same bureau one half of a double identity disc, last wills or other documents of importance to the next of kin, money and in general all articles of an intrinsic or sentimental value, which are found on the dead. These articles, together with unidentified articles, shall be sent in sealed packets, accompanied by statements giving all particulars necessary for the identification of the deceased owners, as well as by a complete list of the contents of the parcel.

As we have seen in connection with Articles 13 and 14, military wounded and sick picked up by the enemy are prisoners of war. But before that, they are wounded and sick and, as such, entitled to special protection and respect. Their position as prisoners of war—to whom the provisions of the Third Convention as a whole apply—already exists, but is (in a manner of speaking) latent, and will not develop until the wounded are brought back behind the lines and are on the way to convalescence and cure. The gradual improvement in their condition implies a corresponding change in their claim to protection. From the moment when the wounded are picked up by the enemy's medical personnel they are under the protection of two Conventions, the First and the Third. But certain provisions of the latter Convention will remain (so to speak) in the background until such time as the individual who has been picked up is no longer a wounded man in need of special protection and care. Gradually, as he ceases to be a wounded man, the Third Convention as a whole will become applicable, until finally, when he has recovered, it is the only instrument governing his status.

It will readily be understood that there is an intermediate stage in the process, when the provisions relating to prisoners of war will have to be applied to the wounded with due regard to their special situation. It would have been possible to indicate these shades of difference in the Third Convention; but it was thought more logical to do so in the First Convention, as being the Convention dealing exclusively with the wounded and sick. The decision to do so was, moreover, in conformity with the general principle of making each Convention, as far as possible, complete in itself.

The First and Third Conventions will therefore be found to contain a certain number of provisions which differ only slightly from one another. Article 16, the provisions of which deal with the identification

of the wounded, sick and dead picked up on the battlefield and the communication to the enemy of the information obtained, is a case in point. So far as the wounded are concerned, its provisions are almost the same as the provisions relating to prisoners in unimpaired health, who have just been captured. They only differ from them in so far as allowance has to be made for the fact that it is not always possible to interrogate a wounded man, and that the authorities in whose charge he is may not always be as well equipped as those in charge of prisoners for obtaining and transmitting information. The same thing is true of the following Article (Article 17), which forms a complete whole with Article 16. Article 17 groups together the special provisions relating to the dead found on the battlefield; similar provisions, relating to prisoners who die in captivity[1], are to be found in the Third Convention.

In the 1929 Convention all these provisions were contained in a single Article (Article 4), which was very short and even rudimentary. The International Committee of the Red Cross introduced numerous improvements in the draft which it submitted to the Diplomatic Conference of 1949, and these were made more explicit and amplified still further by the Conference. As a result the Article became so long that it became necessary to split it up, forming a new Article—Article 17—which is considered below.

Whereas Article 15 deals with soldiers who have fallen wounded or sick in the actual area where fighting takes place, and defines the obligations incumbent on both friend and foe in regard to them, Article 16 begins laying down the rules concerning the duties which the Powers must assume in regard to the wounded or sick of the opposing army, whom they have picked up, once the latter have been brought back behind the lines.

The Articles of the Third Convention which correspond to Article 16 are Articles 17, 120, paragraphs 1 and 2, and 122, which refer to the recording and communication of information concerning prisoners of war as a whole. These three Articles will apply to the wounded and sick from the front at a later stage, when they are in a condition to assume the status of prisoners of war without qualification, and have been re-registered as such.

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[1] It would have been difficult to include in the Prisoners of War Convention provisions concerning combatants found dead on the battlefield, because such persons have died without becoming prisoners.

In the meantime it is sufficient that their home Power should know that they have been picked up, wounded or dead, by the enemy; and this is what Article 16 of the First Convention is there to ensure. Hence its comparatively summary character.

As, however, the provisions of the Third Convention in this connection are very much fuller and more precise than those of the First Convention, it is well to refer to them, or at any rate to bear them constantly in mind, in any case where Article 16 has to be applied. Certain of the provisions in question are of such real importance that we shall have to refer to them here.

PARAGRAPHS 1 AND 2 — RECORDING [1]

Paragraph 1 requires the Parties to the conflict to record without delay any particulars which may assist in the identification of the wounded, sick and dead of the adverse Party falling into their hands [2]. Paragraph 2 gives a list of the particulars which may be regarded as indispensable.

A. *Nature of the obligation.* — The obligation is an absolute one; and the Powers must accordingly take all the necessary preparatory steps in good time, and even before the commencement of hostilities, in order to ensure that the competent authorities are in a position to perform their duties.

In imposing this obligation the paragraph says that it must be implemented "as soon as possible". Further precision in regard to the time allowed for its fulfilment was not possible as the period required will vary according to circumstances.

Obvious humanitarian considerations explain the emphasis laid on speedy fulfilment of the obligation. The Convention requires the information to be transmitted to the home Power, and the latter must in its turn pass it on to the families of the missing. It is essential that

[1] Paragraph 1 in the French version of Article 16 corresponds to paragraphs 1 and 2 of the English version; paragraphs 2 and 3 of the French text correspond to paragraphs 3 and 4 respectively of the English text. — TRANSLATOR.

[2] The recording of particulars of the medical personnel and their subsequent transmission is covered by Article 122 of the Third (Prisoners of War) Convention. Medical personnel, as will be seen below, "receive the benefits and protection" of the Third Convention under Article 28 of the First and Article 33 of the Third Convention.

these families, whose anxiety increases hourly, should be relieved of their painful uncertainty as soon as this is physically possible. Moreover, speed in establishing the necessary records will assist the capturing Power in its task of distributing the wounded to their various places of accommodation—including the homes of local inhabitants as laid down in Article 18—while keeping a careful check on their movements.

B. *Recording.* — What exactly are we to understand by "recording"? The word means: the action of entering in a record. It is this record which will enable the detaining Power to keep a constant check on the enemy wounded, sick and dead, and which will furnish the particulars that are to be forwarded to the enemy. It may take any form desired —collections of lists, card indexes, etc.

C. *Elements of identification.* — Paragraph 2 goes on to give a list of the particulars required for the identification of the wounded, sick or dead picked up by the enemy. This is an innovation introduced by the Diplomatic Conference of 1949. It was felt that everything possible should be done to ensure that persons falling into enemy hands or missing at the front were duly identified; and it was desired that the process of identification should, if possible, be the same for all belligerents. Hence the inclusion in all four Conventions of similar detailed provisions.

The list in Article 16 is neither limitative nor imperative, as is shown by the introductory phrase: "These records should, if possible, include." It indicates the particulars which would appear most likely to assist in establishing the identity of an individual. But additions may be made to the list, and where certain of the particulars indicated are missing, others (such as photographs, body measurements, or descriptions of teeth or special features which the families of the individuals concerned may be expected to know) may be supplied in their place.

One striking point about the list is that all the particulars can be obtained without any necessity for interrogating the wounded or sick man, who may often be unable to reply to questions. This point is of particular importance in connection with the identification of the dead. Items *(a)* to *(f)* of the list appear on the identity card which all military personnel should carry on them, while items *(g)* and *(h)* are supplied by the Detaining Power.

D. *Identity card.* — Item *(f)* speaks of "any other particulars shown on his identity card or disc". The exact position with regard to identity discs will be seen later. The identity cards referred to here are those provided for in the Third Convention (in Article 17, paragraph 3, in the case of combatant members of the armed forces and in Article 4, A (4), in the case of persons who accompany the armed forces without actually being members thereof).

The text of paragraph 3 of Article 17 of the Third Convention is as follows:

> Each Party to a conflict is required to furnish the persons under its jurisdiction who are liable to become prisoners of war, with an identity card showing the owner's surname, first names, rank, army, regimental, personal or serial number or equivalent information, and date of birth. The identity card may, furthermore, bear the signature or the fingerprints, or both, of the owner, and may bear, as well, any other information the Party to the conflict may wish to add concerning persons belonging to its armed forces. As far as possible the card shall measure 6.5 × 10 cm. and shall be issued in duplicate. The identity card shall be shown by the prisoner of war upon demand, but may in no case be taken from him.

It will be noted that the particulars which are to appear on the identity card are not exactly the same as those which are required under the list in Article 16 of the First Convention. The identity card, for example, specifies the rank of the owner, for which there is no provision in Article 16. The latter, on the other hand, in the absence of the army, regimental, personal or serial number, requires a statement of the arm to which the identified party is attached (air, artillery, etc., together with a mention of his unit) [1]; the identity card in the same case only requires "equivalent information". In practice, however, these differences are unimportant. All that matters is that the particulars given on the identity card should be sufficient to identify its holder without any possibility of error, and that these particulars should be recorded and transmitted to the Power on which he depends. Consequently, one can understand the value of the identity card, and how essential it is that all those who are liable to fall on the battlefield should be provided with

[1] In the French text of the Conventions, Article 16, paragraph 1 *(b)*, of the First Convention reads "affectation ou numéro matricule", whereas Article 17, paragraph 3, of the Third Convention merely speaks of "numéro matricule". In the English text the wording is the same in both cases, viz. "army, regimental, personal or serial number". The above remark, therefore, applies only to the French text. — TRANSLATOR.

such cards, and should, moreover, always carry them on their persons. All troops should be fully informed of the importance of this.

E. *Other particulars.* — Item *(f)* refers to "other particulars" which may be shown on the identity card or disc. What other particulars? Article 17 of the Third Convention says that the identity card may, furthermore, bear the signature or the fingerprints, or both, of the owner, and may bear, as well, any other information the Parties to the conflict may wish to add. The signature and fingerprints cannot, of course, be "recorded"; but they can be photographed, and will then afford a valuable means of identification in the absence of general particulars, e. g. in cases where the card is partially destroyed. "Any other particulars" which have been added on the card should be forwarded with the general particulars, whenever the authorities of the Power which has picked up the wounded or dead have reason to believe that the general particulars may not be sufficient.

F. *Date of death.* — It has been pointed out already that the two last items in the list are to be supplied by the Detaining Power. Item *(g)* specifies the date and place of capture or death. It will not always be possible to give the exact date on which death occurred in cases where the dead man was picked up on the battlefield. But the date is nevertheless of great importance for reasons mainly connected with civil law. It must therefore be determined with all the precision which present-day medical science affords; and mention should be made of this medical examination among the particulars which are forwarded.

G. *Medical particulars.* — The last item of the list, item *(h)*, relates to particulars concerning wounds or illness, or cause of death. The information under this heading is medical, and can only be supplied by a doctor. Provision must in consequence be made for the constant presence of a doctor with the competent administrative authorities. The importance of such information, especially for the families of the deceased, is self-evident. The Parties to the conflict must therefore endeavour to supply these particulars, with as many details as possible.

H. *Uncollected wounded.* — Lastly, it may be pointed out in connection with this paragraph that the general obligation to inform the enemy

of the identity of his wounded or dead is not confined to the case of wounded or dead who have been picked up. It covers also that of wounded or dead, whose existence is known or has been detected, though there has been no possibility of picking them up. It will no doubt be impossible to communicate their identity; but the enemy should at least be informed without delay of their existence and given all the necessary particulars, so that he may search for them himself.

PARAGRAPH 3 [1] — FORWARDING OF INFORMATION

This paragraph describes what has to be done with the information that has been collected. It fills an important gap in the previous Geneva Conventions, none of which specified how or to whom the information was to be transmitted. The provision is now quite clear. The information is to be forwarded as soon as possible by the persons or authorities by whom it has been collected to the Information Bureau which the belligerent is required to open on his territory. The Information Bureau will transmit it to the Protecting Power and to the Central Prisoners of War Agency, and the Protecting Power and the Central Prisoners of War Agency will each pass it on to the Power to which the wounded, sick or dead in question belong. It thus travels by two different routes.

1. *Official Information Bureau*

The Information Bureau to which the paragraph refers is that described in Article 122 of the Third Convention.

The 1929 Convention relative to the treatment of prisoners of war had already provided (in its Article 77) that at the commencement of hostilities each of the belligerent Powers was to institute an official bureau to give information about the prisoners of war in its territory. The purpose of the provision was to centralize, not only the lists of prisoners taken, but also everything relating to them (such as movements, releases, illnesses or deaths). This was necessary both for administrative reasons and to enable particulars to be forwarded to the Power of Origin and to their families.

[1] Paragraph 2 in the French text. — TRANSLATOR.

Experience during the Second World War showed, however, that the provisions of the 1929 Convention were still inadequate and lacked precision. Accordingly, the National Red Cross Societies, many of which had been instructed by their Governments to set up these Bureaux, asked in 1946 for fuller and more detailed provisions. They also urged the extension of the activities of the Information Bureaux to all categories of persons falling as a result of hostilities into the hands of a belligerent.

The Diplomatic Conference of 1949 fell in with these views, and expanded Article 122 of the Third Convention to the requisite fullness, while it extended the activities of the Bureaux to all persons protected by the First and Second Conventions [1]. As these individuals, when they lose their special status as wounded, sick or shipwrecked persons, become ordinary prisoners of war, it was only logical to centralize all the particulars concerning them, advising one and the same office of everything happening to them, whether they came under the First, the Second or the Third Convention.

Information which the Information Bureau receives from the competent administrative authorities of the army, is to be forwarded by it to the Power of Origin of the persons to whom the information in question relates.

This communication too must be made without delay, the expression "as soon as possible" covering all stages in the transmission of the information. The communication will accordingly be made by the most rapid means available—for example, by broadcasting the information, or by televisionary transmission of the index photographs.

The transmission will, moreover, be duplicated—made, that is to say, both to the Protecting Power and to the Central Prisoners of War Agency. By Protecting Power we mean the Power which represents the interests of the country of origin of the wounded in the country in which they are detained.

In practice the transmission to the Protecting Power will usually be effected by handing over lists direct to the diplomatic staff which the Protecting Power maintains in the country concerned for the purpose of exercising its protective functions. It will then devolve on the diplo-

[1] The Fourth Convention also makes provision for an Information Bureau for interned civilians; but it need not necessarily be the same as the Information Bureau for which the present paragraph provides.

matic staff in question to arrange for the information to be transmitted as quickly as possible to its own authorities, who will, in their turn, pass it on to the enemy.

2. *Central Prisoners of War Agency*

Paragraph 3 merely refers to the Central Prisoners of War Agency, the functions of which are defined in Article 123 of the Third Convention. It may be helpful to quote the text of this Article:

> A Central Prisoners of War Information Agency shall be created in a neutral country. The International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned the organization of such an Agency.
>
> The function of the Agency shall be to collect all the information it may obtain through official or private channels respecting prisoners of war, and to transmit it as rapidly as possible to the country of origin of the prisoners of war or to the Power on which they depend. It shall receive from the Parties to the conflict all facilities for effecting such transmissions.
>
> The High Contracting Parties, and in particular those whose nationals benefit by the services of the Central Agency, are requested to give the said Agency the financial aid it may require.
>
> The foregoing provisions shall in no way be interpreted as restricting the humanitarian activities of the International Committee of the Red Cross, or of the relief societies provided for in Article 125.

It does not fall within the scope of the present study to consider here in detail the nature and operation of this Agency [1]. But a short account may be given of its origin. In 1870 the International Committee of the Red Cross was the first to take action when it opened an official Agency for wounded officers and soldiers, together with a prisoners of war information bureau. The experiment was repeated in 1912 in Belgrade. But it was only in 1914 that the establishment of an international Prisoners of War Agency enabled the Geneva Committee really to tackle, in all its complexity, the immense problem of transmitting information about prisoners, the wounded and sick, the dead, and civilian internees, and of ensuring their protection. One year after its establishment this Agency was already employing 1200 persons,

[1] The reader, if interested in the matter, may refer to the *Report of the International Committee of the Red Cross on its activities during the Second World War* (September, 1939—June 30, 1947), Vol. II (*The Central Agency for Prisoners of War*), Geneva, 1948.

and its unexpected development had given it a high degree of importance. The valuable experience which it acquired enabled the International Committee to propose to the Diplomatic Conference of 1929 that its existence and operation should receive the sanction of approval in the text of the Convention relative to the treatment of prisoners of war. The approval thus accorded (Article 79) provided the legal basis on the strength of which the International Committee of the Red Cross was able in 1939 to open in Geneva the Central Prisoners of War Agency; the far-reaching activities of this Agency are still alive in everyone's memory.

The Diplomatic Conference of 1949 was careful not to touch the valuable legal basis thus established, the only addition which it made to the existing text being an appeal to the High Contracting Parties to give the Agency the necessary financial aid.

The essential work of the Agency is obviously in connection with prisoners of war. One of its functions is to receive particulars relating to the wounded, sick and dead, and to forward such particulars, always as rapidly as possible, to the Power on which the victims depend. But its chief task is to keep their families informed, and to form a permanent link between them and their captured relatives. It asks the National Bureaux for additional information (including information of a medical character), conducts enquiries of its own, arranges for the exchanging of correspondence (where the ordinary postal channels are closed), and forwards personal assets. Whereas the activities of the Protecting Power are mainly administrative, the Agency is essentially concerned with human relations.

PARAGRAPH 4 [1] — PARTICULARS OF THE DEAD

The preceding paragraphs deal with the forwarding of particulars which mainly concern the wounded or sick. Paragraph 4, on the other hand, deals with the forwarding of everything relating exclusively to the dead picked up on the battlefield or to wounded who die after being brought back behind the lines—that is to say, certificates of death and personal assets.

The corresponding provisions of the 1929 Convention (Article 4,

[1] Paragraph 3 in the French text. — TRANSLATOR.

paragraphs 2 and 3) dealt most inadequately with this subject, merely reproducing the provisions of 1906 in simplified form. The new clauses, on the other hand, embody the practice of a number of belligerents and of the Central Prisoners of War Agency in the last war, and introduce the precision which was lacking.

1. *Death certificates*

The paragraph begins by saying that authenticated documents certifying decease are to be communicated to the adverse Party by the same channels as the information about the wounded and sick—that is to say through (1) the Information Bureau of the country concerned and (2) the Protecting Power and the Central Agency. The documents which certify decease are "certificates of death" or "duly authenticated lists of the dead". The 1929 Convention (Article 4, paragraph 2) spoke only of "certificates of death", without specifying details or laying down the manner in which they were to be made out. In actual fact belligerents adopted different systems during the Second World War; but some of them made use of a detailed standard form proposed by the International Committee of the Red Cross in the course of the conflict. The First Convention of 1949 does not, however, add any further details as to what these certificates or lists should consist of; and it is necessary, as in the case of most of the provisions of Article 16, to refer to the Third Convention (Article 120, paragraph 2) which gives all the requisite details in regard to prisoners dying in captivity. As there is no valid reason for making any distinction between enemy dead collected on the battlefield and prisoners who die in captivity, the provisions of Article 120 should apply equally to the first-named, at least in so far as circumstances on the battlefield allow. The point is not without importance, and the attention of responsible authorities should be drawn to it.

The provisions are as follows. Death certificates, preferably in the form annexed to the Third Convention (Annex IV D), or lists certified by a competent officer, are to be forwarded as rapidly as possible to the Information Bureau. They should include *(a)* the particulars found on the identity cards, viz. name, first names, rank, date of birth and army, regimental, personal or serial number, and *(b)* mention of the place, date and cause of death, the place and date of burial, and all

particulars necessary for subsequent identification of the grave. If the bodies have been cremated, the fact is to be stated, together with the reasons for such exceptional treatment, as provided in the second paragraph of Article 17. All these particulars, it will be noted, with the exception of the last two, are the same as those which the Detaining Power is asked (in Article 16, paragraph 1) to furnish without delay to the Power of Origin of the dead who have been collected. But in the present instance the particulars have a further value in that they are authenticated, which explains the fact of their repetition and makes it important.

The model certificate annexed to the Third Convention was established by the International Committee of the Red Cross on the basis of the war experience of the Central Prisoners of War Agency. It includes, in addition to the above particulars, two headings of the greatest interest to the families of the deceased—namely, a reference to the possible existence of personal effects and a few details about the last moments of the deceased. It will no doubt only be rarely that particulars can be given under the latter heading in the case of dead picked up on the battlefield. But the responsible authorities should nevertheless endeavour to give as many details as possible, in view of their sentimental and human value.

2. *Personal assets*

The paragraph goes on to give a list of articles which, if found on the dead, or near by, are in any case to be sent to the Power of Origin through the national Information Bureau. There is no question in this case of twofold transmission—both by the Protecting Power and by the Central Agency—because only one of each of the articles exists. The paragraph leaves a free choice as to the channel of communication. In practice it will be the Central Agency which is usually chosen, since it has prepared especially for this particular task. The articles referred to are the following:

(a) one half of a double identity disc;

(b) last wills or other documents of importance;

(c) money;

(d) articles of an intrinsic or sentimental value;

(e) unidentified articles.

A. *Identity disc.* — The mention of a *double* identity disc calls for some explanation. The practice of providing each member of the armed forces with an identity disc became widespread during the First World War, and now appears to be universally accepted. But the need for standardization of the disc also became apparent very soon. Accordingly, in 1928, the International Committee of the Red Cross asked the International Commission for the Standardization of Medical Equipment, a body which it had itself set up, to study the question. The Commission produced a model identity disc which could be divided in two. One half, it was proposed, was to remain round the neck of the dead person, while the other was to be detached and sent to the State of which he was a national. The model, or at all events its principle, was approved by the XIIIth International Red Cross Conference, and the 1929 Convention accepted it, stating that "one-half" of the identity disc was to be transmitted, "the other half to remain attached to the body". This wording was not clear, however, and the 1949 text speaks of one-half of a double identity disc, to show that the disc must in fact be composed of two separable parts, each bearing the same indications.

These double discs must naturally be made with the greatest care. The inscriptions on them must be indelible, and must be engraved on a substance which is as resistant as possible to the destructive action of chemical and physical agents, especially to fire and heat.

We need hardly stress the importance of such discs, or the desirability of securing their adoption by all armies and of all troops becoming familiar with them. It should, incidentally, be noted that Article 17, paragraph 1, makes provision for the possibility of soldiers being only provided with single discs. In such cases the whole disc must remain with the body, as it is essential for the latter to be identifiable at any time. But the use of a single disc will deprive the home Power of an additional, and often very valuable, means of identification.

B. *Wills. Objects of value.* — In collecting objects which form estate the sorting of documents and the preservation of those which have legal value, particularly wills, is important. Of equal importance perhaps are objects or documents having an intrinsic or sentimental value. Selection in the latter case will sometimes be more difficult; it must be borne in mind that articles which have little or no apparent value may, for sentimental reasons, be highly prized by near relatives.

C. *Unidentified articles.* — Lastly, the reference in the list to "unidentified articles" is probably more important than appears at first sight. It may happen (and did happen in the last World War) that military personnel—especially airmen—are hit with such brutal force that practically nothing is left of them except a few stray objects, usually of metal, scattered around. Such objects will mean nothing to the belligerent who picks them up; but if sent to the Power of Origin of the man who has disappeared, they may frequently make identification possible as a result of enquiries, cross-checking, etc. Sometimes even, a single object of this sort may constitute the only proof of the total disappearance of an entire aircrew.

No doubt the forwarding of such unidentified articles to the adverse Party involves a certain risk of error. The articles may have been lost by combatants who are afterwards picked up wounded or taken prisoner by the adverse Party. In such a case the Power on which they depend may be led, on receiving the articles, to suppose their owners to be dead. Care must therefore be taken not to notify their families prematurely, without having first made sure by every possible means available that the person or persons concerned are in fact missing.

3. *Forwarding*

Paragraph 4 ends by saying that the Parties to the conflict are to send all these objects forming estate in sealed packets, accompanied by a statement on the identity of the deceased owner, as well as by a complete list of the contents. Precautions must obviously be taken to ensure that parcels of such value are not lost or opened *en route*. In wartime, postal communications are uncertain and often roundabout, and the risk of damage or deterioration is correspondingly increased.

4. *Provisions of the Third Convention*

Before concluding this study of Article 16 we must consider two provisions which, though they appear only in the Third Convention, are none the less applicable to the wounded and sick. An explanation has been given above [1] of the reason why certain provisions of the First

[1] See above, page 159.

and Third Conventions resemble one another, especially in the case of Article 16 of the First Convention. At the same time it was seen that the First Convention's provisions were presented in summary form, making it necessary to refer on occasion to the Third Convention. The majority of the points in connection with which such reference is necessary (identity cards, Information Bureau, Central Prisoners of War Agency, death certificates) have been mentioned in passing when discussing the Article.

There is no reference in the text of the First Convention to the two provisions which have still to be studied. Their absence, in our opinion, leaves a gap; for they are important, and call for observance by those applying the Convention. The provisions in question relate to the conditions under which the wounded and sick may be interrogated, and to cards giving notice of capture.

A. *Interrogation of wounded.* — Article 17 of the Third Convention, paragraphs 1, 2 and 4, reads as follows:

> Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.
>
> If he wilfully infringes this rule, he may render himself liable to a restriction of the privileges accorded to his rank or status.
>
> No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

The essential purpose of these provisions is to protect prisoners against pressure which the Detaining Power may be tempted to put upon them in order to obtain information of a military character. The Second World War afforded all too many examples of such pressure. It was also necessary to prevent a Power from being able to use information concerning the families of prisoners for reprisals against such families.

It goes without saying that these safeguards are equally applicable to the wounded and sick picked up by the enemy, since they are already prisoners of war, and will acquire final status as such as soon as they have recovered. It is therefore essential that the authorities and all persons who are called upon to apply the First Convention should be fully conversant with these provisions of Article 17 of the Third Convention and that they should strictly observe them.

B. *Cards giving notice of capture.* — A prisoner of war is not a man placed, as it were, in solitary confinement. On the contrary, his existence should be reported as soon as possible to his family and to the Power on which he depends. Under the 1929 Convention relative to the treatment of prisoners of war this was to be done (1) by the prisoner himself, who was allowed to send a card to his family, and (2) by the Detaining Power which was to communicate to the enemy, through its Information Bureau, particulars of the prisoner's identity. Experience showed, however, that factors of all kinds delayed to a considerable extent the sending of these two forms of notification. Accordingly, the Diplomatic Conference of 1949 made provision in Article 70 of the Third Convention for a third form of notification, which had been instituted by the International Committee of the Red Cross during the Second World War to meet the drawbacks to the first two forms. Each prisoner is authorized to send to the Central Agency, at the same time as to his family, and not more than one week after his capture, a card to be known as "card giving notice of capture", or for short "capture card", to say what has happened to him. The card is to be the same, if possible, as the model given in the Third Convention in Annex IV B. The identity of the addressee, the limited contents of the card and its standard form should all facilitate its rapid transmission to the Central Agency, which will retransmit the information it contains to the families of the senders. The latter will thus be sure of hearing the news even if the card sent to them direct by the prisoner should be lost.

The chief advantage of these cards is that they arrive soon after the prisoner's capture, and give particulars of his health. Their importance in the case of wounded or sick picked up on the battlefield can thus be judged. Nothing could justify this category of war victims being deprived of an advantage to which they are entitled as prisoners, and which the state of their health makes all the more essential in their case.

The attention of the authorities responsible for applying the First Convention should therefore be drawn to this point; and they must see that their hospital or other accommodation centres, whether close to the front or not, are supplied with a sufficient quantity of these capture cards, which they must arrange for the enemy wounded or sick in these centres to fill in as soon as they are fit to do so.

ARTICLE 17 — PRESCRIPTIONS REGARDING THE DEAD. GRAVES REGISTRATION SERVICE

Parties to the conflict shall ensure that burial or cremation of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made. One half of the double identity disc, or the identity disc itself if it is a single disc, should remain on the body.

Bodies shall not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased. In case of cremation, the circumstances and reasons for cremation shall be stated in detail in the death certificate or on the authenticated list of the dead.

They shall further ensure that the dead are honourably interred, if possible according to the rites of the religion to which they belonged, that their graves are respected, grouped if possible according to the nationality of the deceased, properly maintained and marked so that they may always be found. For this purpose, they shall organize at the commencement of hostilities an Official Graves Registration Service, to allow subsequent exhumations and to ensure the identification of bodies, whatever the site of the graves, and the possible transportation to the home country. These provisions shall likewise apply to the ashes, which shall be kept by the Graves Registration Service until proper disposal thereof in accordance with the wishes of the home country.

As soon as circumstances permit, and at latest at the end of hostilities, these Services shall exchange, through the Information Bureau mentioned in the second paragraph of Article 16, lists showing the exact location and markings of the graves, together with particulars of the dead interred therein.

This Article deals exclusively with the dead, and is therefore bound up, as it were, with the last paragraph of the preceding Article. For after laying down rules in regard to articles left by the combatant dead, and the information found on their persons, it was still necessary to say what was to become of the bodies.

In the 1929 Convention all these provisions were concentrated in a single Article (Article 4, paragraphs 2 to 7), which although much shorter, contained everything that was essential. But the addition of numerous points of detail by the Diplomatic Conference of 1949, led

to a grouping of the material, everything relating to interment being incorporated in the new Article 17.

It may be noted that here again the provisions of the First Convention tally with those of the Third Convention, which deals (Article 120, paragraphs 3 to 6) with the burial of prisoners dying in captivity. But a mere reference to the Third Convention, which might originally have been thought of, would not have been adequate for the reasons already indicated in connection with Article 16. In the first place the present Article (Article 17) is essentially concerned with the dead picked up by the enemy on the battlefield, that is to say, with the mortal remains of combatants who have never for one moment been prisoners of war. Again, combatants who have died shortly after having been picked up wounded or sick, will have succumbed to the wounds or sickness which brought them under the protection of the First Convention, and it is therefore only natural that they should remain subject to the provisions of that Convention.

PARAGRAPH 1 — EXAMINATION OF THE BODIES

Paragraph 1 provides that the bodies, before being buried or cremated, are to be carefully examined, preferably by a doctor, with a view to making certain that death has taken place and establishing the identity of the deceased. In order that the latter's identity may be checked at any time, the identity disc, or one half of it if it is double, is to remain attached to the body.

A. *Nature of the obligation.* — It will be noted at the outset that the form of wording with which the paragraph opens: "Parties to the conflict shall ensure..." is employed here for the first time in the Convention. It is not new, however, having been used to introduce the same provision both in the Convention of 1929 and in that of 1906. What is its significance?

Clearly it must be taken to imply an obligation. According to Littré's French dictionary, the expression *veiller à* (ensure) means *prendre garde à* (see to it). The Parties to the conflict have therefore to "see to it"—that is to say, to make certain—that the prescribed task, for which they are responsible, is duly carried out. There is no justi-

fication for thinking that the task in question is optional. On the contrary, in calling upon the Parties to the conflict to ensure that it is carried out, the Convention is once more drawing attention to the importance of the task and to the necessity for accomplishing it.

B. *Individual burial.* — The paragraph begins by laying down a general rule which applies equally to burial and cremation: both must be carried out individually, as far as circumstances permit. This rule, which was proposed at the XVIIth International Red Cross Conference, is happily conceived, as the idea of a common grave conflicts with the sentiment of respect for the dead, in addition to making any subsequent exhumation impossible or very difficult. No absolute obligation is imposed, however, because circumstances, the climate or military considerations may force a Commanding Officer to resort to burial in a common grave; but this must always remain an exceptional measure.

C. *Examination of the body.* — Before being buried or cremated, the bodies must be examined twice over, even if they have to be placed in a common grave. They must in the first place be subjected, as soon as they are brought in from the front, to a thorough medical examination, in order to make sure that no trace of life remains. This examination can, of course, only be made by a medical man, who, as we have seen in connection with Article 16, paragraph 1, should also endeavour to establish the time of death as accurately as possible, unless the medical personnel who have brought in the body are able to supply the necessary information.

D. *Identification.* — The next thing to be done is to examine the papers found in the clothing of the dead man, in order to establish his identity with as much certainty as possible. In the absence of papers recourse must be had to other methods which will make it possible for the adverse Party itself to establish his identity, *e.g.* measurements and description of the body and its physical features, examination of the teeth, fingerprints, photograph, etc.

The paragraph goes on to say that, when identity has been established, "a report is to be made". This means a minute mentioning not only the identity papers found on the body and the information contained

in them, but also the possessions which the deceased carried on his person, together with a statement of the date of death or, where the date is only presumed, the reasons for this presumption. Later, the place of burial and the particulars on the grave will be added, so that the latter will always be able to be found. These initial measures will enable the death to be notified with the least possible delay to the national Information Bureau, which will in turn inform the adverse Party. They will further facilitate the subsequent work of the Graves Registration Service, one of whose principal tasks is to regroup the graves and draw up lists of them.

This first series of provisions concludes with an injunction to the effect that one half of the double identity disc, or the identity disc itself if it is a single disc, is to remain on the body. The effect of this provision, which has already been discussed in connection with the fourth paragraph of Article 16 [1], is that no member of the armed forces, living or dead, may henceforth be deprived of the identity disc issued to him. The fact that military authorities may thus be certain of being always able to find their own personnel again, unless in very exceptional circumstances, should encourage those of them who have not already done so to make universal use of the identity disc, preferably a double one.

PARAGRAPH 2 — CREMATION

Paragraph 2, which is, as it were, a parenthesis between paragraphs 1 and 3, contains a new idea, proposed for the first time at the meeting of experts in March 1947 [2] and later endorsed by all subsequent conferences of experts. The idea was to prohibit the cremation of bodies except for imperative reasons of hygiene or for reasons connected with the religion of the deceased. In case of cremation, the circumstances and reasons for it are to be stated in detail in the death certificate or on the authenticated list of the dead.

Quite apart from the possible objection to cremation on sentimental grounds, and the fear of seeing a repetition of certain criminal occurrences of the Second World War, the traces of which were effaced by cremation, the very strong opposition of certain peoples to cremation

[1] See above, page 171.

[2] This meeting, which was convened in Geneva by the International Committee of the Red Cross, was attended by representatives of the various Associations for the relief of prisoners of war.

from motives of custom or religion [1] led the Diplomatic Conference to adopt the proposal.

It should be noted that in the Third Convention, where this provision recurs (Article 120, paragraph 5) in connection with the cremation of prisoners of war who die in captivity, there is a further clause which is not to be found in the present paragraph. Mention is made of an additional motive justifying cremation—namely, a wish expressed by the prisoner for cremation for personal reasons. The reason why there is no mention in the present paragraph of this additional motive is no doubt that it was felt that the provision in the First Convention was essentially concerned with the dead picked up on the battlefield. But we must also think of the wounded and sick who may, before their death, express a desire to be cremated. Their wish, in such cases, should be gratified.

PARAGRAPH 3 — INTERMENT. GRAVES REGISTRATION SERVICE

Paragraph 3 is in the nature of a sequel to paragraph 1, the subject of its opening sentence, the word "They" [2], referring back to the opening words of paragraph 1 ("Parties to the conflict"). It first lays down that the dead are to be honourably interred—if possible, according to the rites of the religion to which they belonged—and that their graves are to be respected, and marked in some permanent fashion. It then provides for the organization of a Graves Registration Service, the duties of which it defines.

The mention of the observance of the rites of the religion to which the deceased belonged is new. It too is due to the experts of March 1947. No obligation is imposed, however, since certain religions prescribe rites which it may sometimes be difficult to observe, as, for example, the sacrifice of an animal or the use of some rare ingredient.

1. *Graves*

A. *Respect.* — The grave, once closed, must be respected. The obligation in this case is not purely a passive one. It implies active

[1] As we have already pointed out, certain religions taboo cremation, while others advocate it.

[2] The French text repeats in full the opening words of paragraph 1: "Les Parties au conflit veilleront" (The Parties to the conflict shall ensure). — TRANSLATOR.

measures of protection. The Graves Registration Service is the body primarily responsible for preventing violation of graves and sacrilege of all kinds; but the obligation rests on everybody. The principle of unqualified respect for fallen enemies holds good even after death.

B. *Grouping.* — Graves are further to be grouped, if possible according to the nationality of the deceased. This idea again is not new. The Conference of Government Experts in April 1947 was anxious to avoid the hasty roadside burials which were so frequent a feature of recent wars, and urged the grouping of graves. The Diplomatic Conference of 1949 adopted this proposal, indicating in addition the basis on which the grouping was to take place. The basis selected —that of nationality—cannot, quite obviously, be made obligatory; but it is the one which military authorities will most naturally select in grouping graves. Grouping in this manner will make it possible for countries to pay collective tribute to their dead at a later date. But the main essential is to ensure that the graves are in fact grouped in cemeteries.

C. *Marking.* — Graves must also be properly maintained, and must be marked in such a way that they can be found at any time. The question of marking calls for some comment, as the brief reference to the matter in the Convention gives no exact indication of what the marking should be. The essential point is that it should always be possible to find the grave of any combatant. A mere number or group of symbols corresponding to the particulars in the record is hardly enough for the purpose: for the record may be destroyed. Most certainly, the reference number in the record can, and should, appear on the gravestone or cross; but it is essential that the name and first names and, if possible, the date of birth should also figure in the inscription, and should be inscribed in such a way as to be as nearly indelible as possible. This is all the more essential in the case of common graves.

All the above provisions apply equally to ashes, as stated in the last sentence of the paragraph, which will be discussed below.

2. *Graves Registration Service*

Having said that the graves are to be "properly maintained and marked so that they can always be found", the paragraph goes on: "For this purpose, they" (*i.e.* the Parties to the conflict) "shall organize

at the commencement of hostilities an Official Graves Registration Service..." The purpose of this Service is thus defined from the outset. It is to maintain the graves and to enable them to be found.

A. *Activities.* — Thus, instituted as a matter of obligation from the moment hostilities break out, the Graves Registration Service (which had already been called into being by the 1929 Convention) is responsible for keeping an up-to-date list of all graves of enemy combatants, and has to mark clearly any graves which have not yet been marked or which have been marked inadequately; it must also maintain the graves and group them if possible according to the nationality of the deceased, if they are not already so grouped. It is also responsible for keeping track of any change or transfer, so as to allow of subsequent exhumation at any time and to ensure the identification of bodies, whatever the site of the graves, and their "possible transportation to the home country".[1]

B. *Return of bodies.* — This allusion to the possible return of bodies is an entirely new provision which was introduced by the Diplomatic Conference of 1949. Certain delegations at the Conference proposed making the provision imperative; others wished to omit it altogether. It is the custom in some countries to bring the dead home at the close of hostilities, while others prefer to have them buried in the actual theatre where they have fallen. To satisfy both requirements, the clause was left optional.

C. *Ashes.* — The activities of the Graves Registration Service also extend to the ashes of the dead, as provided in the last sentence of the paragraph. Ashes are to be held by the Service until the country of origin makes known its final decision in regard to them. It is obvious —and follows, incidentally, from the words "These provisions shall likewise apply..."—that ashes must also be identifiable at all times. They must therefore be collected, preferably in urns, which should be clearly marked with all the particulars for which provision is made in the case of graves. The urns are to be kept in a suitable spot, and they, too, must be protected against sacrilege of any kind.

[1] See also below, on paragraph 4.

As soon as all the particulars of the interments have been collected, they are to be communicated to the Party to which the dead persons belong. This is stipulated in the paragraph which follows.

PARAGRAPH 4 — EXCHANGE OF INFORMATION

Paragraph 4 requires the Graves Registration Services [1] of the opposing Parties to exchange as soon as possible, and at the latest at the end of hostilities, all information relating to the dead and to their interment.

The 1929 Convention only stipulated, in the final paragraph of its Article 4, that this exchange of information was to take place after the cessation of hostilities. But the Diplomatic Conference adopted the proposal of the Government Experts of 1947, who had pointed out that in the Second World War such exchanges had actually taken place during hostilities. The practice was a desirable one, and deserved to be officially recognized. There is, moreover, no reason why the communication of these particulars should take the form of an exchange in the strict sense of the word. There would not appear to be any necessity for them to be communicated simultaneously by the two parties.

A. *Graves of prisoners of war.* — The Graves Registration Service is concerned, not only with the graves of those fallen in battle, but also, under Article 120 of the Third Convention, with the graves of prisoners of war who die in captivity. In its final paragraph, the latter Article reproduces the provisions of the present Article 17, taken as a whole; but it contains in addition one important provision which does not figure in the First Convention. Should a country be occupied, the Graves Registration Service of the Occupying Power is required to take over, and carry on, all the activities of the Service of the occupied Power.

B. *Lists.* — It may further be noted that the 1929 Convention, in providing for the exchange of "the list of graves and of dead interred", was not sufficiently explicit. Lists giving only these particulars would undoubtedly have been incomplete, and would not always have made it possible to locate the exact site of a particular grave or to identify the

[1] See above, page 180.

body contained in it. Fortunately the details given in the 1949 Convention made the matter completely clear. There is to be a single list which, in addition to giving full particulars regarding the identity of the dead, must specify the exact location and markings of the grave in which each of them is buried.

C. *Organization of the Service.* — How are the Graves Registration Services to be organized in practice? As a rule their task may be entrusted to a service which already exists. The majority of States have permanent military graves services which are responsible in peacetime for the maintenance of the graves of nationals who have fallen in battle. These services are very well equipped, and are in a position on the outbreak of hostilities either to take over themselves the maintenance and listing of enemy graves or to form a special section for the purpose. In view of the specialized nature of the duties involved, the military authorities will be well advised to entrust the work to individuals or organizations familiar with it rather than set up new bodies which may not have the desired experience or competence.

ARTICLE 18 — ROLE OF THE POPULATION

The military authorities may appeal to the charity of the inhabitants voluntarily to collect and care for, under their direction, the wounded and sick, granting persons who have responded to this appeal the necessary protection and facilities. Should the adverse Party take or retake control of the area, he shall likewise grant these persons the same protection and the same facilities.

The military authorities shall permit the inhabitants and relief societies, even in invaded or occupied areas, spontaneously to collect and care for wounded or sick of whatever nationality. The civilian population shall respect these wounded and sick, and in particular abstain from offering them violence.

No one may ever be molested or convicted for having nursed the wounded or sick.

The provisions of the present Article do not relieve the occupying Power of its obligation to give both physical and moral care to the wounded and sick.

General

The principle formulated in this Article represents, with that of the inviolability of the wounded, the sick, and medical personnel, one of the great advances made by the Geneva Convention of 1864. It was directly inspired by the events at Solferino. Not only must the wounded soldier be respected; he must also be treated without delay, regardless of his nationality. The task is so urgent that, if the Army Medical Service cannot cope with it, civilians—the inhabitants of the country in which the fighting is taking place—must be asked to help. Civilians who respond to this appeal are to be protected while engaged on their work of relief, and the same protection is extended to civilians who pick up and care for a wounded person on their own initiative. The principle according to which a fallen combatant is entitled to respect and care thus becomes universal. Anyone who finds a fallen combatant can, and must, pick him up and give him help.

The principle had been proclaimed in 1864 in forcible and generous terms. "The inhabitants of the country who afford assistance to the wounded shall be respected and remain free... All wounded collected and nursed in a house shall serve as its safeguard."

In 1906, however, it was thought better to be more moderate, and to limit the quasi-neutral status thus accorded to civilian volunteers and the inviolability of their homes. It was felt that the abuse of such facilities was all too easy, and might give rise to regrettable repressive measures. Moreover, while admitting that owing to the deadly effect of modern weapons there would always be cases where the possibilities of treatment fell short of requirements, it was considered that the universal extension of the Red Cross and the development of international solidarity had done much to reduce this risk.

Accordingly the 1906 Convention (Article 5) confined itself to allowing the military authorities to appeal to the charitable zeal of the inhabitants, and to according special protection and certain immunities to inhabitants who responded to this appeal.

The 1929 Convention (Article 5) took over this provision without change, except that it substituted for the word "immunities", which it was thought might give rise to doubt or controversy, the vaguer and more general word "facilities", which left Commanding Officers a freer choice.

Experience during the Second World War demonstrated the value of the provision, but showed at the same time that it was necessary to improve it. Accordingly, the International Committee of the Red Cross and the various Conferences of Experts which helped to prepare for the revision of the Convention, tried to make the Article more complete and at the same time more specific. The origins and nature of the various changes made will be considered below in connection with the detailed discussion of each paragraph. It will suffice here to point out immediately the three principles which, in the light of experience, called for embodiment in the revised Article. These principles are as follows:

1. The protection and the facilities accorded to the inhabitants by a belligerent must also be accorded to them by the adverse Party.

2. The inhabitants must be authorized spontaneously to care for the wounded.

3. The fact of having cared for enemy wounded is never a reprehensible act.

It must be emphasized that these principles do not in actual fact extend the scope of the Convention or, in themselves, involve anything new. They are merely the embodiment in the Convention of provisions which were implicitly contained in the 1906 text and, for that reason, had not been thought worth expressing more specifically. But the release of blind political passions in wartime has shown—in this, as in other connections—how important it may be to give explicit legal form to certain principles, where there is reason to fear that their self-evident character may not always be recognized.

A further point for emphasis is the fact that this Article is the only one in the Convention which is addressed to the civilian population. The Convention is here going outside its specific domain. Does it follow that the Article would be more in place in the Fourth Convention, leaving the unity of the First Convention *pro tanto* unimpaired? Not so! The purpose of the Fourth Convention is to protect civilians against certain effects of war, whereas Article 18, when it mentions civilians, is primarily concerned with the more effective protection of wounded combatants. Its natural place is therefore in the First Convention. The same reason would seem to justify the place of the Article in Chapter II of the Convention, as the Chapter concerned with the wounded and sick, and not (as some would have preferred) in Chapter IV

which deals with medical personnel. The practical effect of the Article is undoubtedly to supplement the inadequate resources of medical services by inviting the civilian population to take over part of the work of the medical personnel. To that extent the provisions of Chapter IV cannot be treated as complete without reference to Article 18. But that is not the essential point. The essential point is that the Article lays down the principle that the care of wounded and sick persons must be universal; and that principle had to be stated in the only Chapter which is devoted in its entirety to the wounded and sick.

PARAGRAPH 1 — APPEAL TO THE INHABITANTS

Paragraph 1 reproduces the whole of the provision of the 1929 Convention (Article 5), under which the military authorities might appeal to the charitable zeal of the inhabitants to collect and care for the wounded or sick of armies in return for certain protection and facilities.

A. *Nature of the provision.* — The provision is optional. The military authorities are not bound to appeal to the inhabitants, and the inhabitants are not bound to respond to their appeal. The expression "appeal to the charitable zeal of the inhabitants" clearly shows that the appeal is only to the humanitarian sentiments of the population, and that all the military authorities can do is to endeavour to arouse such sentiments, should circumstances so require. This aspect of the matter is also indicated by the use of the word "voluntarily" (French, *bénévolement*) which qualifies the action of the inhabitants in caring for the wounded and sick. The word was added in 1949.

B. *Charitable action of the inhabitants.* — The inhabitants are accordingly invited to "collect and care for" the wounded and sick. These words, which were taken without change from the Conventions of 1906 and 1929, call for some comment.

The XVIIth International Red Cross Conference had proposed substituting the expression "give first aid" for the words "care for", on the ground that there must not be too much inducement to the military authorities to lay down their task. The Diplomatic Conference of 1949 on the other hand agreed with the view, put forward by the International

Committee of the Red Cross and shared by a number of delegations, that it was not desirable to limit the charitable action of the inhabitants, particularly as their action was purely voluntary. The words "care for" were accordingly retained, leaving the inhabitants completely free to undertake the entire treatment of a wounded or sick person until the time of his final recovery, if they wish to do so and possess the necessary means.

To "collect" a wounded man is to receive him into one's house. But it may also mean to bring him in from where he is lying wounded. The evolution of methods of warfare, far from diminishing the importance of this provision (as one might have thought it would do, at first sight) has on the contrary lent it new significance, particularly in connection with the development of aviation and the parachuting of troops. Crews of aircraft which have been shot down and wounded parachutists must be collected and cared for, where necessary, by the civilians in the neighbourhood of the place where they come down, which may be a long way behind the lines, or even across the frontier in a non-belligerent country. In the latter case, be it noted, the provisions of Article 18 will apply in the same way to the authorities and inhabitants of the country concerned, not merely because these provisions embody a universally valid principle of humanity, but also as an obligation of positive law —in particular Article 4 of the First Convention, which lays down that neutral Powers are to apply by analogy the principles of the Convention.[1]

In the nature of things it will usually be in particular cases that the military authorities will appeal to the charitable zeal of the inhabitants. But it is also quite conceivable that a national or occupying Power may issue general recommendations to this effect. It would indeed be its duty to do so, if it appeared that the conditions of the fighting were such that the medical services would be unable to cope with the situation.

C. *Control.* — The wounded and sick entrusted to the inhabitants must nevertheless remain under the *control* of the authorities. That is quite obvious in the case of nationals. But the institution of control is equally necessary in the case of enemy wounded. It is the military authorities who are responsible for their condition and medical treatment. It is they again who have to inform the Power of Origin of their identity and capture. Lastly, it is the authorities who must arrange for

[1] See above, page 61.

their protection under the Third Convention relative to the treatment of prisoners of war.

It will rest with the military authorities themselves to prescribe the nature and extent of the measures of control they consider necessary. In practice this control will mainly consist, when once the particulars in regard to identity have been collected, in ensuring that the wounded receive proper care and are treated with the respect to which they are entitled.

D. *Protection and facilities.* — The task of the inhabitants who respond to the appeal of the authorities may often be a heavy one. As it is essential that nothing should curb their charitable zeal, the Convention guarantees them "*the necessary protection and facilities*".

Article 5 of the 1929 Convention spoke of "special protection and certain facilities". The phrase was not very clear and, by leaving too much latitude to the military command in determining the nature of the protection and the facilities, opened the door to abuses. The Diplomatic Conference of 1949 introduced the necessary degree of precision, adopting a wording which had been suggested by the XVIIth International Red Cross Conference. The protection and facilities accorded will henceforth be those which are "necessary"—that is to say, those without which the task of the inhabitants would be difficult, if not impossible. The appreciation of what is "necessary" is naturally left in the first instance to the military authorities; but the inhabitant himself must be free to state his requirements and explain his position, and these must be taken into consideration as far as possible.

What will this protection and these facilities be? The form they take will depend upon circumstances and cannot, therefore, be indicated here. It may be said at once, however, that the protection accorded cannot, in principle, imply the right to display the red cross emblem, either on the houses where the wounded are sheltered or on armlets worn by the inhabitants who volunteer to look after them. The houses cannot be given the status of medical establishments, nor can the inhabitants be given the status of medical personnel, or even of auxiliary medical personnel. The situation might be different if the numbers of wounded were large and if medical personnel were present and permanently responsible for the care of the wounded. The houses could then be converted into medical establishments within the meaning of

Article 19 of the Convention, and could display the emblem, if expressly authorized to do so by the competent authority, in accordance with Article 42, paragraph 1.

There was moreover a lacuna in the 1929 Convention. It failed to stipulate that other military authorities, in particular those of the enemy belligerent, must also accord protection and facilities to inhabitants who helped to care for the wounded. There could, however, be no doubt that the spirit of the Convention required the provision to be understood in its widest possible sense. Accordingly the Conference of Experts of April 1947 recommended that the Diplomatic Conference should complete the provision by stipulating that in the event of occupation the enemy belligerent was to give these people the same protection and the same facilities. The Diplomatic Conference of 1949 approved the proposal, which forms the subject of the last sentence of the paragraph.

PARAGRAPH 2 — SPONTANEOUS EFFORTS

Paragraph 2 is the counterpart of paragraph 1 and restores a just balance. Having authorized military commands to appeal to the charitable zeal of the inhabitants, the next step was to authorize the inhabitants to exercise their charitable zeal spontaneously and, without being asked to do so, care for the wounded and sick, of whatever nationality, whom they collected. This authorization is also given to the inhabitants of invaded or occupied areas and to relief societies.

A. *Right to relief action.* — This provision appears for the first time in explicit form in the Convention; but it is not new. It does not involve any extension of activities under the Convention, nor does it create any new form of protection. The spirit of the Convention has always demanded that assistance to wounded enemies should come before military necessities. The giving of such assistance being an imperative duty, it is impossible *a fortiori* to deny those who wish to come to the help of the wounded their right to do so. That right is the natural appanage of all persons; and no one can prevent the civilian population from carrying out, in all circumstances, their humanitarian duty towards the wounded, even though these should be enemy parachutists or "partisans".

The need for explicit mention of this principle in the Convention arises from the fact that in the Second World War there were, unfortunately, inhabitants who were forbidden to help the wounded, or were punished by occupying authorities, or even by their own authorities, for having done so.

The action which has been taken to prevent such punishment being inflicted in the future is to be found in paragraph 3, and will be discussed below. The clause in the present paragraph which aims at preventing the prohibition of charitable assistance was first suggested by the Preliminary Conference of National Red Cross Societies in 1946, and was repeated in various forms by all the subsequent Conferences of Experts. The Diplomatic Conference of 1949 did not modify the principle involved.

B. *Control.* — On the other hand, the Diplomatic Conference of 1949 took a line which diverged from the proposals of the experts on the question of control. The experts had thought it desirable to reconcile charitable with military requirements, and had agreed after long discussion to propose a provision to the effect that the inhabitants could not withhold the wounded and sick they had collected from possible control by the military authorities. But the Diplomatic Conference refused to make the permission granted to the inhabitants to give spontaneous help dependent on the acceptance of military supervision, or on any kind of compulsory statement, which would be tantamount to informing against those cared for. They pointed out that the absence from the Convention of any allusion to control did not necessarily mean that control was prohibited, and that in actual fact the military authorities could undoubtedly issue regulations of this kind where such a course was indicated by circumstances. But, as the Rapporteur of the First Commission of the Diplomatic Conference remarked: "It would be extremely undesirable that this should be mentioned in a humanitarian Convention".[1]

The idea of control does indeed occur in paragraph 1. But its presence there is intelligible. It is only logical to provide that, when the military authorities themselves approach the inhabitants and ask them to look after the wounded, they should at the same time specify the degree of control they intend to retain over them. The position is different when it is the inhabitants who take the initiative in caring for the wounded

[1] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-A, page 192.

they have collected. It is not for them to come of their own accord and place the wounded under the control of the military authorities. It is for the latter to make provision for the necessary measures; and such measures are not a matter for the Convention.

C. *Relief societies.* — It will be observed that paragraph 2 mentions, not only the inhabitants, but also relief societies. This addition was proposed by the meeting of experts of June 1947, which pointed out that these charitable societies or groups should also, as such, be authorized to care for the wounded spontaneously and with impunity. Their right to do so had been contested on occasion during the Second World War; and action had even been taken retrospectively against the heads of certain Red Cross Societies. Although relief societies are not expressly mentioned in paragraph 1, it is clear nevertheless that they are covered by the generic term "inhabitants" (which, it would seem, might also have sufficed in paragraph 2), and the military authorities may in the same way appeal to their charitable zeal.

D. *Reassertion of the principle of inviolability.* — Paragraph 2 concludes with a reminder: the civilian population are to respect the wounded and sick, and in particular abstain from offering them violence.

It might appear astonishing that a principle, which has already been proclaimed once—in the most solemn terms—in Article 12, should be repeated here. But there are several reasons for the repetition. Article 12 states the principle in very general terms. It does not say by whom the wounded and sick are to be respected and protected; it is addressed to all, military and civilians alike. In actual fact, however, it is mainly with the military that Article 12 is concerned, since it is by them and for them that the Convention is to be applied. Article 18 on the other hand, as has already been pointed out, is an exception to this rule. It alone among the Articles of the Convention is addressed directly to civilians, and it may be said to constitute a summary of the Convention for their benefit. It is complete in itself, and must be able to be isolated from the other Articles of the Convention. It was therefore important that the general principle should be repeated here as a warning addressed solely to civilians. This reminder is at the same time an attempt to prevent the charitable zeal of the inhabitants from being restricted or replaced by sentiments of hostility towards the enemy wounded.

PARAGRAPH 3 — PROHIBITION OF PENALTIES

Paragraph 3 provides that "no one may ever be molested or convicted for having nursed the wounded or sick".

This clause constitutes a decisive verdict, in general and imperative terms, on painful problems which arose during the Second World War and immediately after it in many countries which had suffered materially and morally from the struggle. In these countries, assistance to the enemy wounded and sick could not always be given without hindrance. Men were killed or molested for having taken care of partisans or parachutists, while doctors and orderlies who had worked in the Medical Service or Red Cross Society of an occupying country were subjected at the close of hostilities to laws which treated any form of service in an enemy army as high treason, and were regarded purely and simply as individuals who had taken up arms against their country.

Such things are surely incompatible with the spirit of the Geneva Convention. The Geneva Convention is the embodiment of a great humanitarian idea, which goes far beyond the letter of the Convention's provisions—the idea, namely, that all wounded persons are to be cared for without distinction of nationality. It follows that medical treatment, even where given to enemies, is always legitimate, and does not constitute a hostile act. Medical personnel are placed above the conflict. This, the dominant idea behind the Convention, was at the origin of the clause allowing belligerents to appeal to the charitable zeal of the inhabitants, just as it was responsible for Article 11 of 1929, which authorizes the medical personnel of a neutral country to lend its assistance to one of the belligerents. Such assistance, though unilateral, does not constitute a violation of neutrality and, as stipulated by the Diplomatic Conference of 1949 in its corresponding new Article (Article 27), must never be regarded as interference in the conflict. The Convention lays down that belligerents must be guided by its general principles when faced with unforeseen cases (Article 45). Surely States should also be guided by those principles when faced with situations which come within the moral sphere of the Convention but are not expressly provided for in national or international positive law.

The Diplomatic Conference of 1949 decided, therefore, to incorporate in the Convention the principle which figures as paragraph 3. It

adopted for the purpose, without essential change, the text proposed by the XVIIth International Red Cross Conference on the recommendation of the International Committee.

This provision protects medical personnel in the strict sense of the word as well as civilians. National legislation will no doubt have to be brought into line with it when necessary; moreover, the judge's powers of summing up and the effect of exculpatory and attenuating circumstances, as well as amnesty measures, should enable it to be taken into account.

It is particularly desirable that the principle stated in this paragraph should be widely disseminated in accordance with the provisions of Article 47, which requires the High Contracting Parties to make the text of the Convention known. It should be made clear to everyone that, in adhering to the Geneva Convention, the States have agreed to sacrifice national interests to the dictates of conscience, and that the Convention, by the predominance which it gives to humanitarian sentiments, is a breach in the barrier of hostility between nations and their enemies.

Paragraph 4 — Maintenance of the Occupying Power's obligations

Paragraph 4 lays down that the provisions of the Article cannot be taken as relieving the Occupying Power of its obligation to give both physical and moral care to the wounded and sick.

This new provision, which emanates from the XVIIth International Red Cross Conference, may be compared with the final paragraph of Article 28 [1], which is in the same spirit.

The object of the proposal was to prevent an Occupying Power from making voluntary aid given by the inhabitants a pretext for evading its own duties, and omitting to take the necessary action to provide for the care of the wounded. The Occupying Power continues to be entirely responsible for the fate of the wounded. It rests with it to see that their treatment is in all respects in conformity with the Convention, and it is for it to furnish the means necessary to achieve this.

The provision makes it clear that assistance by the inhabitants can only be an incidental contribution resulting from special circumstances. That may seem obvious; but it was no doubt well that it should be mentioned here.

[1] See below, page 257.

CHAPTER III

MEDICAL UNITS AND ESTABLISHMENTS

Except for the introduction of a new Article dealing with hospital zones and localities (Article 23), this Chapter has not been changed in any important respect from the 1929 text.

Since the wounded, medical personnel and material are protected under special Chapters of the Convention, protection had to be provided for the buildings which shelter them and the units of which they form part.

ARTICLE 19 — PROTECTION

Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict. Should they fall into the hands of the adverse Party, their personnel shall be free to pursue their duties, as long as the capturing Power has not itself ensured the necessary care of the wounded and sick found in such establishments and units.

The responsible authorities shall ensure that the said medical establishments and units are, as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety.

PARAGRAPH 1

A. *Fixed establishments and mobile units.* — Medical units may be either mobile, or in fixed establishments.

Fixed establishments are, as their name indicates, permanent buildings used as hospitals or stores.

Mobile units are defined as establishments which can move from place to place as circumstances require following the movement of the troops. It is field hospitals and ambulances which are in particular referred to, but it is not necessary for them to be accommodated in shelters or tents; an establishment in the open, however small, is a medical unit if its object is to collect the wounded. In the same way, it is not necessary for the wounded to be actually cared for in an establishment for the latter to be regarded as a medical unit. A post where they are collected before being evacuated will be protected, even if no dressings are kept there. Finally, a mobile medical unit may have to be accommodated in a building (such as a school, hotel, etc.), which would then receive protection provided it were occupied exclusively by that unit.

It was advisable to refer expressly to the two categories of medical units, in order that the text of the Convention should be clear and complete. This distinction was also made necessary by the fact that under the 1929 Convention the material of such units, when captured, was dealt with quite differently according to whether it belonged to a fixed establishment or a mobile unit. The procedure today is very much the same in the two cases, but there is still some difference.[1]

At the Diplomatic Conference of 1949, one delegation suggested that the Article should contain a definition of the term "medical units". A medical store or a laboratory attached to a field hospital would, for example, have been mentioned as being covered by the above term, whereas a military or civilian labour unit engaged on drainage work as part of an anti-malaria campaign, would have been expressly excluded.

Definitions may often be dangerous, however, and the Conference rightly refrained from any attempt to produce one. It noted that the established term "medical units" had not in the past been the subject of divergent interpretations and that in the light of the other provisions of the Convention, it was at once sufficiently comprehensive and sufficiently specific.[2]

[1] See below, page 273.

[2] The Conference also rejected a proposal to adopt the term "formations médicales" (in place of "formations sanitaires") in the French text in order to agree more closely with the English expression "medical units". It seemed best for one and the same word—"sanitaire" ("medical" or "hospital")—to continue to apply to everything which contributed to the care of the wounded and was protected by the Convention, whether units, personnel or material. Moreover, the expression "formations médicales" might, in French, have given rise to the completely erroneous idea that the presence of a doctor with such units was necessary in order that they should be pro-

As indicated in Article 19, medical establishments and units must form part of the Medical Service[1] in order to be protected. They may only be composed of personnel and material belonging to the Medical Service and may not be intended to serve any purpose outside that Service. Such establishments and units must therefore, by analogy with Article 24 among others, be used exclusively for the treatment of the wounded and sick or for the prevention of disease.

Let us again consider the examples given above; a store or a laboratory belonging to the Medical Service is automatically entitled to protection; on the other hand, a labour unit engaged on drainage work could only be protected if its members were regularly incorporated in the Medical Service and employed exclusively and permanently on medical duties, which appears hardly likely to be the case in practice.

B. *Respect and protection.* — Under paragraph 1 fixed establishments and mobile units of the Medical Service continue to benefit by the respect and protection which was accorded to them under Article 6 of the 1929 Convention.

For the sense in which the words "respect and protect" are traditionally used, reference should be made to the comments on Article 12.[2]

To respect such units means, first of all, not to attack them or harm them in any way. It might therefore be thought unnecessary to specify, in the provision, that they may not "be attacked"; this strengthening of the general form of wording may not, however, be superfluous in view of the increasing scale of aerial bombardment.

To respect such units means, secondly, not to interfere with their work. It is not enough for the enemy simply to refrain from taking action against them; he must also allow them to continue to give treatment to the wounded in their care, as long as this is necessary.

To protect the units is to ensure that they are respected, that is to say to oblige third parties to respect them. It also means coming to their help in case of need.

Medical units and establishments are guaranteed respect and protection even when they have not yet received any wounded, or when no

tected. Each language therefore continues to use the adjective which is most suitable in that language, and to which a definite meaning has long been attached.

[1] They may, of course, belong to the National Red Cross of the country or to another society assisting the Medical Service.

[2] See above, page 134.

more wounded are with them for the moment. The corresponding Article in the 1864 Convention only laid down that they were to be respected as long as they accommodated wounded. This led to hesitation in sending empty ambulances, containing no wounded, onto the field of battle. Since 1906, the above restriction has fortunately been dropped.

At the Diplomatic Conference of 1949, one delegation proposed that a clause of the present Article should be devoted to the protection of civilian hospitals. The suggestion was not adopted, as the Conference considered that there was no reason for the First Geneva Convention to go outside its proper sphere. Civilian hospitals are fully and completely protected by Article 18 of the Fourth Geneva Convention of 1949. Besides, the First Convention lays down that establishments and units of the Army Medical Service are not to be deprived of protection when their activities extend to the care of civilian wounded and sick.[1] In the same way the Fourth Convention authorizes civilian hospitals to care for military wounded or sick.[2]

C. *In case of capture.* — A new second sentence has been added to the first paragraph. It lays down that fixed establishments and mobile units, should they fall into the hands of the adverse Party, are to be free to pursue their duties, as long as the capturing Power has not itself ensured the necessary care of the wounded and sick found in such establishments and units.

Although this provision follows from one of the basic principles of the Convention and may appear to be self-evident, its express confirmation at this point is fully justified in view of the changes made in 1949 in the provisions dealing with captured medical personnel and equipment. Article 14 of the 1929 Convention provided that mobile units falling into enemy hands were to retain their equipment, means of transport and drivers. This clause has disappeared in the new Article 33 which corresponds to the former Article 14, but the idea has been maintained and is expressed elsewhere.

After capture the ultimate fate reserved for the various elements which go to make up a fixed or mobile medical unit (buildings, personnel and equipment) varies according to their nature and the existing circum-

[1] Article 22, sub-paragraph (5). See below, page 205.
[2] Fourth Geneva Convention of 1949, Article 19, paragraph 2.

stances; this we shall see later. But there is a period during which a medical unit will remain a whole, during which its elements cannot be separated but must be treated alike—the period, namely, during which the wounded and sick which are with the unit, or in its neighbourhood, need its help.

Apart from the fact that the authorities controlling it are not the same, the establishment will continue to function as if it had not been captured. This phase must continue until such time as the capturing Power is itself in a position to provide the wounded with all the necessary care.

PARAGRAPH 2 — REMOTENESS OF MILITARY OBJECTIVES

Under this provision, which is new, the responsible authorities are to ensure that medical establishments and units are, as far as possible, so situated that attacks against military objectives cannot imperil their safety. It was obviously intended that the provision should apply above all to aerial bombardment and that medical units should be protected against dispersion of projectiles. In the Fourth Geneva Convention, civilian hospitals were protected by the introduction of a similar clause (Article 18, paragraph 5) the wording of which is, incidentally, much to be preferred. It reads as follows: "In view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be situated as far as possible from such objectives."

The obligations imposed by the Geneva Conventions are almost exclusively those which belligerents are called upon to assume towards enemy nationals; only rarely do they lay down that belligerents are to take specific measures on behalf of their own wounded. We have, however, seen one example of this in Article 12, paragraph 5[1], and the present case is another.

Certain delegations had objected to the provision, considering that the matter it dealt with was in fact the private concern of individual States. It was nevertheless retained. It is obviously of vital importance that medical establishments and units should not be situated close to military objectives.

[1] See above, page 133.

Such proximity would not weaken the legal protection enjoyed by a medical establishment, but it would, in practice, endanger its security to some extent. Legal protection is certainly valuable; but it is more valuable still when accompanied by practical safeguards. Moreover, such proximity must not appear to be an indirect attempt to protect a military objective from attack.

It should also be emphasized that the stipulation in paragraph 2 is addressed to belligerents both in regard to their own medical units and in regard to those of the enemy which have fallen into their hands.

ARTICLE 20 — PROTECTION OF HOSPITAL SHIPS

Hospital ships entitled to the protection of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, shall not be attacked from the land.

This provision, which was introduced by the Diplomatic Conference of 1949, should be read in conjunction with Article 23 of the Second Geneva Convention, which is also new and its exact counterpart. The latter Article lays down that medical establishments ashore entitled to the protection of the First Geneva Convention, are not to be attacked or bombarded from the sea.

These provisions may appear surprising and superfluous at first sight. For it is obvious that the protection accorded to hospital ships under the Second Convention is general and absolute in character and applies as much to artillery of the land forces as to naval guns or aircraft. In the same way the First Convention undoubtedly protects medical establishments on land against all attacks, whether from land, sea or air.

The only value of the above Articles is therefore as a reminder; it is as such, and for practical reasons, that they have been maintained. It was feared that certain members of naval forces might only be conversant with the Second (Maritime Warfare) Geneva Convention, and that certain members of the land forces might only know the terms of the First Convention. Such cases, which would, we hope, be exceptional,

might lead to serious consequences when military operations took place close to the coast. The two Articles were therefore adopted as a precautionary measure.

ARTICLE 21 — DISCONTINUANCE OF PROTECTION OF MEDICAL ESTABLISHMENTS AND UNITS

The protection to which fixed establishments and mobile medical units of the Medical Service are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after a due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded.

A. *Acts harmful to the enemy.* — The protection to which medical establishments and units are entitled cannot cease unless they are used to commit acts harmful to the enemy. The wording adopted by the Diplomatic Conference of 1949 was intended to make it clear that protection could only cease in the one case mentioned above, whereas in 1929 it had merely been stated that protection would cease if such acts were committed.

In 1949, as in 1929, it was considered unnecessary to define "acts harmful to the enemy"—an expression whose meaning is self-evident and which must remain quite general.[1]

While the International Committee of the Red Cross shared this view, it had prepared an alternative wording expressing the same idea in case the Conference should wish to be more explicit. We quote it here, as we think it may throw light on the meaning to be attached to the words "acts harmful to the enemy". It reads as follows: "acts the purpose or effect of which is to harm the adverse Party, by facilitating or impeding military operations".

Such harmful acts would, for example, include the use of a hospital as a shelter for able-bodied combatants or fugitives, as an arms or

[1] The Diplomatic Conference also quite rightly discarded the expression "acts not compatible with their humanitarian duties" which the XVIIth International Red Cross Conference had proposed substituting for "acts harmful to the enemy". Fortunately, however, the notion of humanitarian duties was retained in addition.

ammunition dump, or as a military observation post; another instance would be the deliberate siting of a medical unit in a position where it would impede an enemy attack. The sense will become still clearer when we consider Article 22 which quotes a series of conditions which are not to be regarded as being harmful to the enemy.

One thing is certain. Medical establishments and units must observe, towards the opposing belligerent, the neutrality which they claim for themselves and which is their right under the Convention. Being placed outside the struggle, they must loyally refrain from all interference, direct or indirect, in military operations. An act harmful to the enemy is not only to be condemned for its treacherous nature, but also because the life and security of the wounded may be very seriously affected by its consequences.

The Diplomatic Conference of 1949 stated specifically that protection could only cease in the case of harmful acts committed by the units "outside their humanitarian duties". It is possible for a humane act to be harmful to the enemy, or for it to be wrongly interpreted as so being by an enemy lacking in generosity. Thus the presence or activities of a medical unit might interfere with tactical operations; so might its lights at night. It was stated, for example, at the Conference, that the waves given off by an X-ray apparatus could interfere with the transmission or reception of wireless messages by a military set, or with the working of a radar unit.

B. *Warning and time limit.* — The corresponding Article of the 1929 Convention merely provided that the protection to which medical units and establishments were entitled would cease if use were made of them to commit acts harmful to the enemy. The 1949 Conference added a further sentence with the object of tempering the possible consequences of too strict an application of the above principle. Safeguards had, in fact, to be provided in order to ensure the humane treatment of the wounded themselves, who could not be held responsible for any unlawful acts committed.

It is thus stipulated that protection may cease only after a due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded.

The enemy has therefore to warn the unit to put an end to the harmful acts and must fix a time limit, on the conclusion of which he may open

fire or attack if the warning has not been complied with. The period of respite is not specified. All that is said is that it must be reasonable. How is it to be determined? It will obviously vary according to the particular case. One thing is certain, however. It must be long enough either to allow the unlawful acts to be stopped or for the wounded and sick who are present with the unit to be removed to a place of safety. The respite will also give the unit an opportunity of replying to an unfounded accusation and clearing itself.

As we have seen, a time limit is to be named "in all appropriate cases". There might obviously be cases where no time limit could be allowed. Suppose, for example, that a body of troops approaching a hospital were met by heavy fire from every window. Fire would be returned without delay.

ARTICLE 22 — CONDITIONS NOT DEPRIVING MEDICAL UNITS AND ESTABLISHMENTS OF PROTECTION

The following conditions shall not be considered as depriving a medical unit or establishment of the protection guaranteed by Article 19 :

(1) *That the personnel of the unit or establishment are armed, and that they use the arms in their own defence, or in that of the wounded and sick in their charge.*

(2) *That in the absence of armed orderlies, the unit or establishment is protected by a picket or by sentries or by an escort.*

(3) *That small arms and ammunition taken from the wounded and sick and not yet handed to the proper service, are found in the unit or establishment.*

(4) *That personnel and material of the veterinary service are found in the unit or establishment, without forming an integral part thereof.*

(5) *That the humanitarian activities of medical units and establishments or of their personnel extend to the care of civilian wounded or sick.*

Article 22—unchanged except for sub-paragraph (5) which is new—was adopted without discussion. It sets out five conditions not depriving a medical unit or establishment of protection, or, in other words,

which must not be regarded as acts harmful to the enemy. These are particular cases where a medical unit retains its character as such, and its right to immunity, in spite of certain appearances which might have led to the contrary conclusion or at least created some doubt. The object of the provision was to avoid disputes which arise only too easily between opposing parties.

This list is not, in our opinion, to be regarded as comprehensive, even though the customary "in particular" has been purposely omitted. Cases can be imagined where the good faith of the unit remains beyond question in spite of certain appearances to the contrary. For each party, the question will always be one of good faith.

(1) Medical personnel have the right to bear arms and may, in case of need, use them in their own defence or in that of the wounded and sick in their charge. That is the most important of the provisions which we are studying here. If a medical unit is attacked, in violation of the Convention, its personnel cannot be asked to sacrifice themselves without resistance. Quite apart from the above extreme case, it is clearly necessary for medical personnel to be in a position to ensure the maintenance of order and discipline in the units under their charge.

But such personnel may only resort to arms for purely defensive purposes, and in cases where it is obviously necessary. They must refrain from all aggressive action and may not use force to prevent the capture of their unit by the enemy.[1] Otherwise they would be violating the rules governing their status.

(2) In the absence of armed orderlies a medical unit may be protected by a picket, by sentries or by an escort, or, in other words, by a small number of armed soldiers.

How should the expression "in the absence of armed orderlies" be interpreted? Does it mean that the simultaneous presence of armed orderlies and a military guard is prohibited? A literal interpretation would lead one to suppose that this was so. We do not think, however, that this can possibly have been the intention of the authors. The correct interpretation of the phrase is a matter of common sense and good faith.

What was intended was that the guard of a medical unit would, as a rule, be provided by its own personnel, but that armed soldiers would be

[1] It is, on the other hand, perfectly legitimate for a medical unit to withdraw in the face of the enemy.

brought in to help in exceptional cases, when this was necessary, e.g. where the orderlies had no weapons of their own or were too few in numbers, or for any other reason. The provision does not mean that a belligerent may dispute the immunity of a medical unit because certain of its orderlies are armed in addition to its having a picket or sentries. The expression should therefore be taken to mean: "in the absence of armed orderlies in sufficient numbers to ensure the protection of a medical unit in any given case".

Although this is not expressly indicated in the text, it is clear that a military guard attached to a medical unit may use its weapons in case of need, just as armed orderlies may, in order to ensure the protection of the unit. One cannot see what real use a guard would be if this were not so. But, as in the case of the orderlies, the soldiers may only act in a purely defensive manner, and may not oppose the occupation or control of the unit by the enemy.

What is the status of such soldiers? The 1906 Convention (Article 9, paragraph 2) placed them on exactly the same footing as medical personnel, on condition that they were provided with regular instructions (Article 8, sub-paragraph (2)). They were entitled to the same protection as medical personnel and were not to be treated as prisoners of war.

The 1929 Conference firmly rejected the above arrangement, regarding it as impracticable. It had not been respected during the First World War and had given rise to abuses. The provision of regular instructions appeared to be impossible in practice.

Their status will therefore be that of ordinary members of the armed forces, although the mere fact of their presence with a medical unit will shelter them from attack. This practical immunity is, after all, only reasonable, since they have no offensive role to play and are there only to protect the wounded and sick. But in case of capture they will be prisoners of war.

(3) Wounded arriving in a medical unit may still be in possession of small arms and ammunition, which will be taken from them and handed to the proper service; but this may take a certain time. Should a unit be visited by the enemy before it is able to get rid of these arms, it must not be liable to be accused of bad faith as a result.

(4) The presence with a medical unit of personnel and material of the Veterinary Service is authorized, even where they do not form an

integral part of such unit. This provision, which dates from 1929, was introduced at the suggestion of the United States Delegation, which pointed out that veterinary personnel were attached to medical units in the American Army.[1]

A proposal, made by another delegation in 1929, to place the Veterinary Service on the same footing as the Medical Service was, on the other hand, rejected.

Speaking generally, the provision in question appears to have lost some of its importance owing to the fact that modern armies are mechanized.

(5) The fifth provision, added in 1949, is very important. It lays down that a medical unit or establishment is not to be deprived of protection when its humanitarian activities or those of its personnel extend to the care of civilian wounded or sick. Establishments protected by the First Geneva Convention, and catering for military wounded or sick, are thus authorized to take in civilians as well, should they require treatment. This clause has its counterpart in Article 19, paragraph 2, of the Fourth Geneva Convention, which authorizes civilian hospitals to shelter and treat military wounded and sick.

The innovation was unavoidable, in view of the character which modern warfare—especially aerial warfare—has taken on; military and civilians may now be struck down on the same spot and by the same act of war, and must in such cases be able to be treated by the same orderlies and accommodated in the same buidings. This clause, which merely sanctions what is actually done in practice, was adopted without opposition.

Since a soldier, whose particular function is to kill, is entitled when wounded to the compassion of his actual enemy, how can an inoffensive civilian be any less deserving of such compassion?

[1] The English text of the 1949 Convention, which is, of course, as authentic as the French text, uses the expression "veterinary service" for the French phrase "service vétérinaire". It should be noted, however, that in the United States of America this expression has a much wider meaning than in French, covering not only the personnel who treat the animals, but also the representatives of the Quartermaster's branch who are responsible for checking the condition of certain foodstuffs. Thus, the following passage may be found in Webster's Dictionary (Volume II, page 2838, 1934 edition): "Veterinary Corps. A component of the Medical Department which concerns itself with the care and health of the animals in the military establishment, and with the inspection and certification of food supplies of animal origin for the troops."

ARTICLE 23 — HOSPITAL ZONES AND LOCALITIES

In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital zones and localities so organized as to protect the wounded and sick from the effects of war, as well as the personnel entrusted with the organization and administration of these zones and localities and with the care of the persons therein assembled.

Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the hospital zones and localities they have created. They may for this purpose implement the provisions of the Draft Agreement annexed to the present Convention, with such amendments as they may consider necessary.

The Protecting Powers and the International Committee of the Red Cross are invited to lend their good offices in order to facilitate the institution and recognition of these hospital zones and localities.

GENERAL

1. *Terminology*

The terminology in normal use should first be defined. A distinction is drawn between:

(a) hospital zones and localities, generally of a permanent character, organized outside the combat zone in order to shelter military or civilian wounded and sick from long range weapons, especially aerial bombardment [1];

(b) safety zones and localities, generally of a permanent character, organized outside the combat zone in order to shelter certain categories of the civilian population, which owing to their weakness require special protection (children, old people, expectant mothers, etc.) from long range weapons, especially aerial bombardment [2];

[1] The expression "hospital towns" has been dropped by the experts since 1938.

[2] The *Association internationale des Lieux de Genève* adopted the terms "lieux de Genève" (Geneva localities) or "zones blanches" (white zones).

(c) hospital and safety zones and localities, which are a combination of *(a)* and *(b)* above;

(d) neutralized zones, generally of a temporary character, established in the actual combat zone to protect both combatant and non-combatant wounded and sick, as well as all members of the civilian population who are in the area and not taking part in the hostilities, from military operations in the neighbourhood.

The above terminology is that used in the 1949 Geneva Conventions. *Locality* should be taken to mean a specific place of limited area, in which there are generally buildings. The term *zone* is used to describe a relatively large stretch of countryside and may include one or more localities.

The Convention which we are studying in the present volume only deals with hospital zones and localities set aside for wounded and sick members of the armed forces. The hospital and safety zones and localities used for civilian wounded and sick, as well as for certain categories of the civilian population, are dealt with in Article 14 of the Fourth Geneva Convention of 1949. Neutralized zones are dealt with in Article 15 of the same Convention.

Although it was necessary to define the meaning of the various terms employed, it must be pointed out that in practice, and even in theory, the problem of providing places of refuge [1] is capable of one or more intermediate solutions. The system described in the Geneva Conventions provides all the flexibility required in this respect. One could, for instance, establish a hospital locality which sheltered both wounded soldiers and sick civilians. In the same way, a safety zone might shelter military or civilian wounded and sick in addition to certain categories of the civilian population.

2. *Historical background*

Since hospital zones made their first appearance in positive law in 1949, it is fitting that the origin and development of the problem should

[1] The expression "places of refuge", which is a current term, may be used to denote any piece of territory organized in such a way as to afford shelter to certain categories of persons. It may therefore cover hospital zones and localities as well as safety zones and localities, and may even be applied to neutralized zones.

be described at some length.[1] In 1870, at the time of the Franco-Prussian War, Henry Dunant, the founder of the Red Cross, suggested that certain towns should be neutralized and wounded members of the armed forces concentrated there. That was the first time the idea of hospital localities was put forward. The proposal was not followed up owing to the rapid development of military events.

The following year, at the time of the revolt of the Commune, Dunant tried in vain to set up places of refuge for the civilian population in Paris. That was the first time the idea of having safety zones arose.

In 1929, General Georges Saint-Paul, of the French Medical Service, drew up a plan for setting up places of refuge to provide shelter not only for military wounded and sick, but also for sick civilians and certain other elements among the civilian population whose weakness placed them on the same footing as the sick (children, old people, etc.). In Paris, in 1931, General Saint-Paul founded the *Association internationale des Lieux de Genève* (International Association for the Lieux de Genève) for the purpose of giving publicity to the plan and working towards its realization.[2]

In 1934, a Commission of medical and legal experts, meeting in Monaco on the recommendation of the Congress for Military Medicine and Pharmacy, drew up a Draft Convention dealing with respect for human life in wartime. This document, which is known as the Monaco Draft, contains important provisions concerning hospital localities and safety zones. The Belgian Government, which had at first contemplated holding a Diplomatic Conference to approve the draft, was later obliged to abandon its intention. The Monaco texts were then handed over to the International Committee of the Red Cross.

In 1936, the International Committee of the Red Cross, which had also been studying the question, convened a Commission of experts nominated by the National Red Cross Societies and by the Standing Committee of the International Congress for Military Medicine and Pharmacy. The Commission considered that some progress might be made, at least as far as hospital zones were concerned; but pointed out that the assistance of military experts would be essential. It felt, however,

[1] The present review is nevertheless very brief. Further details may be obtained from the pamphlet entitled "Hospital Localities and Safety Zones", published by the International Committee of the Red Cross in 1951.

[2] The Headquarters of the Association is now at Geneva.

that it was first necessary to concentrate on the creation of hospital zones for wounded and sick members of the armed forces, and that the wider problem of safety zones to shelter the whole or part of the civilian population, could be tackled later with a greater chance of success.

The International Committee of the Red Cross then drew up a preliminary draft Convention, and proposed that a Commission of military experts and international jurists should be convened. In spite of repeated representations, this Commission was only able to meet in October, 1938, following a recommendation to that effect by the XVIth International Red Cross Conference.

Basing themselves on the whole of the documents which existed at that time, the Commission drew up a Draft Convention (known as the 1938 Draft) for the creation of hospital zones and localities for wounded and sick members of the armed forces. This draft, together with a report by the International Committee of the Red Cross, was transmitted to all States by the Swiss Government. It was intended to serve as a working basis for the Diplomatic Conference which it was proposed to hold at the beginning of 1940 to revise the Geneva Conventions and conclude new humanitarian agreements. The Diplomatic Conference was adjourned owing to the outbreak of hostilities.

During the Second World War, the International Committee of the Red Cross proposed on several occasions (especially in 1939 and 1944) that the belligerent Powers should conclude agreements for the setting up of hospital and safety zones. The 1938 Draft was to have provided the basis for these agreements, even though it had only been designed to shelter military wounded. It would have been applied by analogy to safety zones for certain categories of the civilian population. The fact that neutralized zones had been successfully established at Madrid, in 1936, and at Shanghai, in 1937, was an encouraging precedent. But although a number of States sent replies which were favourable in principle, none of them followed up the precise and concrete proposals which had been put forward by the International Committee of the Red Cross.

Apart from negotiations of a general nature, the International Committee was concerned, during the hostilities, with a certain number of more or less private proposals to set up hospital or safety zones (e.g. at Sienna, Bologna, Imola, Constance, Tromsö and Shanghai). These proposals could not be brought into effect officially, as they did not come

from belligerent Governments and the latter continued to treat the whole question with great reserve.

The International Committee took the 1938 Draft relating to hospital localities and zones as its basis in the preparatory work undertaken by it in 1945 in connection with the revision and development of the Geneva Conventions. It also applied it to the case of safety zones for certain elements of the civilian population who needed special protection.

The 1947 Conference of Government Experts showed that States were not inclined to adopt clauses of a mandatory nature in this matter. The most the experts would agree to was that the Geneva Conventions should provide for the possible creation of such places of refuge; their recognition by the enemy was, however, to be dependent upon the conclusion of special agreements.

The International Committee of the Red Cross accordingly drafted two Articles, for insertion in the First Convention and Fourth Convention respectively, recommending that the Powers should establish hospital zones and safety zones, defining the object of such zones and enumerating the categories of persons who could find shelter there. To encourage the setting up of such zones, it proposed that a Draft Agreement, which States could take as a model when establishing and recognizing the zones, should be annexed to the two Conventions.

About the same time, i.e. in 1948, the International Committee of the Red Cross was able to establish and administer places of refuge in Jerusalem. This experience encouraged it to propose, for inclusion in the Convention, a provision which would enable Powers to set up safety zones of a new type. The zones in Jerusalem, like those in Madrid and Shanghai, were different from the earlier theoretical idea of what such zones should be. In theory, the first tendency had been to establish permanent zones behind the front, in order to shelter certain elements only of the civilian population from long range weapons, especially bomber aircraft. But in actual practice, it was, on each occasion, found necessary to establish temporary places of refuge in the actual area where fighting was taking place, in order to provide shelter for the whole of the local population, who were in danger as a result of the military operations in the vicinity.

The International Committee of the Red Cross accordingly prepared a new draft Article for insertion in the Fourth Geneva Convention, providing for the setting up of places of refuge of the type just described,

open without distinction to the wounded and sick and to all non-combatants, and to be known from then on as "neutralized zones".

The various Articles mentioned, together with the Draft Agreement, were approved, with no change of any importance, by the XVIIth International Red Cross Conference, and later by the Diplomatic Conference of 1949. The latter separated the Draft Agreement, which had previously been common to the First and Fourth Conventions, into two distinct documents, one referring only to hospital zones for wounded and sick members of the armed forces, and the other dealing with hospital zones for wounded and sick civilians and safety zones for certain categories of the population.

3. *Nature of hospital zones and localities*

Attention should first be drawn here to certain principles formulated by the experts of 1938, authors of the Draft Convention on which Article 23 of the First Geneva Convention of 1949, and the model agreement annexed thereto, are very largely based.

The experts were unanimous in recognizing the usefulness of setting up hospital zones and localities, where wounded and sick members of the armed forces could be concentrated far away from the fighting and protected from aerial bombardment. They pointed out that the medical treatment of the wounded and sick would be facilitated by such a measure, if only because of the greater degree of security provided. The recovery of those concerned would be enhanced by this feeling of additional protection.

The experts agreed that the setting up of hospital zones must in no case have the effect of decreasing the protection to which the wounded and sick as a whole were entitled, outside such zones, under the Conventions and general rules of international law.

Finally they pointed out that in law the protection provided by setting up hospital zones and localities in no way differed from that accorded to medical establishments and units under the Geneva Convention. It was merely a matter of making such protection more effective in practice.

Article 23 (new) of the 1949 Convention is optional in character. It should be noted, however, that the object of international Conventions is to define the obligations which States contract towards one another.

It is not customary for them to include mere suggestions, although examples of this do exist. The above course has been adopted in the case of hospital zones, because the authors of the Convention wished to draw attention to their importance from the humanitarian point of view, and to recommend their adoption in practice. The responsible authorities in each country should not, therefore, regard Article 23 as being a mere reference to a possible solution; they should look upon it as a recommendation to make every effort to apply that solution in practice.

PARAGRAPH 1 — CREATION OF ZONES

This clause mentions the option which the Powers have of setting up and organizing hospital zones and localities in their own territory, or in territory occupied by them.

The zones and localities may be set up in case of war or in peacetime. Their establishment remains a purely internal measure and in no way binds the adverse Party, which will only contract obligations under the special agreement, relating to the recognition of zones, referred to in paragraph 2. Although the establishment of zones—that is to say their actual organization—may take place in peacetime, they are not, as a rule, recognized by the enemy until war breaks out.

It has been suggested in certain quarters that it would be difficult, or even impossible, to set up hospital zones in peacetime, especially in a small country, the reason given being that, since the zones must be at some distance from the fighting, the area selected will vary according to which enemy has to be faced. The difficulty pointed out is a real one, but it does not appear to be unsurmountable. A State will, it is true, be unaware of the strategical situation in which it will find itself in case of war; but it should be possible for it to establish a number of zones, of which some only will be utilized, the choice depending upon events.

The Convention makes express mention of the possibility of establishing zones in time of peace, in spite of the fact that States are quite obviously free to organize them when they please; this is to show the importance attached to preparatory measures of this sort. The many problems set by the organization, control, population and feeding of a refuge zone cannot be solved during the first days of a war, at a moment when the administration of the country is overburdened with many other

tasks. It is, on the contrary, desirable that the whole question of establishing the zones should be studied in detail in peacetime, so as to be able to proceed with their notification as soon as war breaks out.

For this purpose, it would appear necessary to take the rules contained in the Draft Agreement annexed to the Convention, as a basis in peacetime, even though the agreement in question is not obligatory. It is, in fact, essential that the zones should be established without delay on a basis which has already been approved in principle at the Diplomatic Conference and which will in all probability obtain final agreement from the adverse Party. The recognition of zones established on some other basis might be problematical.

As we have already pointed out, the establishment of hospital zones or localities does not add anything essentially new to the Convention. The establishment of such zones was actually already possible in theory under earlier Conventions, all that was necessary being to group medical establishments or units in the open. As each of them was protected, the whole would also be protected.

In practice, however, the problem is a little more complicated. Protection will be given, not only to each medical establishment contained in the zone, but also to the area surrounding such establishments. If the locality or zone is of some size, protection will be extended to a whole group of buildings and even to the population which normally resides in the zone.[1]

That brings us to the subject of the categories of persons who may find shelter in hospital zones. They are as follows:

(a) The wounded and sick. The whole object of the First Geneva Convention indicates that it is essentially the wounded and sick of the armed forces who are referred to here. It should be noted, however, that Article 14 of the Fourth Geneva Convention of 1949 authorizes the establishment of hospital zones for wounded and sick civilians. Consequently there is no reason why a hospital zone should not combine the two types and provide shelter for both soldiers and civilians in need of treatment. Besides, the First Geneva Convention lays down, in Article 22, sub-paragraph (5), that a medical unit or establishment shall not be deprived of protection if its activities extend to the care of civilian

[1] See below, on Draft Agreement relating to Hospital Zones and Localities, Article 1, page 415.

wounded and sick[1], and this must admittedly also apply, by analogy, to a hospital zone established by virtue of the First Convention. It should, finally, be noted that Article 15 of the Fourth Convention provides for the creation of neutralized zones open without distinction to wounded and sick combatants and non-combatants and to *bona fide* civilians who take no part in hostilities.

(b) Medical personnel. All medical personnel protected under the Convention are fully entitled to reside in the zones. It should be remembered that this includes not only persons directly employed in the care of wounded, but also the administrative personnel of medical units, as well as chaplains.

(c) Personnel concerned with the organization and administration of the zones. Owing to the size of hospital zones it will no doubt be necessary in most cases to employ special personnel for their administration and organization, in addition to the administrative personnel already mentioned under *(b)*. Members of Commissions of control[2] may also have to be included.

(d) Local population. Although the Convention itself makes no allusion to this category of persons, they must, as we have seen, be taken into consideration when the hospital zone is of any size.

The very silence of the Convention on this point implies that the rules which apply to medical establishments and units also apply, by analogy, to hospital zones and localities. The latter must be respected and protected under all circumstances; but they must not contain any part of the military potential of the country, and no act harmful to the enemy must be committed in them.

Nor does the Convention mention the marking of hospital zones; but it is only logical that they should be protected by the red cross emblem, since they are intended to provide shelter for categories of persons and things which are already entitled to such protection.[3]

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[1] See above, page 202.

[2] See below, on Draft Agreement relating to Hospital Zones and Localities, Article 8, page 423.

[3] See below, on Draft Agreement relating to Hospital Zones and Localities, Article 6, page 422.

PARAGRAPH 2 — RECOGNITION OF ZONES

The zones will not, strictly speaking, have any legal existence, or enjoy protection under the Convention, until such time as they have been recognized by the adverse Party. This will entail the conclusion of an agreement between the Power which has established zones in its territory and the Powers with which it is at war. The agreement will thus be concluded, as a general rule, after the outbreak of hostilities.[1] It should contain a number of clauses relating to the definition of the zones, their organization, the procedure for supervising them, etc., for the Convention itself says practically nothing about these various points and it is essential to come to an exact arrangement with regard to them.

With the object of promoting the establishment of hospital zones, the Diplomatic Conference decided to annex to the Convention a Draft Agreement which States could bring into force with whatever modifications they considered necessary. The Draft Agreement is therefore only in the nature of a suggestion or example. Nevertheless, the fact that it was carefully drawn up by experts and was adopted by the Plenipotentiaries of 1949, gives it a definite value. We have seen above how desirable it is that the principles contained in it should be taken as a basis, without further discussion, whenever a hospital zone is set up[2]. Comments on the Draft Agreement are to be found at the end of the present volume.[3]

PARAGRAPH 3 — GOOD OFFICES

The establishment of hospital zones, their notification, the conclusion of the agreement mentioned above, and, above all, the arrangements for supervision, all presuppose in wartime the existence of a neutral intermediary acting between the belligerents.

In accordance with the general plan adopted in the Geneva Conventions, it was natural to think in this connection of the Protecting

[1] Article 7 of the Draft Agreement provides, however, for the possibility of zones being recognized in time of peace. See below, page 422.

[2] See above, page 213.

[3] See below, page 415.

Powers and of the International Committee of the Red Cross, which are "invited" by the Convention itself to lend their good offices in this matter. That means that, when they think it advisable, they may put forward proposals to Governments, without waiting for the latter to ask for them.

CHAPTER IV

MEDICAL PERSONNEL

The medical personnel and chaplains [1] referred to in the present Convention, in which they form the subject of a special Chapter, are those forming part of the armed forces in the field. They do not include civilian staff, or medical personnel and chaplains of forces at sea, such personnel being dealt with in the Second and Fourth Geneva Conventions of 1949.

Personnel protected by the present Convention comprise the following six categories:

1. Medical personnel of the armed forces exclusively engaged in the search for, or the collection, transport or treatment of the wounded and sick, or in the prevention of disease (Article 24).
2. Personnel of the armed forces exclusively engaged in the administration of medical units and establishments (Article 24).
3. Chaplains attached to the armed forces (Article 24).
4. The staff of National Red Cross Societies and other recognized relief societies, employed on the same duties as the personnel mentioned under 1, 2 and 3, and subject to military laws and regulations (Article 26).
5. Personnel of relief societies of neutral countries, who lend their assistance to a belligerent and are duly authorized to do so (Article 27).
6. Members of the armed forces specially trained for employment, in case of emergency, as hospital orderlies, nurses or auxiliary stretcher-bearers (Article 25).

[1] For the sake of brevity, the term "medical personnel" used hereafter is understood to include the chaplains.

Personnel in the last of these categories are known as "auxiliary personnel", as opposed to "permanent personnel" (see title of Article 24) —a term which is sometimes used to describe the personnel in the first five categories.

ARTICLE 24 — PROTECTION OF PERMANENT MEDICAL PERSONNEL OF THE ARMED FORCES

Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances.

1. *Categories of personnel and their functions*

Article 24 refers to the official medical personnel and chaplains of the armed forces. To be entitled to immunity, they must be employed exclusively on specific medical or religious duties. They are to be furnished with the means of proving their identity provided for in Article 40.

Such personnel fall into three categories—the first three listed above (in the introduction to the present Chapter of the Commentary). These categories, which had already been distinguished in the 1906 and 1929 Conventions, will be considered separately.

A. *Medical personnel proper.* — These are the doctors, surgeons, dentists, chemists, orderlies, nurses, stretcher-bearers, etc., who give direct care to the wounded and sick. Together with the second category, they form the Medical Service of the armed forces.

It is for each Power to decide the composition of its Medical Service and to say who shall be employed in it. To be assured of protection, however, they must be exclusively employed on the duties which are enumerated in limitative fashion in the Conventions—namely the search for and collection, transport and treatment of the wounded and sick, and the prevention of disease. This exclusive assignment to certain

duties applies only to medical personnel, and it was at this price that the States agreed in the Geneva Convention to accord special immunity, even on the battlefield, to members of the enemy's armed forces. The words "exclusively engaged" indicate that the assignment must be permanent, which is not the case in Article 25 dealing with auxiliary personnel.

The fact that the enumeration of the duties of medical personnel is limitative by no means implies, however, that a member of the medical staff may only be assigned to one of these duties; he may be employed on several, or even on all of them, provided he is debarred from duties not included in the list.

The 1949 Conference added prevention of disease to the list. In modern armies, hygienic and prophylactic measures for the prevention of disease—inoculation, delousing, disinfection of water supply, and so on—form an important part of the work of the medical staff. It was consequently necessary to include such measures among the duties which personnel of the Medical Service may carry out.

B. *Administrative staff.* — These are persons who look after the administration of medical units and establishments, without being directly concerned in the treatment of the wounded and sick. They include office staff, ambulance drivers, cooks (male or female), cleaners, etc.

Like the previous category, they form part of the Medical Service of the armed forces, and accordingly had to be accorded the same immunity as medical personnel proper. They form an integral part of medical units and establishments, which could not function properly without their help.

They too must be exclusively assigned to the Medical Service.

C. *Chaplains.* — Chaplains are members of the armed forces whose role in regard to the victims of war is not medical but spiritual—although they are often called upon to give help of a more material nature to the wounded on the battlefield. The principle of placing them on the same footing as medical personnel in the matter of privileges goes back to the 17th century, and is mentioned in several contemporary agreements between the commanders of armies. In 1864 it was recognized as a matter of course that ministers of religion should be protected. Their devotion in bringing the solace of religion and moral consolation

to the wounded, the sick and the dying is well known. They are present at the last moments of men who have been mortally wounded. They hear any requests the latter may have to make, and officiate at their burial.

It is clear from the text of the Convention that chaplains need not be exclusively or even partially assigned to the wounded and sick. They are protected as chaplains, even when—as most often happens—their duties extend to the forces as a whole. Like medical personnel, they must obviously abstain from all hostile acts.

On the other hand, chaplains, to be accorded immunity, must be attached to the armed forces. They do not attach themselves. The decision will rest with the competent military authorities and the relationship must be an official one. Accordingly, ministers of religion who wish to serve in a non-official capacity, are not covered by the Convention, and, until such time as they have been regularly appointed, act at their own risk and peril.

In actual fact, many actual or prospective ministers of religion are enlisted as combatants. Religious services for their comrades in arms are occasionally asked of them. For this reason Article 36 of the Third Convention of 1949 provides that in case of capture—when, unlike regular chaplains, they become prisoners of war—they are to be treated as retained chaplains if they are called upon to minister to their fellow captives.

2. *Respect and protection of permanent personnel*

Article 24 provides that medical personnel are to be "respected and protected in all circumstances". This is the classic formula, employed since 1906; we have already met it in Articles 12 and 19 dealing with the protection of the wounded and of medical units, and in considering those two Articles, have already referred to its value and the shades of meaning attached to it.[1]

The words "in all circumstances" make it quite clear that medical personnel are to be respected and protected at all times and in all places, both on the battlefield and behind the lines, and whether retained only temporarily by the enemy or for a lengthy period.

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[1] See above, pages 134 and 196.

Nevertheless, to enjoy immunity, they must naturally abstain from any form of participation—even indirect—in hostile acts. We saw in Article 21 [1] that the protection to which medical units are entitled ceases if they are used to commit acts "harmful to the enemy". This proviso obviously applies to medical personnel also.

The corresponding Article of the 1929 Convention stated specifically (in paragraph 2) that medical personnel were not to be treated as prisoners of war if they fell into enemy hands. This provision has now been dropped, the retention of medical personnel by the enemy being dealt with in new provisions (Articles 28 to 32) which we shall examine later.

ARTICLE 25 — PROTECTION OF AUXILIARY MEDICAL PERSONNEL OF THE ARMED FORCES

Members of the armed forces specially trained for employment, should the need arise, as hospital orderlies, nurses or auxiliary stretcher-bearers, in the search for or the collection, transport or treatment of the wounded and sick shall likewise be respected and protected if they are carrying out these duties at the time when they come into contact with the enemy or fall into his hands.

The above provision dealing with the position of "auxiliary medical personnel", as they are usually called, now forms a separate Article. In 1929 it was part of the preceding one.

The distinguishing feature of medical personnel properly so-called, *i.e.* permanent staff, is that they are employed exclusively on medical duties. We are now concerned with a special military category [2] only employed for part of their time on such duties. Having received special training as medical orderlies or auxiliary stretcher-bearers, they are, when necessary—that is to say, occasionally—used by their officers to search for or look after the wounded. For the remainder of their time they will be assigned to other military duties.

In some armed forces, this category, which has not up to the present been very numerous in practice, comprises the regimental bandsmen,

[1] See above, page 200.
[2] This category is No. 6 in the list given on page 217.

who receive instruction in medical work. But there is no reason why it should not also include military personnel who are combatants in the true sense of the word.

Such auxiliary personnel must be actual members of the armed forces and cannot belong to a Red Cross Society or other relief society.

Further, they only include auxiliary stretcher-bearers, hospital orderlies and nurses, employed in the search for, or the collection, transport or treatment of the wounded. Chaplains, doctors and administrative staff cannot assume their medical character temporarily.

To be accorded immunity, auxiliary personnel must, as we have said, have received special medical training beforehand, the nature and duration of which are wisely not defined. If it is necessary to make good a deficiency in permanent personnel, such training may even take place in wartime; but personnel filling this temporary role must in any case have had a real training.

The 1929 Conference first introduced the innovation, deciding (by a majority of one), that auxiliary personnel taken prisoner while carrying out their medical duties, were to enjoy the same treatment as permanent medical personnel. They were to have, in principle, the same right as the latter to repatriation. The Conference abandoned the idea of giving them special protection on the battlefield before capture, not considering it possible to authorize them to wear the armlet.[1]

The draft revisions of the Convention, prior to the text adopted by the 1949 Conference, no longer made special provision for auxiliary personnel. The experts were of the opinion that the protection accorded to permanent personnel would be enhanced if they alone were covered. It was also pointed out that the conditions of modern warfare, in which large numbers of prisoners are captured at a time, made it impossible to decide whether some amongst them were, or were not, actually engaged in medical duties when they fell into enemy hands.

The 1949 Convention has retained the category of auxiliary personnel, but with a complete change in the manner in which they are to be protected. They will now be protected "if they are carrying out these duties at the time when they come into contact with the enemy or fall into his hands", *i.e.* on the battlefield. On the other hand, once in

[1] This did not mean that the enemy had the right to fire deliberately upon auxiliary personnel collecting the wounded. If he has by chance recognized them for what they are, he is bound to respect their status.

enemy hands they will, as we shall see when discussing Article 29 [1], become ordinary prisoners of war without any right to repatriation.

As a logical consequence of its decision, the Diplomatic Conference had to allow auxiliary personnel the use of the armlet, which will, however, only bear a red cross in miniature. This solution, which is not without serious drawbacks, will be discussed in connection with Article 41.[2]

Auxiliary personnel must also carry identity documents; but there is no need for them to have a special card. Their ordinary military identity documents must simply specify what special training they have received, the temporary character of their duties and their authority for wearing the armlet.[3]

As we have said, auxiliary personnel are immune if they are carrying out their medical duties at the time when they come into contact with the enemy or fall into his hands. This provision must not be interpreted too literally. A bandsman detailed for medical duties but waiting his turn and not actually engaged in treating the wounded at the moment when his unit is captured, must nevertheless be respected and protected. At that moment he is no longer a combatant or even a bandsman, but a part of the Medical Service.

While the 1949 Conference retained the special category of auxiliary medical personnel, who are semi-combatant [4] and semi-medical, it did not, any more than did previous Conferences, attempt to provide protection for ordinary members of the armed forces who are, in exceptional circumstances, called upon to collect or look after the wounded. It is difficult to see how such protection could have been provided.

To have immunity even on the battlefield, military personnel caring for the wounded had to form a distinct category—that of medical personnel—and enjoy a separate status, recognizable by a distinctive emblem and an identity card. If recourse was had to such safeguards, it was because military considerations demanded them. Otherwise the

[1] See below, page 258.
[2] See below, page 317.
[3] See below, page 318.
[4] For convenience, the term "combatants" is used instead of "ordinary members of the armed forces", to denote all those who do not belong to the special categories of permanent or auxiliary medical personnel. In correct terminology, however, "armed forces" include "combatants" (*i.e.* soldiers bearing arms) and "non-combatants" (who comprise not only medical personnel but also various other army services not called upon to carry arms).

risk of abuse would have been too great. It is not straining the imagination to picture combatants approaching an enemy position, ostensibly to assist the wounded, and then opening fire in order to seize it: similarly, a fighting unit might suddenly transform itself into a medical unit, in order to avoid enemy fire.

Therefore, if a military command should, without previous arrangement, send ordinary combatants to collect the wounded, it would be at their own risk. The letter of the Convention would not protect them, even if its spirit would, and their safety would depend not on any legal obligation, but only upon the goodwill of the adversary.

ARTICLE 26 — PROTECTION OF PERSONNEL OF NATIONAL RED CROSS SOCIETIES AND OTHER RECOGNIZED RELIEF SOCIETIES

The staff of National Red Cross Societies and that of other Voluntary Aid Societies, duly recognized and authorized by their Governments, who may be employed on the same duties as the personnel named in Article 24, are placed on the same footing as the personnel named in the said Article, provided that the staff of such societies are subject to military laws and regulations.

Each High Contracting Party shall notify to the other, either in time of peace, or at the commencement of or during hostilities, but in any case before actually employing them, the names of the societies which it has authorized, under its responsibility, to render assistance to the regular medical service of its armed forces.

PARAGRAPH 1 — ASSIMILATION OF VOLUNTARY PERSONNEL TO OFFICIAL PERSONNEL

1. *Voluntary assistance*

Whereas the two preceding Articles dealt with the regular medical personnel of the armed forces, the present Article and the one which follows it concern the staff of private relief societies (the so-called voluntary aid societies) which have undertaken to assist the Medical Service

of the armed forces. The expression "voluntary aid societies" does not mean that the staff of such societies are necessarily unpaid. It means that their work is not based on any obligation to the State, but on an engagement accepted of their own free will.

Article 26 deals with the staff of societies belonging to a belligerent country which assist the Medical Service of their own armed forces. They are category 4 in the list given at the beginning of our commentary on Chapter IV.

Confirming a long-established practice, the protection of the Geneva Convention was extended in 1906 to the personnel of National Red Cross Societies and other recognized relief societies that assisted the Medical Service of the armed forces.

Up to and including 1929, the Convention only spoke of "recognized aid societies". This term naturally included the National Red Cross Societies, which are by far the most important of the societies assisting the Medical Service, and were originally set up for that very purpose. They were not specifically named, however, doubtless out of excessive modesty.

The 1949 Diplomatic Conference rightly put an end to this anomaly. The Rapporteur of the Committee concerned was at pains to point out that the Committee, in referring to them by name in Article 26, wished to "pay a special tribute to the Red Cross Societies, thus recognizing the great services they had rendered on all the battlefields of the world".[1]

It is gratifying to note that the Article, by granting National Red Cross Societies a recognized status in international law, places them on a still firmer foundation than in the past.

Even if National Red Cross Societies are by far the most important of the societies assisting Medical Services, they are not the only ones. A certain number of other recognized societies provide services of a similar nature, the oldest being the Knights of Malta and the Order of St. John of Jerusalem.[2] Governments could scarcely give the Red Cross a complete monopoly of voluntary relief to the wounded, thereby

[1] *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-A, page 194.

[2] The Knights of Malta requested the 1906 and 1929 Diplomatic Conferences to place them on the same footing as the National Red Cross Societies and to include an express provision to that effect in the Convention. This proposal was not accepted; but the 1929 Conference stated in its Final Act that it considered the provisions of the Geneva Convention governing the position of relief societies, to be applicable to the Knights of Malta and to other charitable Orders of a similar nature.

refusing in advance all other co-operation; such help is never in excess in time of war and it would have been wrong to discourage it. Consequently, Article 26 mentions "other Voluntary Aid Societies" in addition to National Red Cross Societies, and places them both on the same footing.

The 1949 Convention, like its predecessors, grants the staff of Red Cross Societies and other societies the same legal status as medical personnel of the armed forces, both categories being placed on the same footing in all respects. They will therefore have the same right to protection, and the same treatment in the event of capture. As the provisions relating to regular medical personnel also apply to the staff of voluntary societies, reference should be made to the comments on Articles 24, 28, 30 and 31.[1]

2. *Conditions of protection*

When granting the medical personnel of voluntary relief societies the same immunity as medical personnel of the armed forces, appropriate safeguards had to be introduced to prevent uncertainty and abuses. It is proposed to consider in turn the five conditions to be observed, all of them obligatory:

(*a*) The Red Cross Society or other society must be duly recognized by the Government of its home country. This must not be confused with the recognition accorded by the International Committee of the Red Cross to a new Society which becomes a member of the International Red Cross. Recognition in the latter case is peculiar to the Red Cross and in any case implies prior recognition of the Society by its Government. As we have seen, a Government may recognize several societies as auxiliaries to the Medical Service, whereas the International Committee can only recognize one Red Cross Society in any one country.

(*b*) Recognition alone is not sufficient. The Government must also authorize the society to lend its assistance to the Medical Service of the armed forces in time of war. In practice, authorization may often coincide with recognition, both resulting from the same official decree. It may also follow logically in some cases from the Statutes of the society in question, where these have been approved by the Government.

[1] We are only dealing here with the personnel of National Red Cross Societies Their equipment is dealt with in Article 34.

(c) A Government which has authorized one or more societies to assist its Medical Service must, at the latest before actually employing their personnel, notify all other signatory States of the fact in peace-time, or its adversary or adversaries in time of war. This safeguard is in the interests of the personnel themselves. The point will be considered below in connection with paragraph 2 of the present Article, which deals with it.

(d) The staff of voluntary societies must, in time of war, be "subject to military laws and regulations", and (as we shall see under *(e)*) must be employed on the same duties as the personnel of the medical services. Finally, they are to operate under the "responsibility" of the State (Article 26, paragraph 2), and it is from the military authorities that they will receive their badges and identity cards.

From all this it follows that in practice the staff of voluntary aid societies are temporarily attached to the Medical Service, and are under its orders. But attachment and equality of status do not mean loss of identity. There is nothing in the Convention which implies that they become members of the Medical Service and consequently part of the armed forces. If that were so, the societies would lose their essential and traditional quality of giving voluntary aid.

The conditions under which voluntary personnel lend their aid to the official Medical Service and, in the last analysis, their status, will depend on the municipal law and the decisions taken in each country. Unless other provision is made, such personnel will retain civilian status. Their position will be the same as that of their colleagues in the Medical Service, except that they do not become members of the armed forces. This is, in our opinion, as it should be, and would appear, incidentally, to be the solution which has most often been adopted in practice.[1] In many countries the Red Cross recruits its personnel mainly from persons exempted from military service.

In the absence of any stipulation in the Convention the question of the uniform for voluntary personnel also remains a matter for national arrangement. It is not difficult to imagine a State refusing the aid of a society unless the members wear the uniform of the Medical Service,

[1] The Portuguese Regulations of 9 March 1923 relative to the Active Corps of the Red Cross, give some interesting details. *Inter alia*, the Active Corps « forms a special unit which enjoys the same protection as if it formed part of the armed forces". See *Recueil de textes relatifs à l'application de la Convention de Genève*, published by the International Committee in 1934, page 621.

with (possibly) some special marking. But in most cases they will probably wear their society's own uniform. Civilian clothing is not excluded in theory, but for practical reasons is unlikely to be worn.

(e) The personnel of relief societies are to be employed on the same duties as the personnel of the Medical Service. The fundamental importance of this provision has not always been realized, and errors and confusion have resulted. Some societies have thought that, having been recognized and authorized to assist the Medical Service, their entire personnel was entitled to immunity in time of war.

It should, therefore, be emphasized that protection is conferred only on personnel exclusively engaged in the duties set forth in Article 24, namely, the search for, or the collection, transport or treatment of the wounded and sick of the armed forces, the prevention of disease in the forces, the administration of army medical units and establishments, and service as chaplains attached to the forces.

Circumstances may lead to a position where, in a country at war, the whole personnel of the Red Cross Society will work for the Medical Service. But as a general rule only a part of the personnel will be employed in this manner, and the remainder will be engaged, say, in medical or social relief work for the general population. Similarly, members and officers of National Red Cross Societies will only enjoy protection if they are attached to the Medical Service and exclusively engaged in the duties mentioned above.

Personnel of relief societies who do not fulfil these conditions will, if they fall into enemy hands, be covered by the provisions of the Fourth (Civilians) Convention or, in the case of persons following the armed forces, those of the Third (Prisoners of War) Convention.[1]

PARAGRAPH 2 — NOTIFICATION

We have already studied the contents of paragraph 2 when considering the conditions for the protection of voluntary personnel.[2]

Notification must be by one State to another. A Government which has authorized one or more relief societies to assist, under its responsibil-

[1] See Article 4, A (4), of the Third Geneva Convention of 1949.
[2] See above, letter (*c*), page 227.

ity, the Medical Service of its armed forces, must officially communicate the names of such societies to other States in peacetime, or to enemy Powers in time of war. Notification must in any case be made before the personnel of such societies are actually employed. In default of notification, voluntary personnel may find that, although they comply with the other conditions prescribed, the enemy refuses to accord them the privileges to which they are entitled as medical personnel.

This difficulty could hardly arise, however, in the case of National Red Cross Societies. Their existence is a matter of common knowledge. There is known to be one, and only one, such society in each country; they are accorded recognition by the International Committee of the Red Cross, and this is only granted after they have been recognized by their own Governments; they take part in the International Conferences of the Red Cross at which States are also represented. Nevertheless, to avoid any possibility of misunderstanding it is well to observe the formalities required by the Convention.

No special procedure for notification is laid down. In wartime it will normally be made through the intermediary of the Protecting Power.

ARTICLE 27 — PERSONNEL OF SOCIETIES OF NEUTRAL COUNTRIES

A recognized Society of a neutral country can only lend the assistance of its medical personnel and units to a Party to the conflict with the previous consent of its own Government and the authorization of the Party to the conflict concerned. That personnel and those units shall be placed under the control of that Party to the conflict.

The neutral Government shall notify this consent to the adversary of the State which accepts such assistance. The Party to the conflict who accepts such assistance is bound to notify the adverse Party thereof before making any use of it.

In no circumstances shall this assistance be considered as interference in the conflict.

The members of the personnel named in the first paragraph shall be duly furnished with the identity cards provided for in Article 40 before leaving the neutral country to which they belong.

PARAGRAPH 1 — NEUTRAL VOLUNTARY ASSISTANCE

This Article applies, like the preceding one, to National Red Cross Societies and other societies assisting the Medical Service, but in this instance they belong to neutral and not to belligerent countries. Such societies from neutral countries may be asked to assist the Medical Service of a belligerent. By 1906 the necessity of regulating such assistance had already become apparent.

Neutral voluntary assistance, of which Henry Dunant and Louis Appia were the pioneers, is in full conformity with the spirit of the Geneva Convention and with the ideal of the Red Cross, and is one of the finest things the movement has succeeded in bringing about. The men and women who, in a spirit of unqualified devotion to humanitarian ideals, give up the security of a country spared by war and go to the help of the victims of a struggle which is no personal concern of theirs, deserve our fullest admiration.

Neutral assistance was not totally lacking during the last World War; but it was not given on the scale that might have been expected. The reason is not hard to find. There were few neutral States; and those which remained, fearing that they might, in their turn, be drawn into the War, were unwilling to deprive themselves of personnel whose services they might urgently need from one day to the next.

The personnel of neutral voluntary societies will enjoy the same protection as the medical personnel of the belligerent they are assisting. That follows, implicitly but obviously, from the provisions of Chapter IV.

The society to which such personnel belong must obviously fulfil the same conditions as the society of a belligerent which assists the Medical Service of its own country [1], although Article 27 does not specifically say so.

Thus the society must be recognized by its Government, and authorized to assist the Medical Service of a belligerent. In practice the society will always, or nearly always, be one which has already been authorized to assist the Medical Service of its own armed forces.

The Power, which accepts its assistance, must notify its adversary or adversaries that it has done so. This obligation arises under paragraph 2, which will be considered below.

[1] See above, page 226.

Neutral personnel are to be subject to military laws and regulations, and will be attached for practical purposes to the Medical Service of the belligerent. The 1949 text specifies that they are to be placed under the belligerent's control. It is obvious that for reasons of order and discipline neutral personnel cannot retain an autonomous status, but must work under the responsibility of the belligerent authorities.

Finally, such personnel—it is necessary to emphasize the point—must be employed on the same duties as the permanent personnel of the Medical Service of the armed forces, namely on the search for, or the collection, transport or treatment of the wounded and sick of the armed forces, the prevention of disease in the forces, the administration of medical units and establishments, and service as chaplains attached to the forces.

In addition to the above requirements, which we have already met in connection with the preceding Article, there are two others peculiar to this particular case. They are *(a)* the authorization of the belligerent to whom assistance is offered, and *(b)* the notification to the other belligerent, by the neutral Government, of the latter's consent. The first of these requirements is self-evident and needs no explanation; the second will be dealt with under paragraph 2.

PARAGRAPH 2 — NOTIFICATIONS

The 1949 text prescribes two distinct notifications, to both of which we have already referred in our remarks on paragraph 1.

In the first place, the State which accepts neutral help must notify its adversary or adversaries before the personnel in question are employed. This notification corresponds exactly to the one which each State accepting the assistance of a society from its own country is obliged to make under Article 26. This very natural requirement already existed in 1929.

The second notification is new. It comes this time from the neutral State, which informs the adversaries of the country which is aided that it has authorized a society under its jurisdiction to send medical units to a belligerent country.

This stipulation originated in a proposal made to the Commission of Experts in 1937 by the Delegation from the Netherlands—a country

with special experience in questions of neutral humanitarian assistance. The intention of the author of the proposal was *(a)* to crystallize a procedure which had until then been vague, and *(b)* to show that the neutral State accepted responsibility for the aid sent.

So far as *(a)* is concerned, there was, formerly, no concrete evidence of the neutral State's consent, and belligerents might be uncertain in regard to it. This uncertainty now disappears.

Element *(b)* is no doubt explained by a desire to see some form of connection maintained between the neutral State and personnel from among its citizens who have gone to the theatre of war. The neutral State does not lose interest in its citizens. Should they be captured, or otherwise need help, they may appeal to their home country, which will be better placed to defend their interests than the other belligerent would be.[1]

One feature the two notifications have in common is that both are addressed to the same State—the one which is at war with the country to which aid is given. Their contents are, however, different. The belligerent aided will specify the assistance he has received and the staff employed, but his notification will not guarantee the authorization of the neutral State. The latter's own notification will deal with this point.

This duplication may on occasion provide the personnel with an additional safeguard. If the belligerent receiving assistance neglected to make due notification, the communication from the neutral State would to some extent make good the deficiency; it is thus desirable that the latter notification should be as detailed as possible.

Paragraph 3 — Neutrality of assistance

Paragraph 3 stipulates that in no circumstance is the assistance of a neutral Society to a belligerent to be considered as interference in a conflict—that is to say, participation in hostilities, or a breach of neutrality. Assistance need not be given to both the opposing parties. It need only be given to one of them.

[1] The 1937 Experts Commission expressed the hope that a study would be made of the legal status of neutral assistance. Such an investigation would be outside the scope of this Commentary, but we feel that it is much to be desired. It would appear to be an excellent subject for a thesis.

These principles were obviously already implicit in the spirit of the Geneva Convention and in the role of medical personnel. Recognizing neither friend nor foe, they care for the wounded and sick without distinction of nationality. For charity knows no frontiers.

Nevertheless, experience showed that on many occasions, and again very recently, neutral medical assistance had been wrongly interpreted and had been the subject of criticism based on ignorance or malevolence. It was therefore wisest to eliminate all possibility of misunderstanding. Among the things which go without saying there are often some which are better said.

PARAGRAPH 4 — IDENTITY CARDS

Paragraph 4, which is also new, provides that neutral medical personnel who assist a belligerent are to be duly furnished, before leaving their own neutral country, with identity cards as specified in Article 40, paragraph 2, bearing the embossed stamp of the military authority of the belligerent country, the photograph of the bearer and his signature or fingerprints.[1]

The Conference, mindful of what happened in the last War, considered that this requirement was called for in the interests of the personnel themselves; but its decision appears to us unfortunate, since it is bound to give rise to very serious practical difficulties and loss of time.

The least complicated arrangement would appear to be for the neutral medical personnel to send their photographs and all necessary particulars regarding their identity to the belligerent country, and for the military authorities there to affix the photo to the identity card and impress the stamp on them, sending the card back to the owners for the addition of their fingerprints or signature. The authorities would control and check these operations as best they could.

[1] See below, page 313.

ARTICLE 28 — RETAINED MEDICAL PERSONNEL AND CHAPLAINS

Personnel designated in Articles 24 and 26 who fall into the hands of the adverse Party, shall be retained only in so far as the state of health, the spiritual needs and the number of prisoners of war require.

Personnel thus retained shall not be deemed prisoners of war. Nevertheless they shall at least benefit by all the provisions of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949. Within the framework of the military laws and regulations of the Detaining Power, and under the authority of its competent service, they shall continue to carry out, in accordance with their professional ethics, their medical and spiritual duties on behalf of prisoners of war, preferably those of the armed forces to which they themselves belong. They shall further enjoy the following facilities for carrying out their medical or spiritual duties :

(a) *They shall be authorized to visit periodically the prisoners of war in labour units or hospitals outside the camp. The Detaining Power shall put at their disposal the means of transport required.*

(b) *In each camp the senior medical officer of the highest rank shall be responsible to the military authorities of the camp for the professional activity of the retained medical personnel. For this purpose, from the outbreak of hostilities, the Parties to the conflict shall agree regarding the corresponding seniority of the ranks of their medical personnel, including those of the societies designated in Article 26. In all questions arising out of their duties, this medical officer, and the chaplains, shall have direct access to the military and medical authorities of the camp who shall grant them the facilities they may require for correspondence relating to these questions.*

(c) *Although retained personnel in a camp shall be subject to its internal discipline, they shall not, however, be required to perform any work outside their medical or religious duties.*

During hostilities the Parties to the conflict shall make arrangements for relieving where possible retained personnel, and shall settle the procedure of such relief.

None of the preceding provisions shall relieve the Detaining Power of the obligations imposed upon it with regard to the medical and spiritual welfare of the prisoners of war.

HISTORICAL BACKGROUND

The question of the retention of medical personnel and chaplains who fall into enemy hands was the most important which the Diplomatic Conference had to settle when dealing with the first Geneva Convention.[1] It is therefore advisable to begin by outlining the history of the problem.

1. *The First World War*

The 1864 and 1906 Conventions stated as a matter of principle that medical personnel must be unconditionally repatriated. If they fell into enemy hands, they were not to be treated as prisoners of war, but sent back to their own armed forces as soon as their presence was no longer considered indispensable to the wounded in their charge.

This principle was only very indifferently applied during the First World War. The formula employed was not, it is true, a very fortunate one. Some belligerents argued over the text of the Convention, suggested that it was necessary to retain enemy medical personnel to assist in the care of prisoners of war, and held up repatriation for lengthy periods. Other belligerents concluded agreements allowing them, for example, to retain one doctor and ten orderlies for every 1,500 prisoners.

2. *The 1929 Convention*

The 1929 Convention abandoned the unsatisfactory formula of 1906. After confirming (in Article 9) that medical personnel were not to be treated as prisoners of war [2], the Diplomatic Conference laid down (at the beginning of Article 12) the fundamental principle that

[1] For further details, see Jean S. PICTET, *Retention of Members of the Army Medical Services fallen into Enemy Hands* in the English Supplement to the *Revue internationale de la Croix-Rouge*, Dec. 1949 – March 1950, Geneva, 1950.

[2] The United Kingdom Delegation was the only one to vote against this principle in 1929, as again in 1949.

such personnel may not be retained after they have fallen into the hands of the enemy.

But in the second paragraph, stipulating that members of the medical personnel were to be sent back to their own forces as soon as military considerations permitted, a condition was attached by the use of the words "in the absence of an agreement to the contrary" [1]. Moreover, Article 14, paragraph 4, of the Convention of the same date relative to the treatment of prisoners of war authorized belligerents to conclude special agreements for the retention in the camps of doctors and medical orderlies to care for their prisoner compatriots.

It is rather difficult today to understand the attitude of the delegates in 1929 in solemnly proclaiming a fundamental rule only to nullify it immediately afterwards by the words "in the absence of any agreement to the contrary", camouflaged, to all appearance, in an expletive sentence. In actual fact, during the Second World War the fate of most members of the medical services depended on this short phrase.

This attitude had serious consequences. The addition of that brief phrase gave broad latitude for the retention of medical personnel, yet it was entirely unaccompanied by prescriptions as to the procedure to be followed, or the status, treatment and conditions of work of such personnel, who were, nevertheless, retained for years in prisoner of war camps. At most, the 1929 Convention briefly defined the treatment of medical personnel "while in the hands" of the enemy, and then only in regard to their maintenance and pay.

It is possible that the Plenipotentiaries, in acting in this manner, desired to show that in their eyes retention should be an exceptional measure. Be that as it may, one cannot avoid feeling that it would have been better to face up to the problem as a whole and attempt to settle it in all its details. The First World War had already shown the necessity of retaining medical personnel.

3. *The Second World War*

During the Second World War, repatriation of medical personnel took place on a comparatively minor scale. Taking their authority from the phrase "in the absence of an agreement to the contrary" in

[1] This reservation was proposed by the New Zealand Delegation, speaking also in the name of the United Kingdom Delegation.

Article 12 of the Geneva Convention and from a similar provision in Article 14 of the Convention relative to the treatment of prisoners of war, the belligerent Powers agreed among themselves to retain in the camps a considerable number of the medical personnel in their hands, to assist in the care of the prisoners of war. Most belligerents concluded agreements of this nature, the proportion of personnel retained being different in different cases. In Great Britain and Italy, for example, two doctors, two dentists, two chaplains and twelve medical orderlies were retained for every thousand prisoners.

The International Committee did everything in its power to ensure the return of the remainder. Repatriation of these persons, as of the severely wounded, met with great transport difficulties and was impeded by the fact that certain zones of military importance could not be crossed; repatriation was, in consequence, infrequent, incomplete and extremely dilatory.

Medical personnel from occupied countries were nearly all retained in Germany and were often employed on non-medical work. In defence of this measure it was alleged that a "reserve" was essential if such eventualities as air raids, sudden influxes of prisoners, and epidemics in the camps were to be adequately dealt with.

After hostilities ended, the same inclination to retain a large proportion of medical personnel in the camps was noted amongst the victorious nations. The proportion was eventually reduced to one doctor and ten medical orderlies for every thousand prisoners, but the repatriation of personnel in excess of this number was not always effected as promptly as could be desired.

With regard to treatment, the lack of any provision in the Convention led in general to the belligerents subjecting such personnel to the same conditions of captivity as prisoners of war, and indeed sometimes to their considering them as such.

The International Committee protested energetically against the placing of medical personnel on the same footing as prisoners of war, declaring that this was inadmissible under prevailing international law. It also pointed out that while such personnel should enjoy all the rights of prisoners of war, they should also have additional privileges, in order to be able to carry out their duties as well as possible. The Committee endeavoured to secure them such treatment, its efforts in this direction often meeting with success.

Among the Committee's demands were that the members of the medical services should be separately housed, either in or close to the camp infirmary, that they should be entitled, in certain cases, to supplementary rations, and that they should be authorized to leave the camp, and to receive double the normal quantity of mail.

4. *Elaboration of the 1949 texts*

During the preliminary work on the revision of the Geneva Conventions, which began in 1945, the experts soon agreed that it would be necessary to make provision for the retention of a part of the enemy's medical personnel, the proportion to be retained depending on the number of prisoners and their needs. A lively discussion continued for several years, however, on the subject of the status of retained personnel, on which there were two different views.

A new proposal, considered revolutionary, and supported mainly by the English-speaking delegations, came to the fore during the Conference of Government Experts in 1947.[1] It was suggested that medical personnel should, on falling into enemy hands, be treated as prisoners of war. Those in favour of this course had a series of arguments. In modern warfare, they contended, medical personnel have to give as much attention to men in captivity as to the wounded from the front. According to modern ideas of discipline all captured men should receive the same treatment—namely, that of prisoners of war subject to the effective safeguards at present prevailing. Prisoners, they said, prefer to be cared for by their own countrymen, speaking the same language, and medical treatment under such conditions gives better results. Endless difficulties would attend the repatriation of medical personnel, and there would be a danger of espionage. Besides, religious and medical personnel themselves did not wish to abandon their fellow prisoners.[2]

[1] For the sake of clarity we are giving here all the arguments presented in support of each proposal, and will not repeat them, although some of these arguments were in fact only advanced at later Conferences.

[2] A recent book by Professor Paul de la Pradelle, *La Conférence diplomatique et les nouvelles Conventions de Genève de 1949*, speaks of a secret motive which, it is suggested, inspired those who wished retained personnel to be treated as prisoners. The real reason, he claims, was to reduce the efficacity of medical personnel, whose reablement work had become decisive in keeping up fighting strength and in winning the final battles. Nothing in the discussions during the Conference or the long studies which preceded it appears to us to justify such an assertion, even superficially, or to give any grounds for thinking that certain delegations wished to challenge the

The other side retorted that the traditional principle of the Geneva Convention—representing, as it did, a great humanitarian achievement—should be maintained, that prisoners would be better cared for if medical personnel had liberty and prestige, that their inviolable character as non-combatants detached from the fighting should not be tampered with, and that otherwise, a Detaining Power could turn its obligations over to such personnel and abuse the right of retention, with the result that qualified personnel would no longer be sent to the front line by the opposing party.

Those in favour of the new arrangement were at first largely successful. The Conference agreed that if medical personnel fell into enemy hands, they should be treated as prisoners of war, subject to the provision of the necessary facilities for carrying out their duties to the best advantage. But they were only to be retained in the camps in so far as the state of health, the spiritual needs and the number of the prisoners demanded. The remainder were to be repatriated as soon as possible.

The proposals of the Conference of Government Experts caused a considerable stir, especially in the medical circles of a number of countries. During the year which elapsed before the XVIIth International Red Cross Conference, the International Committee continued to devote close attention to this important question and obtained many further opinions from authoritative sources. Supported by the National Red Cross Societies, the Committee decided to make certain changes in the Articles in question when embodying them in the Draft Conventions which it submitted to the Conference. They proposed merely to say that medical personnel should have all the rights of prisoners of war. The Committee felt, moreover, that the designation "prisoners of war" should be reserved for combatant troops, who even in captivity retain their character as enemies, whereas medical personnel are at all times outside the fighting. The status of retained medical personnel was defined in a series of Articles with sufficient precision for it to be regarded as a status *sui generis*. Besides, it was hardly conceivable that the personnel of voluntary aid societies, who are placed on the same footing as medical personnel of the armed forces, should be treated as prisoners of war. Such treatment would certainly have damped their enthusiasm.

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very basis of the Geneva Conventions. Moreover, any restriction in this domain would have been as prejudicial to those who proposed it as to their enemies in the event of war.

The two opposing theses clashed again at the XVIIth International Red Cross Conference. But after lengthy discussion an appreciable majority voted for the principle of non-captivity, the Conference recommending that it should be stated specifically in the text of the Convention that medical personnel were not to be treated as prisoners of war.

The problem was examined for the last time by the Diplomatic Conference of 1949. Divergencies of view were still apparent. This time, almost all the delegates were opposed to the principle of captivity, but in order to conciliate their opponents as far as possible, the draft approved by the XVIIth International Red Cross Conference was adopted in broad outline.[1]

PARAGRAPH 1 — RETENTION

This paragraph lays down the principle of the possible retention of the medical personnel and chaplains to whom Articles 24 and 26 relate, *i.e.* members of the Medical Service and chaplains of the armed forces, as well as the staff of National Red Cross Societies and other recognized relief societies.[2]

It will be noted that the statement of principle is given in a negative form, namely "Personnel shall be retained only in so far as the state of health, the spiritual needs and the number of prisoners of war require". This turn of phrase is deliberate: it helps to emphasize the fact that, although the principle of retention precedes that of repatriation in the order in which the Articles are placed, retention remains subordinate to repatriation. The latter is the rule, as the Rapporteur of the First Commission took pains to underline at the Diplomatic Conference. If the above wording is compared with that of Article 30, which states the principle of repatriation ("Personnel whose retention is not indis-

[1] Only the United Kingdom and New Zealand Delegations voted against the solution finally adopted by the Diplomatic Conference.

[2] There has been criticism of the fact that the staff of voluntary relief societies, being placed in all respects on the same footing as personnel of the Medical Service, can be retained in like manner by the opposing side. It is thought in certain quarters that this may hinder recruiting for such societies. Thus Professor Paul de la Pradelle *(La Conférence diplomatique et les nouvelles Conventions de Genève de 1949)* has pointed out that parents of young girls might prevent them from enrolling as nurses in order to avoid the possibility of their being subjected to prisoner of war camp conditions. The argument is not without weight, and States making special agreements on the subject should bear it in mind. See below, page 266.

pensable..."), it will be seen quite clearly that retention is intended to be the exception.

Under the 1929 Convention, retention was possible only by special arrangement. In the 1949 text it has full legal sanction. But, in order that a belligerent may retain a proportion of the medical personnel and chaplains who have fallen into his power, one essential condition must be fulfilled: he must have in his charge prisoners of war whose state of health and spiritual needs "require" or render "indispensable" the presence of such personnel. Retention must be justified by a real and pressing need.

It is not possible to read into the text of the Convention that retention is permissible only when the Detaining Power holds prisoners of the same nationality. The text with which we are dealing speaks of "prisoners of war" in general. Furthermore, paragraph 2 of Article 28 lays down that retained medical personnel are to carry out their duties "on behalf of prisoners of war, *preferably* those of the armed forces to which they themselves belong". The implication clearly is that, when a belligerent holds prisoners who are nationals of different countries, he shall as far as possible allocate retained medical personnel on a basis of nationality. But a belligerent who held a surplus of personnel of any one nationality might be justified in retaining them, should circumstances so demand, to care for prisoners of a different nationality. Such a solution is obviously an abnormal one, and should only be adopted as an exceptional and temporary measure; we must not forget that it was decided to make provision for the retention of medical personnel, largely because it was thought desirable that prisoners should be cared for by their own countrymen, speaking the same language and using methods of treatment to which the prisoners were accustomed. It would seem in any event that the eventuality considered will rarely occur in practice, since medical personnel are nearly always captured at the same time as combatants.

The condition which we have just mentioned as being essential to justify the retention of medical personnel in the camps, is accompanied by a reference to the number of prisoners. The only purpose of this reference is to make it possible to fix the proportion of personnel who may be retained. We shall see in connection with Article 31, paragraph 2, that belligerent Powers may fix by special agreement the percentage of personnel to be retained in proportion to the number of

prisoners. Such agreements are optional and not obligatory; they may *inter alia* specify that medical personnel are only to be retained in the camps in numbers proportionate to the number of prisoners of their own nationality.

In the absence of any special agreement, the Detaining Power will determine the percentage in the light of common sense, equity and experience. The maximum which may be allowed, but in no circumstances exceeded, is the staff necessary to meet the real needs of a camp without calling upon personnel of the detaining forces.[1] Should the Power of Origin consider the proportion fixed excessive, it may open negotiations with the Detaining Power and call upon the good services of the Protecting Power or the International Committee of the Red Cross.

We may further point out, in connection with this paragraph, that the Convention, when speaking of the passing of medical personnel and chaplains into enemy hands, uses the words "who fall into the hands of the adverse Party". The wording implies that the capture of medical personnel must be a matter of chance and depend upon fluctuations at the battle front; for it is hardly conceivable that a belligerent should deliberately try to capture such personnel. An organized "medical hunt" would certainly be a sorry sight and completely contrary to the spirit of the Geneva Conventions. On the other hand one can well imagine a fighting unit coming upon a group of medical personnel and leaving them to carry on their duties, and the medical staff, for their part, not taking to flight when enemy forces draw near.

PARAGRAPH 2 — STATUS AND TREATMENT OF RETAINED MEDICAL PERSONNEL

1. *First and second sentences — Status*

The Convention lays down that retained personnel "shall not be deemed prisoners of war", and adds: "Nevertheless they shall at least benefit by all the provisions of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949."

[1] Article 30, paragraph 3, of the Prisoners of War Convention reads: "Prisoners of war shall have the attention, preferably, of medical personnel of the Power on which they depend and, if possible, of their nationality."

Although this formula was only arrived at after thorough discussion and represents a compromise that finally rallied almost unanimous support among the delegations, it must be admitted that it lacks clarity.

There can be no doubt, however, that the words "shall at least benefit" are intended to underline the fact that not all the provisions of the Prisoners of War Convention are applicable to retained medical personnel, but those only that constitute an advantage for them. To convince ourselves of this, we have only to compare the wording of the Article we are considering with that of the corresponding Article in the Prisoners of War Convention.

As a matter of fact, the Conference thought it advisable to introduce the substance of Article 28 of the First Convention into the Third Convention, in order that the commandants of prisoner of war camps could not fail to be aware of it. It did so in practically identical terms, except for the words we are examining. The authors of the proposal had the happy inspiration of giving a clearer wording to this very important sentence, which is drafted as follows in Article 33 of the 1949 Prisoners of War Convention: "They shall, however, receive as a minimum the benefits and protection of the present Convention." This Article has the same legal force as Article 28 of the First Convention.

Moreover, study of the preliminary documents [1] and Conference records—especially the latter—shows quite clearly that the authors of the Conventions intended to lay down, with the help of the somewhat cryptic formula quoted above, that the Detaining Power could apply to retained medical personnel only those provisions of the Prisoners of War Convention that are manifestly to their advantage.

In his Report to the Plenary Assembly, the Rapporteur of Committee I said [2]: "For all these reasons, Committee I came to the decision that detained medical personnel should not be treated as prisoners of war; but that they should be accorded a special Article which should, on the one hand, include all the provisions stipulated in favour of prisoners of war [3] and, on the other, various special facilities essential for the proper performance of their duties."

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[1] The text approved by the XVIIth International Red Cross Conference read: They "shall not be deemed to be prisoners of war, but shall enjoy all the rights of the latter".

[2] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-A, page 195.

[3] We do not think that it is provisions in favour of prisoners of war that is meant,

Furthermore, those who were in favour of giving prisoner of war status to retained medical personnel opposed the present wording of the Convention precisely on the grounds that it would render certain provisions of the Prisoners of War Convention inapplicable to such personnel and give them a special status. They considered that this would actually operate to the disadvantage of the personnel themselves and that it would therefore be better to say that medical personnel, without being considered as prisoners of war, should be treated "in accordance with all the provisions" of the Third Convention. Those holding the contrary view opposed this latter wording, emphasizing that it would place medical personnel on the same footing as prisoners war, which was precisely what they wished to avoid. They also pointed out that the two elements in the provision would be flatly contradictory. The proposed amendment was rejected by 42 votes to 6, with 2 abstentions.

The Conference finally decided to specify that the medical personnel should "at least" benefit by the provisions of the Prisoners of War Convention. The use of this expression underlines the fact that treatment as for prisoners of war should be regarded as a minimum, and that medical personnel should continue to have a privileged position.

This view is in harmony with practice, and the policy of the International Committee of the Red Cross, during the last World War. The Convention thus invites belligerents to give the medical personnel they retain additional advantages over and above those expressly provided for in the Conventions, whenever it is possible to do so.

We need not recall here the various reasons why the Conference decided not to place retained medical personnel and chaplains on the same footing as prisoners of war, and yet to give them the advantages and protection of the Prisoners of War Convention.[1] It is enough to note that its intention in so doing was to make it possible for them to carry out their medical and spiritual work for prisoners under the best possible conditions. On the one hand, the Conference thought it necessary to affirm the supra-national and quasi-neutral character of personnel whose duties placed them above the conflict. It should, moreover, always be borne in mind that these personnel should normally

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but more exactly provisions, the application of which would be to the advantage of retained medical personnel, who are not prisoners of war. The difference in meaning is only a very slight one.

[1] See above, page 239.

be repatriated, and that they are only retained as an exceptional measure with one purpose in view—namely, relief work carried out with the consent, and even, in a manner of speaking, on behalf of the Power of Origin. On the other hand, the Conference recognized the fact that the safeguards afforded to prisoners of war under international law were effective, that they had been well tested, and that they constituted, generally speaking, the best guarantee that could be offered to persons in enemy hands. No less important was the practical advantage of being able to make use of an existing Convention, instead of having to establish an entirely separate code.

Although the Convention lays down that medical personnel are not to be regarded as prisoners of war—a privilege that the wounded themselves do not enjoy—there is no mention of exemption from capture. This expression had been rejected in 1929, because such capture exists *de facto*, if not *de jure*.[1]

Similarly, while they remain with the enemy, medical personnel will actually find that their liberty is to some extent restricted, in spite of the fact that from a strictly legal point of view they are not in captivity inasmuch as they are not prisoners of war. This state of affairs is inevitable in view of their status as "retained personnel", their enemy nationality, and the necessity, for the Detaining Power, of ensuring its own military and political security. Besides, Article 28 lays down that they are to be subject to camp discipline. The extent of the restrictions on their liberty will vary according to circumstances; and it is to be hoped that belligerents will be particularly generous in this matter, having recourse, whenever possible, to supervision and assigned residence rather than actual internment. But one can scarcely imagine any Power granting full liberty to retained medical personnel and allowing them to move about freely in a country at war, with all the consequent risk of espionage.

In order to determine the treatment to be accorded to retained medical personnel, it is necessary to consider which provisions of the 1949 Prisoners of War Convention are applicable to them. We shall study this question in due course.[2]

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[1] See P. DES GOUTTES, *Commentaire de la Convention de Genève du 27 juillet 1929*, Geneva, 1930, page 77.

[2] See below, page 252.

2. *Third sentence — Exercise of functions*

This sentence contains several distinct elements.

It lays down, in the first place, that retained medical personnel and chaplains are to continue to carry out their medical and spiritual duties in behalf of prisoners. The words "shall continue", which already figured in the Conventions of 1864, 1906 and 1929, have been kept, and with good reason. They bring out the fact that although the capture and retention of medical personnel places them in a new environment and under a different authority, their essential work of caring for sick and wounded combatants remains unchanged, and should continue without hindrance, and practically without a break.

From now on, these duties will be carried out under the laws and military regulations of the Detaining Power, and the authority of its competent services. This provision is dictated both by common sense and the demands of efficient administration. The Detaining Power, being responsible for the state of health of all prisoners in its hands, and indeed of the entire population, must necessarily retain full powers of direction and control. The retained personnel whose help it receives, are therefore absorbed, as it were, into the larger organization of the Detaining Power, and are subject in their work to the same rules as the national staff. It is difficult to see what other course could be adopted in practice. The medical personnel will naturally be placed under the authority of the Medical Service of the Detaining Power, while chaplains will come under the appropriate service—doubtless the same as that to which the chaplains of the Detaining Power are attached.

The Convention nevertheless tempers the force of this rule by stipulating that medical and religious personnel are to carry out their duties "in accordance with their professional ethics". Although they are subject administratively to their captors, their subordination has definite limits. Compulsion by the detaining authority must end when we enter a domain which, for the priest as for the doctor, is governed by a professional code or by the dictates of his own conscience. Thus a doctor could not be prevented from treating a sick man, or obliged to apply a treatment detrimental to the patient's health. Obviously, however, medical treatment may vary with different countries and different doctors, and the competent authorities of the Detaining Power may decide what methods are to be used.

The text also provides that the prisoners of war in whose behalf retained personnel are to carry out their duties, shall preferably be "those of the armed forces to which they themselves belong". We have already mentioned this point when discussing the principle of retention.[1]

The provision was introduced (in reference to medical personnel awaiting repatriation) when the Geneva Convention was revised in 1929. It was only adopted by a narrow majority, however, some delegates considering that it was contrary to a fundamental principle of the Convention—the principle, namely, that the wounded are to be cared for without distinction of nationality.

In our opinion, the fears expressed in 1929 were unfounded, although those who expressed them had the best of intentions. They appear to us to have actually resulted from a confusion of thought. The fundamental obligation laid down in the Geneva Convention is that the captor is to treat and care for the enemy wounded as well as he does his own. Similarly a Power fighting against several countries must give equal care to the wounded of each; but there is no restriction as to the methods chosen to ensure such equality of treatment. In taking steps to discharge its general obligation, a Power is entirely justified in having prisoners of a particular nationality cared for by doctors, medical orderlies or chaplains who are their own countrymen. Such a course is, in fact, eminently desirable, one of the main reasons which led to the decision to sanction the retention of medical personnel being that prisoners preferred to be looked after by doctors of their own nationality, speaking the same language, and that medical treatment given under these conditions yielded better results.

In any case only a preference is expressed. The Detaining Power is recommended to take nationality into account in the allocation of medical personnel; but exceptions may be made where circumstances so demand, and the system can therefore be adapted to the needs of the prisoners as a whole, the fundamental principle of the Geneva Convention being thus fully respected.

[1] See above, page 241.

3. *Fourth sentence and sub-paragraphs* (a), (b) *and* (c) — *Facilities*

The preceding clauses confer the benefits and protection of the Prisoners of War Convention on retained medical personnel and chaplains, and give them the right to continue their proper work.

The fourth sentence of paragraph 2 sets out the additional facilities which should be accorded to such personnel. It is stated quite clearly at the outset, and emphasized in the clauses which deal with the details, that the facilities accorded are "for carrying out their medical or spiritual duties". The authors of the 1949 Conventions wished to emphasize in this way that their intention in giving medical personnel and chaplains a special status, was to enable them to carry out their duties under the best possible conditions, and not to grant them privileges as individuals. The ultimate justification of their privileged status is the good of the combatants for whose benefit they work.

It should be noted that these facilities, being expressly mentioned in the Convention, should always take precedence over similar provisions in regard to prisoners of war in general in the Prisoners of War Convention.

The first facility accorded to the personnel, under sub-paragraph *(a)*, is the right to make periodic visits to prisoners of war in labour units or hospitals outside the camp, and to have the necessary transport for the purpose.

Prisoners need medical and spiritual aid, no matter where they are, and those whose duty it is to bring them such aid must be able to leave camp and make whatever journeys are required. The specific mention of hospitals and labour units should not be considered as limiting the scope of the provision, because prisoners in penitentiaries or living with private families also need medical or spiritual aid. The Detaining Power is free to exercise such supervision as it considers necessary over these journeys, and will decide if the circumstances call for an escort or not. It might, for example, dispense with an escort in the case of medical personnel who had promised not to abandon their posts. It should, incidentally, be noted that retained personnel cannot misuse the right so conferred on them: they are only entitled to leave the camp and travel in order to visit prisoners entrusted to their care, or in need of their services.

The Convention next provides, under sub-paragraph *(b)*, that

"the senior medical officer of the highest rank shall be responsible to the military authorities of the camp for the professional activity [1] of the retained medical personnel". The duty so imposed has a striking analogy with that of the "prisoners' representative" in prisoner of war camps. In actual fact, the said medical officer will perform, on behalf of the retained medical personnel, all the duties which the prisoners' representative performs for the prisoners, so that the presence amongst the medical personnel of a representative, side by side with the responsible medical officer, is hardly conceivable. The medical officer in question will, in fact, be the personnel's representative.

His sphere of competence is, however, greater. While the prisoners' representative "represents" the prisoners with the military authorities [2], the senior medical officer is to be "responsible" to the authorities "for the professional activity of the retained medical personnel". The responsible officer will therefore be the real head of the retained medical personnel in the camp in all professional matters, in so far as this is compatible with the fact that such personnel are placed, in principle, under the authority of the competent services of the Detaining Power.

The necessity of placing the retained medical personnel under a responsible chief follows logically from the fact that they have a special role to play, which is not the case with prisoners of war. Their task of caring for the health of prisoners is an important one and demands their whole time and energy. An organized and graded staff, such as there is in a hospital, is necessary for the satisfactory performance of their duties, and it is for this reason that the Diplomatic Conference rightly amended at this point the draft submitted to it, which provided that medical personnel could elect a spokesman from amongst their number.

On the other hand, the Conference adopted the same procedure for the appointment of the responsible medical officer as for the appointment of the prisoners' representative in officers' camps: the senior medical officer of the highest rank [3] is automatically selected.

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[1] The French text corresponding to the words "the professional activity" says "tout ce qui concerne les activités" (everything which concerns the activities). — TRANSLATOR.

[2] Article 79 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

[3] The wording in the French text which corresponds to the English expression "the senior medical officer of the highest rank" is "le plus ancien dans le grade le plus élevé". If these words are to have a precise meaning, as they should have, it

It was in order to make it possible to decide upon the rightful nominee that mention was retained of an agreement to be concluded between the Parties to the conflict, to determine the corresponding seniority of the ranks of their medical personnel, including the members of Red Cross Societies and other societies authorized to collaborate with the Medical Services of the armed forces. Under the 1929 Convention, this agreement also decided their conditions of pay and maintenance; this is no longer necessary under the new text.

The Article under review gives the responsible medical officer two prerogatives: he is to have direct access to the camp authorities in all questions arising out of his duties, and he is to be allowed the necessary facilities for correspondence relating to such questions. Thus the number of letters and cards which it may be necessary for him as responsible medical officer to write and receive must never be limited, as the number of letters and cards written and received by prisoners of war may be in certain circumstances. It is important that the responsible medical officer should remain in close touch with medical circles in his own country, with the Protecting Power, the International Committee of the Red Cross, relief organizations, the families of captured personnel and so forth. In general, the facilities for correspondence accorded to him should be as generous as those accorded to prisoners' representatives.[1]

It should be noted that the appointment of a "responsible" officer only affects medical personnel, and not chaplains. On the other hand, individual chaplains are, like the responsible medical officer himself, to have direct access to the camp authorities. They will also have similar facilities for correspondence.

The provisions we have quoted help to show that the privileges accorded to retained medical personnel, far from being for their direct personal advantage, in reality benefit the sick and wounded to whom such personnel devote themselves.

As retained personnel receive in principle the protection and all the benefits of the Prisoners of War Convention, it follows that chaplains

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should be what the English text says, viz. "The senior medical officer of the highest rank." But it may be pointed out that the Detaining Power will not have ready facilities for checking dates of promotion, whereas it will generally know the age of any military personnel in its hands. It is therefore conceivable that it might take age as the determining factor in designating the responsible medical officer.

[1] See Article 81, paragraph 4, of the Third Convention.

could, if they so wished, avail themselves of the services of the prisoners' representative in their camp and take part in his election. The point is immaterial, however, in view of the fact that the Convention places each chaplain on the same level (so to speak) as the prisoners' representative and the responsible medical officer, conforming, in this respect, to the practice followed during the last World War.

It is, furthermore, most unlikely that chaplains in a camp could have one of their number recognized as their representative, or as responsible for them. The Convention does not provide for such representation in their case, whereas it does so expressly in the case of medical personnel. The situation is altogether different in the two cases, since chaplains do not form a separate corps, are few in number, and are often of different denominations.

The 1929 Convention accorded to medical personnel in enemy hands the same conditions of maintenance, housing, allowances and pay as to corresponding members of the detaining forces. The 1949 Conference did not consider it possible to continue this system, and retained personnel are now to have the same maintenance, housing and pay as prisoners of war, with the proviso that these conditions should be regarded as a minimum which the Detaining Power is invited to exceed.

In sub-paragraph *(c)* we find two elements which appear to have been grouped together for convenience in drafting, but between which there is little or no connection.

Retained personnel are not to be required to perform any work outside their medical or religious duties. This was implied in the 1929 text; but regrettable experiences in the last World War proved the need for putting it down in black and white.

The rule is now absolute; so much so that retained personnel cannot even be obliged to do work connected with the administration and upkeep of the camp, should they happen to be unoccupied for the time being. Nevertheless, the expression "medical duties" must be understood in its broadest sense. It must be remembered that the term "medical personnel" includes men who are engaged in the administration of units and hospitals. Although such work is not, strictly speaking, medical, these men will continue to carry out the duties assigned to them in their own forces.

The same sentence provides that retained personnel are to be subject to the internal discipline of their camp. Common sense dictated

this important provision. It should be read in conjunction with the clause, examined above, which lays down that the personnel are to carry out their duties under the authority of the competent service of the Detaining Power. They will thus come under the authority of the commander of the camp except when actually carrying out their duties. Every military organization is subject to military discipline, and this rule applies with even greater force to prisoner of war camps. Personnel of enemy nationality who are often in a camp and take part in its life, cannot conceivably escape the discipline common to all: nothing but disorder could ensue.

We may note that Article 35 of the Prisoners of War Convention is devoted entirely to chaplains who are retained. This Article to a large extent duplicates Article 28 under review (which is itself reproduced as Article 33 in the Third Convention). Some of the provisions of Article 35 are, however, more detailed and it may be best to quote the actual text of the Article:

> Chaplains who fall into the hands of the enemy Power and who remain or are retained with a view to assisting prisoners of war, shall be allowed to minister to them and to exercise freely their ministry amongst prisoners of war of the same religion, in accordance with their religious conscience. They shall be allocated among the various camps and labour detachments containing prisoners of war belonging to the same forces, speaking the same language or practising the same religion. They shall enjoy the necessary facilities, including the means of transport provided for in Article 33, for visiting the prisoners of war outside their camp. They shall be free to correspond, subject to censorship, on matters concerning their religious duties with the ecclesiastical authorities in the country of detention and with international religious organizations. Letters and cards which they may send for this purpose shall be in addition to the quota provided for in Article 71.

4. *Provisions of the Prisoners of War Convention which are applicable to retained personnel*

We have now to consider how far the provisions of the 1949 Prisoners of War Convention are applicable to retained personnel.

We have seen above [1] that retained personnel "shall at least benefit by all the provisions of the Geneva Convention of 1949 relative to the Treatment of Prisoners of War", which means, as stated specifically

[1] See above, pages 242 ff.

in this latter Convention, that they shall "receive as a minimum the benefits and protection" of the Convention in question.

The idea of "benefits" must not be considered here in relation to prisoners of war, but in relation to medical personnel and chaplains, who are not prisoners. In other words, we must try to determine what "benefits" might accrue from the application of prisoner of war status to persons who are not prisoners and who enjoy special immunity.

The idea of "benefits" is not the only criterion. Other factors arising out of the special status of retained medical personnel must also be considered. They may be summarized as follows:

In matters where special provisions relating to retained personnel and similar provisions relating to prisoners of war both apply, the first-named always take precedence.

In matters regulated only by provisions designed for prisoners of war, it is necessary to take into consideration certain consequences of the special position and duties of retained personnel. They are, briefly, as follows:

(a) The effective carrying out of the medical or spiritual duties for the benefit of the prisoners should be the determining factor. In case of doubt, the interpretation chosen should be the one which will facilitate this.

(b) Retained personnel are, in actual fact, at liberty within certain limits only.

(c) Retained personnel are subject to the military discipline of the camp in which they find themselves.

This much being said, the provisions of the Prisoners of War Convention are, in their great majority, applicable to retained medical personnel and chaplains. It is to be hoped that the Powers will clarify, by means of agreements, points whose interpretation is not quite clear.

We can confine ourselves here to the following:

Article 21, which provides in its first paragraph that prisoners of war may be interned, does not legally apply to medical personnel and chaplains, since they are not prisoners of war. In any case, internment could scarcely be considered as either a "benefit" or a form of "protection". It is none the less true that their liberty may in actual fact be restricted, as we have shown above.[1]

[1] See above, page 245.

Paragraph 2 of the same Article provides that prisoners may be wholly or partially released on parole. This would appear to be applicable by analogy to medical personnel: on their undertaking not to attempt to escape, they might be allowed to move about without escort. Such a concession would appear eminently desirable and would certainly be an advantage to those concerned.

Article 12, paragraphs 2 and 3, lays down the safeguards required when prisoners of war are transferred by the Detaining Power to another Power which is a party to the Convention and in a position to observe its requirements. The problem does not arise directly out of this provision, since it is quite clear that if retained personnel are transferred, they should be provided with the same safeguards as prisoners.

Transfers are recognized as being possible in the case of prisoners of war. But can retained personnel be transferred? As an appreciation of the advantages and disadvantages of transfer will depend on factors which vary in each individual case, it is difficult to find an answer to our question without taking a further element into consideration, namely, the prisoners' right to medical care. This would incline us to the opinion that it should be permissible to transfer medical personnel, in so far as this is necessary to meet the needs of the prisoners in the new country where they will be detained.

On the other hand, a Detaining Power would not be justified in transferring medical personnel to another Power where there was no accompanying transfer of prisoners of war. The retention of medical personnel is only provided for in the First Convention for the purpose of helping the Power into whose hands they have fallen to care for prisoners held by that same Power.

Articles 49 to 57 are concerned with the labour of prisoners of war. Articles 49, 50, 52, 56 and 57 deal with the work to which prisoners may be assigned and the arrangements connected with it, and do not, generally speaking, apply to retained personnel. Such personnel will, on the other hand, have the benefit of the other Articles, dealing with working conditions, rest, etc., in so far as the provisions in question are compatible with the carrying out of medical or spiritual duties.[1]

[1] Medical personnel will not, for example, cease work if there are patients in urgent need of attention.

Article 62 provides that all prisoners of war who work are to receive "working pay" (formerly referred to as "wages"), which may not be less than one-fourth of one Swiss franc a day.

This pay has a direct connection with the obligation laid on prisoners to do work which is not of their own choice; one might wonder, therefore, if retained personnel are entitled to receive it, their work on behalf of the prisoners being the same as the work they do normally in their own forces.

We are inclined to think that they should receive it, because this would obviously be to their advantage and because they too are compelled to do work—even if it is the work which is normally theirs. Furthermore, Article 62, paragraph 2, grants working pay to prisoners of war [1] who are required to carry out medical or spiritual duties on behalf of their comrades. A difference in treatment would therefore appear to be inequitable. This is a point, however, that belligerents would do well to settle by means of an agreement.

Article 82 to 108 provide safeguards for prisoners prosecuted for alleged offences. Such safeguards can but be to the advantage of retained personnel against whom proceedings are taken, and they must therefore be considered as being applicable.

Article 92 lays down that unsuccessful attempts to escape will render prisoners liable to disciplinary punishment only. As medical personnel are not prisoners, one could not properly speak of escape in their case.

It has sometimes been held that such acts are a form of desertion and should be dealt with more severely than the escape of a prisoner of war, as they would be in the nature of a breach of professional duty. If that is so, the matter should be left to the judgment of the Power of Origin, which can, if it wishes, give suitable instructions to its medical personnel and itself provide for penalties in cases of flight. For even when in enemy hands, medical personnel, like prisoners of war, remain, to some extent, in the service of their home country. It is not impossible to visualize the conclusion, between the two interested Powers, of an agreement to put down cases of desertion among retained personnel.

[1] The persons referred to are those who are engaged in medical or religious work in civil life, but have served in a fighting unit in their armed forces and not in the Medical Service or as chaplains, and who have, therefore, on capture become prisoners of war. The reference could also include auxiliary medical personnel, of whom we shall speak later.

The Convention itself only entitles the Detaining Power to regard the flight of medical personnel as a breach of camp discipline. Their flight is therefore punishable by disciplinary measures only.

The provisions of *Articles 109 to 117* which provide for the repatriation of seriously ill and seriously wounded prisoners, should be taken as applying to retained personnel. But it is not easy to see how the provisions dealing with accommodation in a neutral country can concern medical personnel. From the moment their state of health prevents them from carrying out their work of relief, there is no longer any justification for retaining them and they must be allowed to return home.

5. *Conclusions*

It may be useful at the end of this study of Article 28, paragraph 2, to summarize the various elements which go to make up the special status and treatment accorded to medical personnel and chaplains who have fallen into enemy hands and are retained to care for their countrymen who are prisoners:

1. They are not prisoners of war, but enjoy the special immunity which attaches to their status.

2. Because of their position as "retained persons", their enemy nationality and the fact that it is necessary for a Detaining Power to ensure its security, their liberty may, in practice, be restricted.

3. They are subject to the laws and regulations of the Detaining Power, and to camp discipline.

4. They carry out their duties in accordance with their professional ethics.

5. They may not be compelled to do any work outside their proper sphere of duty.

6. They may visit labour detachments and hospitals.

7. The "responsible medical officer" and the chaplains have direct access to the authorities and special facilities for correspondence.

8. They receive, as a minimum, the benefits and protection of the Prisoners of War Convention, in so far as express provision has not already been made to meet their case (see points 3 to 7 above).

The new status of medical personnel who have fallen into enemy hands is thus a very complicated matter. Experience alone can show if the system patiently built up will work, or whether it will have to be reconsidered and completely recast.

PARAGRAPH 3 — RELIEVING OF MEDICAL PERSONNEL

During the last World War certain belligerents planned to relieve doctors retained in enemy camps, by personnel from the home country. On being replaced the doctors in question were to be repatriated. A beginning was made in the case of some Yugoslav doctors and a larger number of French doctors retained in Germany.

The Diplomatic Conference (1949) did not consider that it could make such arrangements compulsory; it merely provided for their possibility, by agreement between the Powers concerned. Security considerations seem bound to create difficulties; and it is worth pointing out that on the one occasion when relief on a partial scale was found possible during the last World War, the home country of the medical officers concerned was itself occupied by the Detaining Power.

Nevertheless, the Conference, in its Resolution 3, requested the International Committee of the Red Cross to prepare a model agreement for use in such cases.[1]

PARAGRAPH 4 — GENERAL OBLIGATIONS OF THE DETAINING POWER

The Article ends by stating that none of its provisions are to relieve the Detaining Power of the obligations imposed on it with regard to the medical and spiritual welfare of prisoners of war.

Under the Prisoners of War Convention the Detaining Power is bound to provide free of charge whatever medical attention the prisoners' state of health may require, to take any necessary public health measures, to set up and operate suitable hospitals, etc. It is also bound to allow prisoners to practise their religion, and to provide suitable premises for the purpose.

[1] See below, page 432.

A Detaining Power must not be able to use the fact that the retention of a portion of the opposing party's medical and religious personnel is authorized, as a pretext for avoiding its own obligations or as justification for a dereliction on its part; it may not, for example, find in the retention of enemy medical personnel a reason for not making available such of its own personnel as may be necessary.

Retention, as the new Convention regards it, must remain a supplementary measure taken for the good of the prisoners themselves and to assist the Detaining Power. The latter continues to be fully responsible for the prisoners of war who have fallen into its hands.

ARTICLE 29 — STATUS OF AUXILIARY PERSONNEL

Members of the personnel designated in Article 25 who have fallen into the hands of the enemy, shall be prisoners of war, but shall be employed on their medical duties in so far as the need arises.

As we saw in connection with Article 25 [1], which defines auxiliary personnel, such personnel will be protected in future on the field of battle and when they fall into enemy hands, but they are no longer entitled to repatriation as they were under the 1929 Convention. Article 29 defines their status in the event of capture.

The solution adopted by the Conference is justified on several grounds. First of all, there is no real affinity of status between auxiliary personnel and permanent medical and religious personnel. Auxiliary personnel are as much "combatant" as medical, and their repatriation would help to increase the military potential of the home country. Besides, since their medical functions are subsidiary only, the necessary instruction can quickly be given to other troops who can be detailed to replace those captured.

Secondly, although the bold innovation of the 1929 Convention did not, fortunately, give rise to abuse, it was nevertheless open to it. One can well imagine a belligerent giving training as stretcher-bearers to large numbers of the fighting troops of his armed forces, in order to

[1] See above, page 222.

furnish them with a claim to repatriation, should they be captured.

Finally, as we have seen above, troops are most often captured nowadays in large groups, following encircling operations. When a body of troops is surrounded in this manner and disarmed, it is sent behind the lines, where the sorting out process begins. In most such cases, it will be impossible for the commanding officer to establish with any degree of certainty, whether or not particular soldiers were engaged on medical work at the moment of capture, especially as the exact moment of capture is not itself at all easy to ascertain. It would seem to have been especially this last consideration which led the delegates of 1949 to reverse the former system.

Does it follow that the special training of these men will become useless from the moment they are taken prisoner? The answer is "No". The Conference was careful to provide that auxiliary personnel who become prisoners of war "shall be employed on their medical duties, in so far as the need arises". The Detaining Power should therefore call upon them as far as may be necessary, and may employ them from time to time, or permanently, on duties connected with the care of their fellow prisoners.

Should the presence in prisoner of war camps of auxiliary medical personnel (*i.e.* of stretcher-bearers and medical orderlies) involve a reduction in the proportion of permanent medical personnel retained? The Convention has no specific provision dealing with this point. The matter must therefore be left to the agreements which belligerents are invited to conclude, or, in default of such agreements, to the judgment of the Detaining Power, which, under the terms of Article 45, must always be guided by the general principles of the Convention when dealing with unforeseen cases.

It should be remembered that auxiliary personnel are only trained to act as stretcher-bearers or auxiliary medical orderlies, so that their presence in camps could at most justify the repatriation of permanent personnel of the same class, not of fully qualified personnel. Besides, there is unlikely to be a constant need for stretcher-bearers in the camps, so that the problem will probably be limited in practice to the case of auxiliary medical orderlies.

If some of them are able to fill the necessary posts satisfactorily and permanently, the Detaining Power should admittedly consider freeing a corresponding number of the permanent medical orderlies retained

under Article 28. Such an attitude would be in full accordance with the spirit and general principles of the Convention.

What then is the status of auxiliary personnel in captivity? When they are not doing medical work, they will be treated as ordinary prisoners of war. When they are called upon to act in a professional capacity, they should, in our opinion, have the benefit of the provisions of Article 32 of the Prisoners of War Convention, which applies to prisoners who, though not attached to the Medical Service, are doctors, medical orderlies, etc., and are required by the Detaining Power to exercise their profession. According to the terms of this Article, "they shall continue to be prisoners of war, but shall receive the same treatment as corresponding medical personnel retained by the Detaining Power".

ARTICLE 30 — RETURN OF MEDICAL AND RELIGIOUS PERSONNEL

Personnel whose retention is not indispensable by virtue of the provisions of Article 28 shall be returned to the Party to the conflict to whom they belong, as soon as a road is open for their return and military requirements permit.

Pending their return, they shall not be deemed prisoners of war. Nevertheless they shall at least benefit by all the provisions of the Geneva Convention of August 12, 1949, relative to the Treatment of Prisoners of War. They shall continue to fulfil their duties under the orders of the adverse Party and shall preferably be engaged in the care of the wounded and sick of the Party to the conflict to which they themselves belong.

On their departure, they shall take with them the effects, personal belongings, valuables and instruments belonging to them.

PARAGRAPH 1 — REPATRIATION OF MEDICAL PERSONNEL

The repatriation of medical personnel, traditionally a principle of the Geneva Convention, remains, as we have shown above [1], the essential

[1] See above, page 240.

rule. Retention is only a secondary possibility. Consequently, all permanent medical and religious personnel [1] whose retention is not indispensable under the provisions of Article 28, which we have examined, should be sent back to the belligerent to whom they belong. All medical personnel and chaplains beyond the number fixed by agreement and proportional to the number of prisoners, or, in default of such agreement, all who are not indispensable in view of the medical condition or spiritual needs of the prisoners, are to be repatriated. The obligation laid on the Detaining Power in this matter is an absolute one. It springs not only from the letter of the Convention, but from its inmost spirit, which the 1949 revision has not affected. Medical personnel must always, as a matter of principle, be in a position to carry on their particular work. To hinder them in this by holding doctors idle while they might be saving the lives of patients in their own country, would be gravely at variance with the Geneva Convention and the very idea of the Red Cross.

The retention of indispensable personnel is now explicitly recognized by the Convention and governed by carefully drafted rules, thus satisfying the legitimate requirements of States which felt they should be able to avail themselves of the services of medical personnel of the adverse Party. The Powers must therefore aim at respecting the essential principle of repatriation all the more strictly, since its field of application is now more limited. The provisions of the new Geneva Convention spring as a whole from the central idea that sick and wounded soldiers form a single group, and must be cared for as well as possible, whether they are with their own forces or in enemy hands. All the preliminary discussions were dominated by the desire to maintain a just balance between the needs of the wounded on the battlefield and those of prisoners of war.

The paragraph lays down that surplus medical personnel are to be returned "as soon as a road is open for their return and military requirements permit".

Only physical impossibility or military necessity can be invoked as a reason for delaying their return. Thus it is not always possible to cross a battle front; similarly, transport overseas or across a neutral country cannot be organized from one moment to the next. Then

[1] The Diplomatic Conference rejected a proposal that only doctors, dentists and medical orderlies should be repatriated.

again, repatriation may be delayed if there are good grounds for believing that medical personnel have, at the time of capture, been able to collect information of tactical or strategic value which they will communicate to their own army command on their return.

The two conditions laid down in the paragraph under review are the only admissible ones; and they must be reasons, not pretexts.[1] These conditions apart, repatriation should be immediate. It is essential that steps should be taken to prevent a repetition of the unjustifiable delay which occurred in the repatriation of medical personnel in the two World Wars. If one really wishes, it is not physically impossible to hold fire just long enough to allow a few hundred men to pass; nor is it impossible to ensure the security of a ship over a route agreed upon beforehand. Similarly, any information of military value which medical personnel may have been able to collect will very soon be out of date.

If belligerents were to yield to the temptation of delaying the repatriation of surplus medical personnel on the chance of prisoners later falling into their hands, it might well be said that the introduction of the system of retention had marked the end of one of the first real achievements of the Geneva Convention. The system of retention will not, we must repeat, give the good results expected of it, unless the principle of repatriation is also scrupulously observed. It is at this price that the new provisions will take on their full value and that the Convention as a whole will retain its high moral significance.

The Convention stipulates that medical personnel are to be returned "to the Party to the conflict to whom they belong". This is the expression used in the 1929 Convention, and was preferred to the 1906 text which spoke of the return of medical personnel "to their own army or country". It was necessary to ensure that the belligerent could not meet his obligation by transferring medical personnel to a part of their country which he himself had occupied. Further, medical personnel might have served in forces other than those of their home country, and it is to these forces that they should be returned. The whole object of the restitution is to reinstate medical personnel in the position which they occupied when they fell into enemy hands or, if that is not possible, in conditions approaching it as nearly as possible.

[1] See Paul DES GOUTTES, *Commentaire de la Convention de Genève du 27 juillet 1929*, Geneva, 1930, page 81.

PARAGRAPH 2 — MEDICAL PERSONNEL AWAITING REPATRIATION

We have seen above that a certain interval—which should be as short as possible—will elapse between the capture of medical personnel and their return. It was necessary to decide their status and living conditions during this period, and this is done in the paragraph under review.

The essential provisions laid down for the benefit of medical personnel retained permanently are also valid for those awaiting repatriation. The latter are not to be considered as prisoners of war, but are to receive, as a minimum, the benefits and protection offered by the Prisoners of War Convention. They are to continue to carry out their duties under the orders of the adverse Party, and to be engaged, preferably, in the care of the wounded and sick of their own nationality. It is desirable from every point of view that their professional abilities should not be left unused. For the rest the reader is referred to what has been said in this connection on Article 28.

Although the Diplomatic Conference reproduced here only the most striking of the provisions established for the benefit of retained personnel, this does not mean that personnel awaiting repatriation cannot also claim the benefit of the other provisions and general spirit of Article 28, as for example the right to carry out their duties in accordance with their professional ethics.

The real reason for simplifying the Article is that the medical personnel in question only have to remain with the enemy for a short period, and will therefore most often have no need of more detailed provisions.

But if repatriation is delayed and the work they are doing justifies it, such personnel certainly have every right to demand fuller application of the provisions. Indeed, in such cases, they should very soon be considered as having passed by force of circumstances into the category of retained personnel, at least in so far as their prerogatives are concerned.

PARAGRAPH 3 — PERSONAL BELONGINGS

Provision is made here for the principle of respect for private property, already recognized as being valid in the case of prisoners of war (Prisoners of War Convention, Article 18), as in the case of civilians.

Among the things which are to remain the property of medical personnel, and which they may take with them on repatriation, the Convention mentions "instruments"—articles proper to the medical profession, especially to surgeons. All articles, including instruments, taken with them must "belong to them". If only entrusted to them by their home country, such articles cannot be taken away, but come under the provisions dealing with medical equipment of the armed forces.

The 1929 Convention included arms and means of transport among the personal belongings which medical personnel were authorized to take with them on departure. The 1949 Conference dropped this provision, as they felt that it would be difficult to apply in practice. Besides, such material could admittedly be used to assist the war effort.

Therefore, even if the arms and means of transport are the private property of medical personnel, they are in future to be subject to capture.

Let us finally note that it is not only medical personnel earmarked from the beginning for return to their own fighting forces, who will be able to invoke Article 30. Retained medical personnel are obviously entitled to the benefit of this Article as soon as they also are nominated for repatriation, which will be the case when their help is no longer necessary, when they are replaced by colleagues who have been captured more recently, or when their state of health so requires.

ARTICLE 31 — SELECTION OF PERSONNEL FOR RETURN

The selection of personnel for return [1] *under Article 30 shall be made irrespective of any consideration of race, religion or political opinion, but preferably according to the chronological order of their capture and their state of health.*

As from the outbreak of hostilities, Parties to the conflict may determine by special agreement the percentage of personnel to be retained, in proportion to the number of prisoners and the distribution of the said personnel in the camps.

[1] The French text adds, after the word "return", the words "to the Party to the conflict"; the additional words "dont ils relèvent" (to whom they belong) being understood. Cf. text of Article 30.

PARAGRAPH 1 — PRIORITIES

As the Convention provides for the retention of medical personnel whose presence is necessary to the prisoners of war, and for the return of the remainder, it was necessary to decide the rules according to which the Detaining Power would make the selection. But the criteria which the Convention lays down for selecting personnel for repatriation will first of all have to be used to select those who are to remain, this selection preceding the other in time. For it is only after deciding who will have to be retained that the Detaining Power can determine who can be returned.

The first factor to be taken into account is not mentioned in this Article, but follows from Article 28, and is self-evident. It is the criterion of needs.

The agreements which belligerents are invited to conclude, or, in the absence of such agreements, a reasonable estimate of the needs of the prisoners, will make it possible to decide how many doctors, chaplains, dentists, medical orderlies, members of the administrative staff, etc., it will be necessary to retain.

The Detaining Power should therefore always classify medical personnel and chaplains according to the duties they are called upon to fulfil—it could hardly hold back a doctor, for example, to act as a stretcher-bearer or hospital cook.[1]

After this question of appreciation as between needs and special qualifications, we must consider the two distinct provisions in the paragraph

[1] At the 1949 Diplomatic Conference certain delegations (especially the French Delegation) actually asked that the Convention should take into account in this connection any specialized qualifications which doctors might possess. They advocated that express provision should be made for a selection which would "take into account the need for specialists at the front". It would, in their view, be senseless and completely contrary to the interests of the sick and wounded of the fighting forces to retain a specialist, such as a neurological surgeon, in the camps to do work which an ordinary general practitioner could do equally well, while his particular qualifications were urgently needed in his own army. If the Convention could not exclude anomalies of this sort, one would find army commands refusing to allow specialists to go to the front line, for fear they might be captured, and it would be the wounded who would suffer as a result.

These are obviously not imaginary difficulties. The proposal to amend the Convention in this way could not be accepted, however, as it was put forward too late. The question might well be dealt with, with others, in the special agreements which belligerents are, in the next paragraph, invited to conclude.

under review, which, as we have seen, should be applied to each category of the personnel after they have been classified according to their functions.

The first prohibits any discrimination founded on race, religion or political opinions. Born of the painful experiences of the Second World War, it makes use of a formula which is used in several places in the new Conventions to stress the equal rights of the human beings protected. It is in the form of an absolute prohibition.

The second provision is different in character. Its effect is that, in the absence of the details which would be given in an *ad hoc* agreement, medical personnel are to be repatriated preferably according to their date of capture and state of health: those who have been held for a long time and those whose health has deteriorated are to have priority. Equity demands that the Detaining Power should, so far as possible, base itself on these two considerations.

Thus, if the fortunes of war lead to the arrival of successive batches of medical personnel and their number exceeds requirements, a rotation is to be introduced among the retained personnel, the latest arrivals replacing their comrades, who can then return to their home country.

PARAGRAPH 2 — SPECIAL AGREEMENTS

Under this provision belligerents can determine by special agreement, as from the outbreak of hostilities, the percentage of personnel to be retained in proportion to the number of prisoners, and the distribution of the said personnel in the camps.

We have already referred to these agreements on several occasions, and we have, we think, shown how desirable it is that the Powers should accept the invitation made to them. The retention of medical personnel is a complicated matter, and calls for detailed provision over and above what is actually in the Convention if the new system is to work satisfactorily without giving rise to disputes. We feel that such agreements should not be limited to settling the percentage of personnel to be retained and their distribution in the camps, but should also decide, as we have already mentioned, whether medical personnel may be retained only in proportion to the number of prisoners of their own nationality, how far certain Articles of the Prisoners of War Convention

are applicable to retained personnel, whether the presence in the camps of auxiliary medical personnel should lead to a reduction in the number of permanent personnel who may be retained, and to what extent the need for specialists in the forces of the country of origin can be taken into account.

Conscious of the importance of concluding special agreements of this nature, the 1949 Diplomatic Conference, in its Resolution 3, requested the International Committee of the Red Cross to prepare a model agreement for submission to the Powers for their approval.

ARTICLE 32 — RETURN OF PERSONNEL BELONGING TO NEUTRAL COUNTRIES

Persons designated in Article 27 who have fallen into the hands of the adverse Party may not be detained.

Unless otherwise agreed, they shall have permission to return to their country, or if this is not possible, to the territory of the Party to the conflict in whose service they were, as soon as a route for their return is open and military considerations permit.

Pending their release, they shall continue their work under the direction of the adverse Party; they shall preferably be engaged in the care of the wounded and sick of the Party to the conflict in whose service they were.

On their departure, they shall take with them their effects, personal articles and valuables and the instruments, arms and if possible the means of transport belonging to them.

The Parties to the conflict shall secure to this personnel, while in their power, the same food, lodging, allowances and pay as are granted to the corresponding personnel of their armed forces. The food shall in any case be sufficient as regards quantity, quality and variety to keep the said personnel in a normal state of health.

We have seen, when discussing Article 27, the conditions under which a relief society of a neutral country may lend the assistance of its staff to the Medical Service of a belligerent.

Article 32 is designed to cover cases in which the personnel concerned fall into the hands of the armed forces opposed to the belligerent who is receiving such assistance.

PARAGRAPH 1 — PROHIBITED RETENTION

This provision prohibits the retention of neutral medical personnel.

While the Diplomatic Conference profoundly modified the position of medical personnel of belligerent countries by instituting a legalized power of retention, the general rules of international law relating to neutrals obviously precluded any similar change in the status of medical personnel from neutral countries. The latter may in no circumstances be retained against their will; they remain neutrals in their new country of residence just as much as they were in the one to which they went of their own accord. In giving medical aid to a belligerent, neutral volunteers (who by definition are not even members of the armed forces in their own country, but of a private relief society) are not incorporated into the belligerent forces, as would be men who enlisted in them as combatants. Article 27, as we have seen, provides expressly that in no circumstances shall the medical assistance of neutrals be considered as interference in a conflict.[1]

If they cannot be retained, they cannot with even greater reason be regarded as prisoners of war; they should rather be treated as guests.

The Article dealing with such personnel has therefore remained almost identical with the corresponding Article of the 1929 Convention (Article 12). But whereas it applied then to all medical personnel, whether they belonged to belligerent forces or to a neutral country, it now relates only to neutral volunteers.

PARAGRAPH 2 — RETURN OF PERSONNEL

Paragraph 2 lays down that neutral personnel are to have permission to return to their country as soon as a route for their return is open and military considerations permit. We refer in this connection to our remarks on Article 30, paragraph 1.[2] The place to which they return

[1] See above, page 232.
[2] See above, page 260.

is to be their home country or, if this is not possible, the country in whose service they were.

The paragraph begins, however, as did the 1929 text, with the words "unless otherwise agreed", which must be taken to mean that the rule of immediate repatriation need not necessarily be followed. The personnel may wish to continue their relief work, and it was not desirable that the Convention should appear to discourage them from so doing.

With whom should the Detaining Power come to an understanding? In the first place with the actual personnel, who will continue to give voluntary help as before, and possibly also with the relief society to which they belong. Then again, it is conceivable that the neutral Power which gave its consent to the sending of medical personnel to the first belligerent country, should also be consulted. In any case, the terms of an agreement cannot affect the rights which every citizen of a neutral country possesses when on the territory of a foreign State.

What we have said above shows that there can be no question of the retention of neutral volunteers, in the sense in which the medical personnel of a belligerent may be retained. Neutrals will enjoy a very special status, and no compulsion may be exercised on them.

Paragraph 3 — Employment pending return

Pending return, neutrals are authorized to continue their work under the direction of the adverse Party; they are preferably to be engaged in the care of the wounded and sick of the belligerent in whose service they were.

This provision calls for no comment, except that the phrase "under the direction of" has not here the same significance as when used in connection with the medical personnel of belligerents; it refers to a direction freely consented to.

Paragraph 4 — Personal belongings

Paragraph 4 is similar to Article 30, paragraph 3.[1] Its scope is somewhat wider, however, since it mentions arms and means of trans-

[1] See above, page 263.

port among the items of personal property which the medical personnel in question may take with them when they leave. The return of means of transport is conditioned by the words "if possible"; the reference can obviously only be to cases of actual physical impossibility.

PARAGRAPH 5 — TREATMENT OF PERSONNEL

Paragraph 5 offers neutral volunteers certain advantages which the 1929 Convention also accorded to the medical personnel of belligerents, but which the 1949 Conference did not find it possible to retain in the case of the latter.

Thus the food, lodging and pay of neutral medical personnel awaiting repatriation are not to be determined by the Prisoners of War Convention, as will be the case in future for the medical personnel of belligerents, but will depend upon the provision made for the corresponding medical personnel of the forces into whose hands the neutrals have fallen. The captor State is to treat neutral medical personnel and his own medical personnel alike. This solution is logical, and in conformity with the special status of neutral volunteers.

The Conference was careful to add that the food should in any case be sufficient as regards quantity, quality and variety to keep the said personnel in a normal state of health. This formula is modelled on that used in the Third Geneva Convention (Article 26, paragraph 1) in reference to the food of prisoners of war.

CHAPTER V

BUILDINGS AND MATERIAL

There was no need to make provision in Chapter V for the respect and protection of medical units and establishments, as this had already been done in Chapter III. Moreover, Article 19 states specifically that should such units and establishments fall into the hands of the adverse Party, they may continue to function[1] as long as the capturing Power has not itself ensured the necessary care for the wounded and sick contained in them.

It remained to decide what should be done with buildings and material after capture.[2] Article 33 deals with the question as far as medical establishments and material of the armed forces—in other words, those belonging to the Medical Service—are concerned, except as regards vehicles, which come under Article 35 in the following Chapter.

Article 34 deals with the question as far as the buildings and material of Red Cross Societies and other recognized relief societies are concerned; in this case, the vehicles used by such societies are also covered.

The personal property of medical personnel is dealt with in Articles 30, paragraph 3, and 32, paragraph 4, on which we have commented above.[3]

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[1] The French text of Article 19 reads: "ils pourront continuer à fonctionner" (they may continue to function); the corresponding passage in the English text reads: "their personnel shall be free to pursue their duties." — TRANSLATOR.

[2] The present Chapter does not, of course, cover civilian hospitals and charitable establishments. Provision in regard to them is made in the Fourth Geneva Convention of 1949 and in the Regulations annexed to the Fourth Hague Convention of 1907.

[3] See above, pages 263 and 269.

ARTICLE 33 — BUILDINGS AND MATERIAL OF THE MEDICAL SERVICE

The material of mobile medical units of the armed forces which fall into the hands of the enemy, shall be reserved for the care of wounded and sick.

The buildings, material and stores of fixed medical establishments of the armed forces shall remain subject to the laws of war, but may not be diverted from their purpose as long as they are required for the care of wounded and sick. Nevertheless, the commanders of forces in the field may make use of them, in case of urgent military necessity, provided that they make previous arrangements for the welfare of the wounded and sick who are nursed in them.

The material and stores defined in the present Article shall not be intentionally destroyed.

PARAGRAPH 1 — MOBILE MEDICAL UNITS

This paragraph speaks only of the material of mobile units, which, ordinarily, will not have buildings.

A. *Non-restitution of material.* — Under Article 14 of the 1929 Convention, mobile medical units falling into enemy hands kept their equipment and vehicles, and were to be restored, together with the said equipment and vehicles, under the conditions laid down for medical personnel and, as far as possible, at the same time—or, in other words, during hostilities. A single exception had been provided for: the captor was to be free to use the material for the care of the wounded and sick. But he was obviously only entitled to do this in cases of immediate need, where the equipment required for the care of the wounded and sick in the captured unit was not immediately available from other sources; furthermore, the material had to be later restored or replaced. A medical unit was thus considered as a whole and was in principle to be given back as a complete unit.

In its first draft revisions, the International Committee of the Red Cross did not propose that these provisions should be modified. But at the Conference of Government Experts in 1947, and again during the Diplomatic Conference in 1949, the representatives of States pointed out that the far-reaching changes introduced into the Geneva Convention in regard to medical personnel who fell into enemy hands, and who might in future be legally retained, should logically lead to a radical change in the provision made for the disposal of the equipment of mobile medical units, which need no longer be restored to the country of origin.[1] This point of view prevailed in 1949. The practical obstacles to the restoring of equipment under modern war conditions also influenced the decision of the Conference to some extent. It should be noted, however, that this decision only affects material belonging to the Medical Service of the armed forces, and not that of Red Cross Societies, which should continue to be regarded as private property.

B. *Assignment to the wounded.* — The Conference of Government Experts in 1947, pursuing the above thesis to its logical conclusion, suggested further that the material of mobile units should be treated in the same way as that of fixed establishments; Paragraphs 1 and 2 of the present Article would then have become a single paragraph. At the XVIIth International Red Cross Conference in 1948, the International Committee of the Red Cross opposed this solution, which would have weakened the safeguards medical units and the wounded themselves had hitherto enjoyed; the material of the mobile units would have been liable to become war booty in the same way as that of the fixed establishments, and to be diverted from its proper use, whereas previously the capturing Power could only use it for the benefit of the wounded.

This point of view was adopted by the XVIIth Conference and later by the Diplomatic Conference, although certain delegations again supported the thesis which had been accepted in 1947.

Contrary to the policy laid down—both in this and in previous Conventions—in regard to the material of fixed medical establishments,

[1] We are referring here to the handing back of material during hostilities, as provided for in the 1929 text. The Convention does not decide what is to be done with such material after hostilities end. The latter question is governed by the general provisions of the laws of war, according to which, subject to contrary stipulation in the peace treaty, it would not appear that the State which had originally owned the material could demand to have it restored or look for compensation. See below, page 275.

the equipment of mobile units will not be subject to the laws of war, but will be used for the care of the wounded and sick—in the first instance, those cared for in the captured unit. If there are no patients in the unit, or when those who were there have been cured, the material is to be used for the treatment of other wounded and sick persons. Fairness demands, however, that the said material should preferably benefit patients of the same nationality as the unit from which it was taken.

PARAGRAPH 2 — FIXED MEDICAL ESTABLISHMENTS

In the 1864 Geneva Convention (Article 4), a distinction had already been drawn between the material of fixed medical establishments and that of mobile units: the material of military hospitals was to be subject to the laws of war, but the ambulances retained theirs. This distinction was maintained in the 1906 and 1929 texts and, also to some extent, as we have just seen, in the existing text.

As before, the buildings, material and stores of fixed medical establishments of the armed forces "shall remain subject to the laws of war".

On this point, as on others, the Convention limits itself in part to a reference to the laws of war in force under other provisions of international law. Recourse to such references is justified, since the laws of war may change. It is possible to vizualize a gradual change for the better which would automatically benefit medical buildings and material.

We are not called upon here to comment on the laws of war, except those contained in the Geneva Conventions themselves. It will be sufficient to recall those rules very briefly; they are often summary and not very precise, and have not always been accepted unanimously by legal authorities.

As matters stand at present, it is the Regulations respecting the Laws and Customs of War on Land, annexed to the Fourth Hague Convention of 1907, which are relevant here. Under one stipulation, it is forbidden to destroy or seize enemy property unless such destruction or seizure is imperatively demanded by the necessities of war (Article 23 *(g)*).[1] Pillage is formally prohibited in Articles 28 and 47.

[1] This provision was introduced into Article 53 of the Fourth Geneva Convention of 1949 in connection with the destruction of property.

A distinction is, however, made between pillage and the right to booty. This right may be exercised in regard to any movable property of the enemy State which may be used, directly or indirectly, for military operations (Article 53, paragraph 1).[1] A State which takes booty is regarded as acquiring property without any obligation of restitution or indemnity.[2] The capturing State, subject to the conditions stated in the Geneva Convention, which we shall examine later, may therefore utilize such movable property in any way it wishes.

The real property of enemy States, however, is not war booty. The Occupying Power may only administer it and have the use of it. (Article 55.)

Let us now return to Article 33 of the Geneva Convention. It refers back to the laws of war, but there is an important limitation: the buildings, material, and stores of fixed medical establishments "may not be diverted from their purpose as long as they are required for the care of wounded and sick." In other words, the captor may not make use of them so long as the interests of the wounded and sick nursed in such buildings demand that he should not do so.

This humanitarian ruling—which recurs several times in the Convention—is in turn subject, in accordance with an accepted principle of international law, to the exception of urgent military necessity. If tactical considerations demand that a medical establishment be used for another purpose, they will be imperative. But here we find a further exception: before resorting to such an extreme measure, the belligerent must make prior arrangements for the safety and welfare of the wounded and sick who are nursed in the said establishment.

The paragraph therefore lays down a principle derived from the circumstances of war, and then quotes an exception based on humanitarian considerations; this exception is itself tempered by a further concession to military realities, which are once again subordinated to humanitarian requirements. Thus, by alternate compromises between military needs and the dictates of humanity, a *via media* has been found.

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[1] Article 56 of the Regulations provides that the property of municipalities and that of institutions dedicated to religion, charity and education, and the arts and sciences, shall be exempted. But as the property mentioned in Article 33 of the 1949 Geneva Convention belongs to the armed forces, it would not be considered as exempted by this provision.

[2] In spite of the fact that the expression used in Article 53, Paragraph 1, of the Regulations is "take possession of" (in the French version — "saisir").

It may even be affirmed that the entire Geneva Convention is the outcome of similar compromises between the two main opposing tendencies. It was due to its authors in 1864, who grasped this fact, and to their successors, who continued to appreciate its importance, that the Geneva Convention gained its prestige and has become an enduring force.

PARAGRAPH 3 — PROHIBITION OF DESTRUCTION

This is a new provision born of the Diplomatic Conference of 1949: the material and stores defined in the present Article are not to be intentionally destroyed.

The provision covers the material of both mobile units and fixed establishments. It also refers to stores of material, but only to those belonging to fixed establishments, as the nature of mobile units excludes their having stores in the real sense. The stipulation does not, however, cover the actual buildings, which may in certain extreme cases have to be destroyed for tactical reasons.

The introduction of the paragraph is a remarkable step forward in humanitarian legislation. It does not confine itself to protecting the material of fixed establishments against the enemy (which is done by the general provisions of the Convention—and was in fact already done in 1929); it also protects the material in cases where those holding it might be tempted to destroy it to prevent it from falling into enemy hands.[1]

Such acts are not unprecedented, but they are altogether contrary to the spirit of the Geneva Convention, an essential aim of which is to "neutralize", as it were, all persons or objects potentially useful to the wounded and sick, whatever their nationality. Destruction of this sort is now expressly forbidden.

[1] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-A, page 83.

ARTICLE 34 — PROPERTY OF AID SOCIETIES

The real and personal property of aid societies which are admitted to the privileges of the Convention shall be regarded as private property.

The right of requisition recognized for belligerents by the laws and customs of war shall not be exercised except in case of urgent necessity, and only after the welfare of the wounded and sick has been ensured.

PARAGRAPH 1 — TREATMENT AS PRIVATE PROPERTY

As in the 1929 Convention, the real and personal property of National Red Cross Societies and other societies, duly recognized and authorized to lend their services to the Medical Service of the armed forces (see Article 26), are declared to be private property, and may never, therefore, be regarded as war booty, or even confiscated (see Regulations annexed to the Fourth Hague Convention of 1907, Article 46).

This provision naturally applies only to property belonging to societies engaged in caring for the wounded and sick of the armed forces, and used in connection with the assistance lent by these societies to the Medical Service of the armed forces. Property used for other purposes, especially for aid to civilians, is not thereby deprived of protection, but is governed by other provisions of international law, in particular the Fourth (Civilians) Convention.

The property of the Red Cross Societies and other societies referred to above, in so far as it falls under the present Convention, is fully protected, however, whatever its nature and wherever it may be. Protection is thus extended to fixed establishments and mobile units, separate objects and vehicles, apparatus and pharmaceutical products, and no distinction is drawn between property in a building belonging to the Society and property in army premises. In the latter case, proof of ownership will no doubt have to be produced. National Red Cross Societies will therefore be well advised to mark their material with a distinctive emblem to indicate that it is their property, as proposed by the International Committee at the XIVth International Red Cross Conference.

The Convention does not say that the material must be actually owned by the Red Cross Societies.[1] Article 34 therefore covers all material used by them, irrespective of ownership.

Red Cross Societies and other aid societies are thus, in the matter of medical material, in a very advantageous position as compared with the Medical Service of the armed forces.

In 1949 the above solution was accepted without question; but this was not the case in 1906 and 1929, when it was felt by some that as the aid societies were merged into the Medical Service, their material should be placed on the same footing as that of the forces; any difference in treatment might, it was said, induce the State to turn its hospitals into Red Cross establishments, to prevent their material from being captured.

This view was not endorsed, humanitarian considerations prevailing once again. It was admitted that aid societies, although closely connected with the State in time of war, retained their own personality and their status as voluntary and private institutions. The Rapporteur to the 1906 Conference, Louis Renault, remarked: "To admit that the material of aid societies should be treated as war booty would seriously affect the development of these societies and make it far more difficult for them to find the resources they require. Private subscribers would not feel encouraged to make the sacrifices needed for the purchase of material, if it was liable to be captured out of hand."

PARAGRAPH 2 — LIMITATION OF REQUISITION

The material of Red Cross Societies and other aid societies, although placed everywhere and in all circumstances on the same footing as private property, is nevertheless not absolutely immune—such is the sense of paragraph 2 of Article 34. Like all private property, it is subject to requisition—a right which the belligerent acquires through his temporary control of the territory. If the material in question is necessary to the armed forces of the enemy, they may requisition it.

[1] In the French text the term used is "biens" (property, goods) and not "propriété" (property, estate). In French law, the latter term necessarily implies full ownership, whereas the former term does not. — TRANSLATOR.

The right to requisition is, however, subject to a twofold limitation: it presupposes, firstly, an urgent medical—and not military—need, and secondly, that proper arrangements are made for the care of the wounded and sick concerned. This latter rule really follows logically from the obligation, assumed by every belligerent, never to leave the wounded without assistance, but always to provide for their treatment. It was, however, just as well to stress this fundamental duty once more.

The right to requisition the medical material of a National Red Cross Society must therefore only be exercised as an exceptional measure, and with discretion, when it is absolutely necessary to do so in order to assist the wounded and sick. The 1929 Conference had rejected, as being difficult to apply in practice, the proposal that material thus requisitioned should only be used on the spot and restored as soon as it was no longer indispensable. This idea was not put forward again in 1949.

The consequences of such requisition are governed by Article 52 of the Hague Regulations, which shows that a transfer of property is involved. Fair compensation must, however, be paid, and receipts given for all material handed over. The Occupying Power must likewise bear in mind the obligations imposed on it under Articles 55, 56, 57 and 63 of the Fourth Geneva Convention of 1949.

Since Article 34 of the First Geneva Convention, which we are discussing, has thus limited the right of belligerents to requisition the property of aid societies, it must be assumed that the right of seizure [1] is limited in the same way. Under Article 53, paragraph 2, of the Hague Regulations the right of seizure could in any case be applied only in regard to means of transport, which must, moreover, be restored as soon as possible.

[1] There is a distinction in law between seizure and requisition. Seizure applies primarily to State property which is war booty; requisition only affects private property. There are, however, certain cases mentioned in Article 53, paragraph 2, of the Hague Convention in which private property can also be seized; but such seizure is only sequestration, to be followed by restitution and indemnity, whereas requisition implies a transfer of ownership.

CHAPTER VI

MEDICAL TRANSPORT

ARTICLE 35 — PROTECTION AND CAPTURE

Transports of wounded and sick or of medical equipment shall be respected and protected in the same way as mobile medical units.

Should such transports or vehicles fall into the hands of the adverse Party, they shall be subject to the laws of war, on condition that the Party to the conflict who captures them shall in all cases ensure the care of the wounded and sick they contain.

The civilian personnel and all means of transport obtained by requisition shall be subject to the general rules of international law.

This Article is much simpler than the corresponding Article 17 of 1929. For, once the principle of restoring the material of medical units had been abandoned, it was no longer necessary to make various distinctions.

The term "medical transport" should be taken to mean either convoys or isolated vehicles.

The word "vehicles" must be understood in its widest sense; it covers road, rail, and inland water transport, but not aircraft, which are dealt with in Articles 36 and 37, or hospital ships and sea-going craft, which are dealt with in the Second Geneva Convention of 1949.

PARAGRAPH 1 — PROTECTION

It was sufficient to specify that medical transports must be respected and protected in the same way as mobile medical units: for that is what they really are. We can therefore refer the reader, on this point, to our comments on Chapter III.

The 1929 Convention made a distinction between vehicles "equipped" or "specially organized" for the evacuation of wounded and sick, and other military vehicles employed temporarily as medical transport. The first had to be restored, whilst the others could be treated as captured material. This distinction has disappeared in the new text, which makes no provision for restoring medical vehicles.

Thus, all vehicles employed, permanently or temporarily, on medical transport work are protected on the field of battle.[1] This was indeed already so under the 1929 text—or it was, in any case, where the vehicles employed temporarily formed part of a medical convoy.

The soundness of this provision does not appear to be open to question. It is absolutely essential that the wounded should be transported to a hospital as quickly as possible. A motor ambulance of the Medical Service will not always be readily available and, as has often happened, any vehicle available will be used. It must not be possible for this to be used as a pretext for opening fire on the wounded.

The distinctive emblem must naturally appear on these vehicles during the whole of the time that they are employed on medical work; on the other hand, it is only during such periods that they may display the sign. The military authorities must take the greatest care to ensure that the red cross sign is removed as soon as a vehicle is no longer employed as medical transport, and strict orders to this effect must be given to all ranks. It is essential that the serious abuses which occurred during the Second World War should not be repeated.[2]

For although there were very good reasons for introducing the principle of a distinctive emblem which could be removed, the risk of abuse has certainly been increased as a result. After the wounded have been taken to the rear under the protection of the red cross sign, there

[1] Certain delegations at the 1949 Conference feared abuses and would have liked protection to be confined to vehicles employed exclusively on medical work; they proposed to delete from the draft a sentence to the effect that vehicles employed temporarily for medical work would be protected as long as they were so used. The sentence was removed, but—as was underlined at the Conference—the effect is by no means to deprive these vehicles of protection. In actual fact, paragraph 1 is completely general in its application, and the sentence to which objection was made was therefore superfluous. To obtain the desired result, it would have been necessary to stipulate in the paragraph that it referred only to vehicles used exclusively for medical transport.

[2] See *Report of the International Committee of the Red Cross on its activities during the Second World War* (September 1, 1939—June 30, 1947), Geneva, 1948, Vol. I, pages 210 and 211.

will be a great temptation to load the empty vehicles returning to the front with war material. If the emblem then remains on the loaded vehicles, there is a grave breach of the Convention, even if the sign has simply been left on through negligence or because there has been no time to remove it. Such cases have occurred. Constant vigilance is therefore essential.

The 1929 Convention spoke only of "vehicles equipped for the evacuation of wounded and sick." It might have been concluded from this that vehicles which carried medical material only were not protected. This is no longer so, as the new text refers expressly to "transports of wounded and sick or of medical equipment".

PARAGRAPH 2 — DISPOSAL IN CASE OF CAPTURE

Once it had been decided to place medical transports on the same footing as medical units, the question remained of what was to happen to the actual vehicles should they fall into enemy hands. Paragraph 2 deals with this question. Had this specific provision not been included, the rule relating to mobile medical units would have applied, and the vehicles would have had to continue to be used for the wounded and sick.

The 1949 Conference, however, taking into account the military importance of transport vehicles in modern warfare, adopted a less liberal arrangement. Medical vehicles—like the material of fixed medical establishments—are to be subject to the laws of war. The captor may thus dispose of these vehicles, and may even use them as military transport. Naturally, in the latter case, the emblem must be at once removed.

The usual exception is introduced, however: the captor may use the vehicles only on condition that in all cases he ensures the care of the wounded and sick they contain. The words "ensure the care of" must be interpreted as safeguarding the inalienable rights of the wounded: they must be treated as their state of health requires and must receive adequate care; they must not suffer in any way as a result of the impounding of the vehicles.

If, therefore, the captor is unable to give the wounded the care they require, he must allow the convoy or vehicle to pursue its journey and return to its own lines.

Similarly the words "the wounded and sick they contain" must not be interpreted in a narrow sense, but must be taken to cover all the wounded and sick whose health depends on the convoy, if it has been unable to evacuate them all in one trip.

Article 35 deals only with the disposal of the actual vehicles in the event of capture. Should they contain men who are wounded and sick, or medical personnel or material, the rules laid down in the previous Chapters for each of these three categories will apply.

What is to happen to military personnel not attached to the Medical Service who are detailed to medical transport, as drivers for example? The 1929 Convention laid down that they were to be treated in the same way as medical personnel and given all the latter's prerogatives (Article 17, paragraph 3). It also stipulated that mobile medical units were to retain their drivers (Article 14, paragraph 1). As these clauses have disappeared in the 1949 text, it must be assumed that these men may, as a general rule, be made prisoners of war. The rights of the capturing Power in this respect are subject, however, to the same limitation as in respect of the vehicles—they may be exercised only if the captor ensures the care of the wounded. If he is not in a position to do so, he must allow the convoy to pass and go back to its own lines with the drivers necessary for this purpose. If he does not do this, he will deprive the convoy of its essential character by preventing it from moving. The safeguards laid down in the Convention would then become completely illusory. A transport group without its drivers is like a knife without a blade.

Lastly, the provisions of this Article do not affect medical vehicles belonging to National Red Cross Societies or other recognized aid societies. Under the special provision made in Article 34, which we have examined above, they, in common with all the other material of these societies, are to be considered as private property and exempt from capture.

PARAGRAPH 3 — CIVILIAN PERSONNEL AND MEANS OF TRANSPORT

This paragraph dates from 1929 and is unchanged. It provides for the case in which a belligerent has not sufficient medical or military transport available to evacuate the wounded and has to requisition

civilian personnel or material. The words "civilian" and "requisition" show clearly that the personnel and material in question do not belong either to the armed forces or to voluntary aid societies. What will happen to them if the convoy is captured?

The general rules of international law must needs apply to such persons and vehicles. These rules cannot be specified as they will vary with the evolution of international law.

There are two possible cases to be considered. In the first place, the persons and vehicles may have been requisitioned in occupied territory by the Occupying Power; on being captured, they will be released automatically.

On the other hand, the persons and vehicles may have been requisitioned by the belligerent within his own territory.[1] On capture, the persons concerned will have the benefit of the provisions of the Fourth Geneva Convention of 1949.[2] The disposal of the vehicles is governed by Articles 52 and 53 of the Hague Regulations. Under paragraph 2 of Article 53 such vehicles, which belong by definition to private persons or private institutions, may be seized, but must later be restored and compensation paid for them.

ARTICLE 36 — MEDICAL AIRCRAFT

Medical aircraft, that is to say, aircraft exclusively employed for the removal of wounded and sick and for the transport of medical personnel and equipment, shall not be attacked, but shall be respected by the belligerents, while flying at heights, times and on routes specifically agreed upon between the belligerents concerned.

They shall bear, clearly marked, the distinctive emblem prescribed in Article 38, together with their national colours, on their lower, upper and lateral surfaces. They shall be provided with any other markings or means

[1] This is unlikely to occur often, except for purely temporary work. In most cases the belligerent would no doubt prefer to attach such persons to the armed forces, and more particularly to the Medical Service.

[2] If, however, such persons can be considered as "persons who accompany the armed forces without actually being members thereof," in the sense of Article 4 A (4) of the Third (Prisoners of War) Convention, they will be protected under this latter Convention.

of identification that may be agreed upon between the belligerents upon the outbreak or during the course of hostilities.

Unless agreed otherwise, flights over enemy or enemy-occupied territory are prohibited.

Medical aircraft shall obey every summons to land. In the event of a landing thus imposed, the aircraft with its occupants may continue its flight after examination, if any.

In the event of an involuntary landing in enemy or enemy-occupied territory, the wounded and sick, as well as the crew of the aircraft shall be prisoners of war. The medical personnel shall be treated according to Article 24 and the Articles following.

GENERAL

The use of aviation for medical purposes received legal sanction in 1929, when the Diplomatic Conference adopted the new Article 18 of the Geneva Convention. This was in fact the most important innovation in 1929.

The idea of medical aircraft dates, however, from the XIth International Red Cross Conference in 1923, which decided, on the proposal of the French Delegation, to place the matter on the Agenda of the next Conference. A complete draft of a Convention for the adaptation to aerial warfare of the principles of the Geneva Convention of 1906 was accordingly prepared, discussed by a committee of experts, and then approved by the XIIth International Red Cross Conference in 1925. It was subsequently transmitted to the Swiss Federal Council with a view to its being placed before a Diplomatic Conference. The Swiss Government, however, when convening the Diplomatic Conference of 1929 for the purpose of revising the Geneva Convention and concluding a Convention on the treatment of prisoners of war, did not think it advisable to add a new and complex problem to the already heavy programme.

During the actual Conference, France and Great Britain took up the question again. The subject had become so topical and so important that it appeared impossible to revise the Geneva Convention without making provision for the use of medical aircraft.

There was no time to draw up a complete set of detailed provisions; and Governments, not having had sufficient notice that the matter

would be on the Agenda, had not been able to include the necessary experts in their delegations. The problem, therefore, was only settled in summary fashion by the introduction into the Convention of the new Article 18, laying down the basic principles.

Aware of the inadequacy of this solution, the Conference recommended in its Final Act "that the countries signatory to the Geneva Conventions should meet in conference, at an early date, for the purpose of regulating in as wide a sense as may be expedient the utilization of air ambulances in time of war".

The International Committee of the Red Cross accordingly submitted to the XIVth International Red Cross Conference in 1930 a draft adaptation to aerial warfare of the principles of the Geneva Convention, drawn up by MM. Ch. Julliot and P. Des Gouttes.[1] The Conference approved this draft, and instructed the International Committee of the Red Cross to transmit it to the Swiss Government with a view to its figuring on the Agenda of the next Diplomatic Conference, which was fixed for 1940, but was postponed owing to the war.

In 1945, when the International Committee of the Red Cross resumed its work on the revision of the Geneva Conventions, it still considered that it would be well to draw up detailed regulations regarding the use of medical aircraft. It therefore placed the special draft Convention before a meeting of experts which it had convened, requesting them to decide, in the light of experience in the various countries, on what points the draft should be extended or modified.

The International Committee at the same time advocated reverting to the idea—put forward by the Diplomatic Conference of 1929 and supported by MM. Julliot and Schickelé in 1935—of extending the Geneva Convention to cover the use of medical aircraft, and abandoning the attempt to adapt its principles to aerial warfare. In actual fact, the protection afforded by the Geneva Convention to the wounded and to the buildings and personnel reserved for them, is as valid in aerial as in land warfare. Medical aircraft are merely a means, like any other, of transporting or helping the wounded. The special conditions prevailing at sea, which made it appear advisable in 1907 to adapt the principles of the Geneva Convention to maritime warfare, do not exist in the air.

[1] Another draft Convention was drawn up unofficially by MM. Julliot and Schickelé in 1935.

The Government experts quite agreed with this view. On the other hand, they did not consider that medical aircraft should form the subject of detailed regulations. The most they would admit was that the substance of Article 18 of the 1929 Convention might be retained, provided it was adapted to flights over neutral countries. They argued that the Article in question had only found a limited application during the Second World War, and that technical progress in fighter aircraft and anti-aircraft artillery rendered somewhat unreal any attempts to develop the use of protected medical aircraft on a wide scale. On the other hand, the practice of evacuating the wounded by air under fighter escort had been adopted to an increasing extent.

The same opinion prevailed at the 1949 Diplomatic Conference, despite a proposal which aimed at allowing greater use to be made of medical aircraft. This proposal was put forward by the Delegations of Monaco and Finland, who insisted that aeronautical progress, far from condemning medical aviation, offered excellent possibilities of bringing rapid aid to the wounded and of transporting them to the centres behind the lines, often at a great distance, where they would receive adequate treatment. The draft Articles submitted by these delegations recommended that medical aircraft should be recruited more widely and authorized their flight over enemy territory.[1]

Since the 1929 provisions were, in short, left unchanged by the Diplomatic Conference, it is to be hoped that the States applying them will do so in as generous and humane a fashion as possible, so that the resources which medical aircraft offer for the protection of the wounded and the sick may be exploited to the full.

"When an American C-97 military transport plane," writes General A. Schickelé, Medical Inspector of the French Army Reserve and one of the pioneers of medical aviation, "has proved capable, after conversion requiring only twenty minutes work, of taking on board sixty-seven wounded lying on stretchers, with medical personnel available to look after them *en route*—using, if need be, a real operating theatre—and of conveying them from Japan to the United States of America in a single non-stop flight of 9,700 kilometers in from thirty to forty hours, it would be folly to miss the significance of such possibilities, and deny them to medical transport in future armed conflicts".

[1] For further details see Professor Paul DE LA PRADELLE, *La Conférence diplomatique et les nouvelles Conventions de Genève du 12 août 1949*, pages 199 ff.

PARAGRAPH 1 — DEFINITION AND PROTECTION

Medical aircraft have the same role under the 1949 Convention as in the past: flying alone or in convoys, they may be used both for the evacuation of the wounded and sick, and for transporting medical personnel and material. Like any other means of transport, they may be the property of the army, or of voluntary aid societies, or have been requisitioned. As in 1929, it was not considered possible, for reasons of military security, to accord protection to aircraft searching for wounded.

The nature of the protection accorded remains the same: the aircraft, like medical transport on land, are placed on the same footing as mobile medical units.

Nevertheless—and this is the main difference as compared with 1929—they are to be respected only "while flying at heights, times and on routes specifically agreed upon between the belligerents concerned." The experts who recommended this solution pointed out that under conditions of modern warfare, systems of identification based only on the painting of machines were useless. Aircraft were sometimes fired upon from the ground, or from other planes, before their colour or markings could be distinguished. Only previous agreement as to routes, heights and times of flight could, in their opinion, afford medical aircraft a real degree of security and provide belligerents with adequate safeguards against abuse.

The solution adopted makes any future use of protected medical aircraft dependent on the conclusion of an agreement between the belligerents. As it will be a matter of fixing routes and times of flights, such agreements will no doubt usually be made for each specific case and by a simple exchange of communications between the military commands. But there might also be an agreement of a general nature, concluded for the duration of hostilities.

If there is no agreement, belligerents will only be able to use medical aircraft at their own risk and peril. It is, however, to be hoped that in such cases the enemy will not resort to extreme measures until he has exhausted all other means of control at his disposal.

Today, as in 1929, an aeroplane, to be protected, need not be specially equipped or permanently detailed for medical work. It may

therefore be used temporarily on a relief mission. This liberal conception is entirely justified, as medical aircraft are called upon to bring help in emergencies—often under improvised arrangements. At times, if land routes have been bombarded, they may offer the only available means of transport. An aircraft used temporarily on a relief mission should, of course, bear the distinctive sign only while on the mission, and will be respected only for its duration.

Moreover, it is clear from the text of the Convention that, to be protected, a medical aircraft must, during its relief mission, be used exclusively for that purpose, and consequently be completely unarmed. That is obvious.

We may note that the article speaks of "medical aircraft" and not of aeroplanes. An airship, if such a craft should still be used, could therefore receive protection under the Convention. This is also true of helicopters and any new type of flying machine.

PARAGRAPH 2 — MARKING AND RECOGNITION

In studying the preceding paragraph we have already touched on the matter of marking. Strictly speaking, this should have come under Chapter VII, which deals with the distinctive emblem. It was, however, more convenient to include all the rules concerning medical aircraft in a single Article.

As in the 1929 text, the first sentence of paragraph 2 lays down that medical aircraft are to bear, clearly marked, the distinctive emblem of the Convention, together with their national colours, on their lower, upper and lateral surfaces. Wings have purposely not been mentioned, as an airship does not have any.

The 1929 Convention laid down that medical aircraft should be painted entirely white, like hospital ships. For the reasons indicated in our comments on the preceding paragraph, this stipulation, which was declared by some to be out-of-date and unnecessary, was not retained. Certain experts regret this, for they consider that the colour white, which offers good visibility, is clearly distinguishable from that of military aircraft and should be kept for everything connected with the Medical Service. It is, of course, still permissible for those who prefer the old method to use it, and this even seems desirable. At the

same time it is worth noting that the fact that the use of white paint is no longer compulsory will save time in converting aircraft, and this will facilitate their use in cases of emergency.

It must be remembered that the distinctive emblem of the Convention is a red cross *on a white ground.* It is not therefore sufficient to paint the red cross on the machine itself if the background is not white.

The second sentence of paragraph 2 lays down that medical aircraft are to be provided with any other markings or means of identification that may be agreed upon between the belligerents concerned. This is a wise provision, as it leaves the way open for any technical improvements in this field.

Certain facts lead one to suppose that, with the resources available today, great improvements could already be made in the methods by which medical aircraft are identified. The main means of establishing the authenticity of the relief mission of an aircraft would appear to be the permanent contact it can establish by radio with the ground and with other aircraft. Every aircraft now has its own code signal.[1] Surely a special international signal for medical missions could be agreed upon? Similarly, a short international code, like those used in navies and air forces, would make it possible to communicate with the aircraft during its mission, and question it as to the nature of the latter and the way in which it was to be carried out. The same means could be used to give the aircraft instructions regarding its flight and, if necessary, order it to land.

The Diplomatic Conference of 1949, in Resolution 6 of its Final Act, recommended that a committee of experts should examine improvements in the means of communication between hospital ships and other ships and aircraft, as well as the possibility of drawing-up an international code for the purpose. It would appear most desirable that this study should be extended to the means of communication of medical aircraft. This has, incidentally, been done in the draft regulations which were produced by the Italian Government on 1 March 1950 in pursuance of the said Resolution, and which are at present the subject of discussions between the Powers signatory to the 1949 Conventions.

[1] Technical progress may, perhaps, make it possible to produce a code signal which can be picked up by radar. Flares might also be used.

PARAGRAPH 3 — PROHIBITION OF FLIGHT OVER ENEMY TERRITORY

The question of flight over enemy territory was the one stumbling-block in 1929. On this point it was found necessary to bow to the demands of military security, as otherwise the Conference might have been forced to abandon all idea of securing protection for medical aircraft; the general staffs considered that the risk of unwarranted observation from such aircraft would have been too great.

Prohibition of flight over enemy territory would not, however, appear to be as prejudicial to the interests of humanity as has been believed. For what does a medical aircraft actually do? It takes medical personnel and material to the wounded and brings the latter back to hospitals behind the lines. For these purposes it flies over the territory of the country it is serving or territory occupied by the armed forces of that country. Besides, the new text adopted was considerably less rigid than the old one. In 1929 it was not only flights over enemy territory that were prohibited, but also flights over the firing line and over the zone in front of the main clearing or dressing stations. In the 1949 Convention, the reference is only to enemy or enemy-occupied territory.[1]

Finally, it must not be forgotten that the paragraph begins with the words "unless agreed otherwise." On certain occasions when circumstances so require, e. g. when there are wounded in a besieged zone or area, special permission to fly over enemy-controlled territory may be requested. Such a solution is in full accordance with Article 15, paragraph 3, of the Convention.[2]

What is to happen if, as the result of an error for example, a medical aircraft fails to comply with the rule prohibiting flight over enemy-controlled territory? It will obviously lose its right to special protection and will be exposed to all the accompanying risks. Nevertheless, every belligerent conscious of his duty would warn the offending plane by

[1] In this Article and the Article following, the word "territory" should be understood in the sense in which it is used in international law. It may be mentioned in this connection that, according to Article 2 of the Chicago Convention on International Civil Aviation concluded at Chicago on 7 December 1944, the territory of a State is deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State. It did not appear necessary to enter into these details in the Geneva Convention.

[2] See above, page 155.

radio or order it to land (paragraph 4) before resorting to extreme measures. It is clear that once the machine is on the ground, the wounded and the medical personnel will be entitled to the full to the protection which must be accorded to them in all circumstances.

PARAGRAPH 4 — SUMMONS TO LAND

The summons to land provides the adverse Party with a safeguard; it is his one real means of defence against abuse. This very important provision dates from 1929; it states explicitly that medical aircraft must obey every summons to land. It applies in the first place to aircraft flying over enemy or enemy-occupied territory, whether or not authorized to do so. It also applies to aircraft which are over their own territory, but close to enemy lines.

If the aircraft refuses to obey, it does so at its own risk, and it is lawful to open fire on it. If the machine is already out of reach, the summons obviously become a mere formality. It should not be forgotten, however, that if the plane refuses to obey the summons and is pursued, it loses the protection of the Convention, having failed to comply with its own obligations.

The Convention does not state how the summons is to be given: this is a technical question, into the details of which there was no need to enter.

What is to happen to a plane after it has obeyed the summons to land? The enemy can examine it and will, in normal cases, be able to convince himself that the machine is being used exclusively for medical purposes. The necessary steps will then be taken to ensure that the wounded do not suffer from the delay imposed.

The 1929 Convention, treating this case and an involuntary landing alike, decided that the wounded and sick in the plane, the medical personnel and material, including the aircraft itself, should continue to have the protection of the Convention. This meant that the wounded and sick would become prisoners of war, as they do when a belligerent intercepts an enemy medical convoy on the ground. The medical personnel and material, including the aircraft, were to be treated in accordance with the general rules of the Convention, or, in other words, restored, following the usual procedure. The crew was to be sent back,

on condition that its members took no part in operations until the end of hostilities, medical service excepted.

The 1949 Convention, has, on this point, adopted a more liberal formula: the aircraft, with its occupants, may resume its flight. This appears just. The object of medical aviation is to permit the rapid evacuation of the wounded and sick. They should not have to suffer from the fact that the enemy exercises his right of examination—all the more so (always presuming that the crew of the plane are guilty of no irregularities) because the summons has, so to speak, been wrongly made. Finally, it should not be forgotten that the plane has actually obeyed the summons to land; this fact must be placed to the credit of its occupants.

What should happen—and it is to be hoped that such cases will be rarest of exceptions—if examination reveals that an act "harmful to the enemy," in the sense of Article 21, has been committed, i.e. if the plane is carrying munitions or has been used for military observation? The machine loses the benefit of the Convention; the enemy may seize it, take the wounded prisoner, and treat the medical staff and material according to the general rules of the Convention.

PARAGRAPH 5 — FORCED LANDINGS

An involuntary or forced landing occurs when a medical aircraft, without receiving a summons, is obliged by weather conditions, engine trouble or any other cause to land in enemy or enemy-controlled territory.

Certain delegations proposed that the solution in this case should be the same as that adopted for landings made in answer to a summons, but the Diplomatic Conference did not consider this feasible. It was held that considerations of military security must have priority. The adverse Party may therefore take the wounded and sick and the crew prisoner. The medical personnel are to be treated in accordance with the general rules of the Convention (Articles 24 ff.). Even though Article 36 does not actually say so, the material will be governed by the provisions of Articles 33 and 34. The aircraft itself will become war booty, as would a medical vehicle on the ground in similar circumstances. If, however, it belongs to a relief society protected by the Convention, it will be regarded as private property.

ARTICLE 37 — FLIGHT OVER NEUTRAL COUNTRIES

Subject to the provisions of the second paragraph, medical aircraft of Parties to the conflict may fly over the territory of neutral Powers, land on it in case of necessity, or use it as a port of call. They shall give the neutral Powers previous notice of their passage over the said territory and obey all summons to alight, on land or water. They will be immune from attack only when flying on routes, at heights and at times specifically agreed upon between the Parties to the conflict and the neutral Power concerned.

The neutral Powers may, however, place conditions or restrictions on the passage or landing of medical aircraft on their territory. Such possible conditions or restrictions shall be applied equally to all Parties to the conflict.

Unless agreed otherwise between the neutral Power and the Parties to the conflict, the wounded and sick who are disembarked, with the consent of the local authorities, on neutral territory by medical aircraft, shall be detained by the neutral Power, where so required by international law, in such a manner that they cannot again take part in operations of war. The cost of their accommodation and internment shall be borne by the Power on which they depend.

This Article is new and represents an advance in humanitarian legislation.

For several years the International Committee of the Red Cross, faced with certain specific cases, had felt that it was necessary to make such provision.[1] Two requirements had to be reconciled—humane considerations on the one hand, and on the other the rights of neutral States. The problem of meeting these two requirements was already a dominant factor in the discussions which took place on the wording of Article 14 of the Fifth and Article 15 of the Tenth Hague Conventions, during the Peace Conference of 1907.

[1] The International Committee of the Red Cross would like to express its gratitude to Dr. Alex Meyer, expert in air legislation, for his valuable help in the wording of the draft Article which the Committee submitted to the XVIIth International Red Cross Conference, and which with slight changes has become Article 37 of the Geneva Convention of 1949.

PARAGRAPHS 1 AND 2 — CONDITIONS FOR FLIGHT AND LANDING

For the reasons already given, it did not seem possible to impose on a neutral State the duty of allowing the unconditional flight of aircraft over its territory. On the other hand, it did not seem feasible to leave neutral States at liberty to accord or refuse at will the access of medical aircraft to their territory. It was accordingly decided to adopt the general rule that medical aircraft of belligerents could fly over the territory of neutral Powers, land on it in case of necessity, or use it as a port of call, and at the same time to give neutral Powers the right to place conditions or restrictions on the passage or landing of medical aircraft on their territory, with the proviso that they were to apply such conditions or restrictions equally to all belligerents.

The Convention itself imposes three express conditions or restrictions. They are based on the preceding Article dealing with the rights of the belligerents. Medical aircraft must give neutral Powers previous notice of their passage over their territory; they must obey any summons to alight on land or water; and they are to be immune from attack only when flying on routes, at heights and at times specifically agreed upon between the belligerent Power and neutral Power concerned.[1]

PARAGRAPH 3 — LANDING OF WOUNDED

When a medical plane lands in a neutral country, either of its own accord or in response to a summons, it may leave again with its occupants, after being examined by the neutral Power if this is thought necessary. It may be retained only if it is discovered that acts incompatible with the humane role of such aircraft have been committed. Although these considerations have not been mentioned explicitly in the Convention, they follow clearly from the whole text of the Article and from the general principles of international law.

The officer in charge of the aircraft may, however, be anxious—for example, because of their state of health—to land the wounded or sick

[1] This formula is based on the one which appears in the preceding Article. Here the word "attack" is surely inappropriate; such attacks could only be made by the armed forces of the neutral country. Belligerents have obviously no right to pursue or attack over neutral territory.

he is transporting in neutral territory, not merely for the short time he stops there, but to leave them there. This he may do, if the local authority in the neutral country agrees. In such cases, and unless there is an agreement to the contrary between the neutral Power and the Parties to the conflict, the wounded and sick must be detained by the neutral Power in such a manner that they cannot again take part in operations of war. The cost of their accommodation and internment is to be borne by the Power on which they depend.

The obligation imposed on the neutral Power to intern wounded and sick landed by a medical plane belonging to a belligerent, is qualified by the words "where so required by international law". These words were inserted to bring the Geneva Convention into line with the Fifth Hague Convention of 1907, in which general provision is already made for the case in point.[1] Furthermore, under Article 4 of the First Geneva Convention of 1949, neutral Powers are required to apply by analogy the provisions of the said Convention to the wounded and sick, and to members of the medical personnel and to chaplains of the armed forces of the Parties to the conflict, received or interned in their territory, as well as to dead persons found.[2] Moreover, under Article 4 B (2) of the Third Geneva Convention of 1949, members of the belligerent armed forces who are interned in a neutral country are to receive treatment at least as favourable as that granted by the Convention to prisoners of war.

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[1] See Chapter II of the Fifth Hague Convention of 1907, entitled "Belligerents Interned and Wounded Tended in Neutral Territory".

[2] See above, page 61.

CHAPTER VII

THE DISTINCTIVE EMBLEM

ARTICLE 38 — EMBLEM OF THE CONVENTION

As a compliment to Switzerland, the heraldic emblem of the red cross on a white ground, formed by reversing the Federal colours, is retained as the emblem and distinctive sign of the Medical Service of armed forces.

Nevertheless, in the case of countries which already use as emblem, in place of the red cross, the red crescent or the red lion and sun on a white ground, those emblems are also recognized by the terms of the present Convention.

1. *Origin of the red cross emblem* [1]

Long before the Red Cross was founded, hospitals and ambulances were sometimes marked on the battlefield by a flag of a single colour, which varied according to the occasion and the country. From the beginning, those responsible for the Red Cross and the Geneva Convention recognized the need for a uniform international emblem as the visible sign of the immunity to which medical personnel and the wounded should be entitled.

The sign of the red cross on a white ground came into being at the historic International Conference which sat in Geneva from October 26 to 29, 1863, and laid the foundations of the Red Cross movement. It was only a question, on that occasion, of choosing a badge for voluntary medical orderlies. Dr. Appia proposed a white armlet; the Conference—probably at the suggestion of General Dufour—decided to add a red cross.

[1] In the following pages, "red cross" is printed in lower case when it refers to the heraldic emblem, capitals being reserved for the "Red Cross" as an institution. If generally adopted, this system might avoid confusion.

The Diplomatic Conference which drew up the first Geneva Convention the following year, officially adopted the red cross on a white ground, this time as a single distinctive emblem for all army medical personnel, and for military hospitals and ambulances.

It is not certain that there was, either in 1863 or in 1864, any conscious intention of reversing the colours of the Swiss flag. No contemporary writings suggest such a comparison, and it is possible that the analogy was not remarked until later. The first written allusion to it was by Gustave Moynier in 1870.

The 1906 Conference, which revised the Convention, added a clause stating that the emblem was adopted as a compliment to Switzerland, and was formed by reversing the Federal colours.

The term "Red Cross", to denote the work of voluntary relief to wounded members of the armed forces, was first adopted by the Netherlands Society in 1867, and had some difficulty in finding general acceptance. By 1885, however, it was widely used.

The red cross emblem is sometimes called the "Geneva Cross", not because of any supposed connection with the Genevese armorial bearings—which are entirely different—but because it originated in Geneva. [1]

2. *Authorized exceptions*

It was rightly regarded as essential to have a single emblem only, but although this unity was universally established—at least legally—by the 1864 Convention, it was not to endure for long.

Turkey, who in 1865 had adhered unreservedly to the Geneva Convention, notified the Swiss Federal Council in 1876, during her war first with Serbia and later with Russia, that her Medical Service would display a red crescent and not a red cross, because this latter sign was offensive to Moslem soldiers. They had apparently not forgotten the Crusades. Russia, who came into the war in 1877, at first contested Turkey's right to modify a treaty clause unilaterally, but later agreed to the red crescent being used, against a promise that the Turks would continue to respect the red cross of their opponents.

At the Hague Peace Conference of 1899, which drew up the Conven-

[1] For further details regarding the origin of the red cross emblem, see Jean S. PICTET, *The Sign of the Red Cross* in the *Revue internationale de la Croix-Rouge*, English Supplement, April 1949, page 143.

tion for the adaptation to maritime warfare of the principles of the Geneva Convention of 1864, the Turkish Delegate declared that the red cross would be replaced by the red crescent on the flags of Turkish hospital ships. The Siamese and Persian Delegates asked for recognition of their countries' right to use respectively the red flame and the red sun. The United States Delegate then proposed that the red cross should be replaced by an emblem acceptable to all. The Hague Conference was not competent to revise the Geneva Convention, and merely noted the reservations and recommendations made. The International Committee of the Red Cross has never ceased to regret that the principle of having a single universal emblem was not maintained.

The Conference which revised the Geneva Convention in 1906 confirmed the adoption of the red cross sign; it did not authorize any exceptions and, as we shall see later, emphasized by a unanimous vote that the emblem had no religious significance. Turkey, however, who had not been represented at this Conference, adhered to the Convention the following year only on condition that she could use the red crescent. At the time of the revision of the Maritime Warfare Convention at the Hague in 1907, the Conference, as in 1899, merely noted the reservations made by Turkey and Persia.

On the proposal of Turkey, Persia and Egypt, the in 1929 Conference which undertook the second revision of the Geneva Convention, unanimously recognized the red crescent and the red lion and sun for countries which already used these emblems, i.e. for the three countries concerned. It was hoped that this would prevent any further exceptions. Several Moslem States, however, adopted the red crescent after 1929, and the International Committee of the Red Cross did not feel that it should refuse recognition to their Societies.[1] It had even, in 1924, recognized the Persian Red Lion and Sun Society—a decision that was apparently premature.[2]

The Committee has at least been successful in its formal opposition to the introduction of several other emblems suggested.

[1] It may be noted that Lebanon and Pakistan have adopted the red cross emblem. The Lebanese Red Cross was recognized by the International Committee in 1947, and the Pakistan Red Cross in 1948.

[2] It was not until 1929 that the Geneva Convention recognized this emblem. Moreover, as Persia is not party to the 1929 Convention, the provision in regard to this emblem has not formally taken effect.

3. *Return to a single emblem*

A very strong tendency to return to a single emblem was apparent at the Expert Conferences which considered the revision of the 1929 Convention. The Commission which drew up the first draft in 1937 was unanimous on this point. It emphasized the fact that the red cross was an international sign, devoid of any religious significance, and that it was illogical to try to replace it by national or religious emblems; such a course would involve the risk of confusion with national flags which are, in time of war, symbols of belligerency. The Preliminary Red Cross Conference in 1946 was of the same opinion. Some delegations recommended that steps should be taken in Middle Eastern Countries[1] to explain the real significance of the red cross emblem. One delegate pointed out that the arithmetical plus sign—which is a cross—was not objected to anywhere on these grounds. The representative of one of the countries using the red crescent maintained, however, that it was still impossible to introduce the red cross sign in Moslem countries, but did not deny that it might one day be possible to do so. The Conference did not propose that the text of the Convention should be amended.

The subject was again discussed at the Conference of Government Experts in 1947 and, the following year, at the XVIIth International Red Cross Conference. The latter, while it did not recommend any change in the wording of the Convention, expressed the wish "that the Governments and National Societies concerned should endeavour to return as soon as possible to the unity of the Red Cross emblem".

This was the situation which faced the International Committee of the Red Cross on the eve of the 1949 Diplomatic Conference. The Society of the Red Shield of David, operating as a relief society in Israel, had, moreover, asked to be recognized as a member of the International Red Cross, whilst retaining the right to use as emblem the "shield of David", in red on a white ground.[2] In its "Remarks and Proposals" to Governments participating in the Geneva Conference, the International Committee suggested various possible solutions to this difficult problem.

[1] All Eastern and Far Eastern countries adopted the red cross without hesitation.
[2] The "shield of David" is the Jewish, six-pointed star, formed by two intersecting triangles.

One was that exceptions should be tolerated only for a limited period, during which the countries concerned could take steps to educate public opinion and gradually replace their own emblems by the red cross. Another suggestion was that the red cross emblem should be used by all countries, but that certain of them should be authorized to add their own symbol (in miniature) in one corner of the flag. The International Committee also considered the possibility of only recognizing a single exception—an entirely new and strictly neutral emblem for use by countries which found it absolutely impossible to accept the red cross. Finally, it was pointed out that if Iran, the only country to employ the red lion and sun, would agree to give it up, the only special emblem remaining in use would be the red crescent.

4. *Discussions at the 1949 Conference*

Apart from a very slight change in wording, Article 38 follows the corresponding 1929 text. It was nevertheless the subject of important and protracted debates during the Conference. Three main tendencies became apparent:

(a) To revert to the use of the red cross as the only distinctive emblem. The Conference, while hoping that the time would come when all the countries of the world would decide to adopt the red cross on a white ground as the only distinctive emblem, was nevertheless compelled to recognize that it was impossible, for the moment, to revert to the use of a single emblem.[1]

(b) To increase the number of exceptions. The Conference first considered the Israeli Delegation's proposal that the red "shield of David" should be recognized. It was later suggested that each country should be allowed to choose for itself any red symbol on a white ground. These suggestions were rejected by the Conference, which was fully aware of the danger they represented—the danger of substituting national or religious symbols for the emblem of charity, which must necessarily be neutral, and the danger of opening the way to a multiplicity of emblems which would undermine the universality of the red cross and diminish its protective value.[2] It should be remembered that the Internation-

[1] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-A, page 197.

[2] See statement by M. Paul Ruegger, President of the International Committee of the Red Cross, to the Plenary Assembly of the Conference. *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, page 223.

al Committee of the Red Cross had already received a great many requests for the recognition of new emblems, such as the flame, shrine, bow, palm, wheel, trident, cedar, and mosque. The amendment proposed by the Israeli Delegation was rejected in the final vote in plenary session by a majority of only one (22 votes to 21, with 7 abstentions).[1]

(c) To abolish not only the alternative emblems, but the red cross itself and to substitute a new geometrical sign which would have to be decided upon. One delegate suggested a red heart, as being the symbol of charity; it would have taken the conventional form of an inverted equilateral triangle. This revolutionary proposal did not stand examination. It was felt at once that to abandon a long and universally known and respected emblem, of such high significance as the red cross, would be to endanger human lives.

Present arrangements were therefore maintained: the red cross remains the accepted sign, and the two former exceptions (the red crescent and the red lion and sun) may still be used—not only by the countries which were using them in 1929, but also by those which adopted them between 1929 and 1949. The Convention is opposed to their adoption by any further countries after 1949.[2]

5. *Nature of the red cross emblem*

A. *Neutrality.* — The sign of the red cross on a white ground, sanctioned by the Geneva Convention from 1864 down to our times, is above all, as Article 38 says, "the emblem and distinctive sign of the Medical Service of armed forces". It is also, as we shall see in connection with Article 44, the emblem of the Red Cross movement.

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[1] When signing the Convention, the Israeli Delegation made a reservation with regard to the use of the red shield in Israel. Certain delegations asserted that this reservation was invalid. We do not wish to raise here the difficult problem of the value of reservations, which is now being studied internationally. It may, however, be pointed out that according to several writers, the only effect of reservations is to limit the obligations accepted under a Convention; they cannot create, for the other Contracting Parties, obligations which exceed the stipulations of the said Convention.

[2] The States party to the Geneva Convention which have recognized Red Crescent Societies, and had adopted the red crescent before 1949, are Egypt, Iraq, Jordan, Syria, and Turkey. Several Republics of the Soviet Union (Azerbaidzhan, Tazhikistan, Turkmenistan and Uzbekistan) have also adopted the red crescent. In Afghanistan, a Red Crescent Society has been in process of formation for several years.

The red lion and sun is used only in Iran.

The sign was meant to be international and neutral, a symbol of disinterested aid to the wounded soldier, be he friend or foe. It was not the Swiss armorial bearings which were adopted, even though it was intended to pay a tribute to the country where the Red Cross came into existence. The reversal of the Swiss colours created a new emblem, bereft of any national association.

Similarly, the emblem chosen was intended to be without any religious significance, since it had to be employed by persons of all beliefs. This was always considered self-evident in official circles, and there is no real need to enlarge on the subject. Nevertheless, certain delegations at the 1949 Conference thought they could cast some doubt on the matter in order to justify the rejection of the red cross and its replacement by special emblems which have in fact a religious or national significance. It is therefore best to make the position absolutely clear.

The Conferences of 1863 and 1864 which adopted the red cross sign, stressed the universal and neutral character of the emblem. M. Max Huber, President of the International Committee of the Red Cross for nearly twenty years, wrote:

"It was neither Dunant's desire nor that of his collaborators, nor that of the countries participating in the Geneva Convention, that the work and emblem of the Red Cross should bear a religious stamp or be in any way attached to a given set of philosophical ideas. On the contrary, the movement was not only to serve, but also to gather to itself, all sorts and conditions of men." [1]

The phrase stating that the red cross emblem was formed, as a compliment to Switzerland, by reversing the Federal colours was introduced into the Geneva Convention by the Diplomatic Conference of 1906. "This tribute in 1906 ", wrote Paul Des Gouttes, the eminent commentator on the Geneva Convention, "had also another object: to confirm officially and explicitly that the emblem had no religious significance".[2]

Louis Renault, a leading figure at the Geneva and Hague Conferences, wrote in his General Report to the 1906 Conference:

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[1] Max HUBER. *The Red Cross : Principles and Problems*, Geneva 1946, page 62. The same idea is expressed on page 25 of the above work and in *The Good Samaritan*, London, Gollanz, 1945, page 31.

[2] Paul DES GOUTTES. *Commentaire de la Convention de Genève du 27 juillet 1929*, Geneva, 1930, page 143.

"As we know, it was in no sense as a religious symbol that the cross was adopted by our predecessors; they thought of Switzerland, whose guests they were and which had taken the initiative in regard to their meeting... The foregoing explanation should satisfy all requirements, proving as it does that the emblem adopted cannot offend any religious convictions. The Conference has expressly noted that the emblem has no religious significance, and the formula proposed is intended to underline the purely historical origin of the red cross and the character of the emblem... The absence of religious significance is shown clearly enough, even if implicitly, by the expressions used."[1]

We emphasize again that the Diplomatic Conference of 1906—as Louis Renault pointed out—unanimously agreed that the red cross sign had no religious significance. The following passage is quoted from the official minutes:

> Sir Ardagh proposed that the meeting should decide definitely whether or not the present system had a religious character. The President called upon the meeting; as no delegate spoke, the President noted that no one attached religious significance to this sign.[2]

The Plenipotentiaries at the Diplomatic Conference of 1929 expressed similar views; the Egyptian Delegate was even heard to say: "It is not for religious reasons that we have the red crescent or the red lion and sun".[3]

At the 1949 Conference the Head of the Delegation of the Holy See himself recalled that "the red cross had been selected as a tribute to Switzerland and it had always been made clear, particularly in 1906, that the red cross symbol in question was devoid of all religious significance."[4]

In the face of such testimony, need we insist further?

The emblem of the Geneva Convention is also that of the Red Cross. What is true for one is true for the other. Neutrality in religious matters is

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[1] See *Actes de la Conférence de Revision réunie à Genève en 1906*, Geneva 1906, page 260.

[2] See *Actes de la Conférence de Revision réunie à Genève en 1906*, Geneva, 1906, page 162.

[3] See *Actes de la Conférence diplomatique de Genève de 1929*, Geneva, 1930, page 248.

[4] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol.II-A, page 150.

a fundamental, statutory principle of the Red Cross. It is difficult to see how its flag could be different in this respect.

The red cross emblem is intended to signify one thing only—something which is, however, of immense importance: respect for the individual who suffers and is defenceless, who must be aided, whether friend or enemy, without distinction of nationality, race, religion, class or opinion.

People may associate this cross with the Christian cross in their own minds; but such an interpretation cannot have any official or international standing. "The Red Cross" wrote M. Max Huber, "is neutral in religion, and must always remain so. Whether the charitable motives that prompt its collaborators' participation are of religious or other inspiration, is their exclusively personal affair, shut in the silence of each conscience and, for the sake of the cause, never outwardly stressed".[1]

B. *Form of the cross.* — The statement in the Geneva Convention that the emblem of the red cross on a white ground is "formed by reversing the Federal colours" has sometimes been thought to mean that the red cross must necessarily have the same form as the Swiss cross—which has been fixed.[2] This is obviously not so. The word "colours" should be taken literally to refer simply to the colours red and white. If it had been intended to speak of the Federal flag, the word "reversing" would not have been used. The Proceedings of the Diplomatic Conference of 1906 are, moreover, explicit: the Conference deliberately refrained from defining the form of the cross, since definition might have led to dangerous abuses. The reasons are clear. If the form of the cross had been rigidly defined, attempts might have been made to justify attacks on installations protected by the Convention, on the pretext that the emblems displayed were not of the prescribed dimensions. Similarly, unscrupulous persons could have taken advantage of a rigid definition to use a slightly larger or slightly smaller red cross for commercial purposes.

For the same reasons, the Convention does not specify the shape of the white ground or the exact shade of red in the cross, as Switzerland has done for its flag. Some National Red Cross Societies have defined

[1] See *The Good Samaritan*, London, Gollanz, 1945, page 29.

[2] In 1889, the Swiss Federal Assembly defined the arms of the Confederation as "a white cross, upright and humetty, placed on a red ground, having arms equal to each other and of a length exceeding their breadth by one-sixth;". In heraldic parlance, "humetty" is used of a cross whose arms do not extend to the edges of the shield.

the form of cross which they themselves will use.[1] This they are perfectly entitled to do. The majority appear to have chosen a cross made up of five equal squares—the shape which is most easily mass-produced.

C. *Official standing.* — Article 38 speaks of "the *heraldic* emblem of the red cross on a white ground". The world "heraldic" was not selected at random in 1906, but chosen, after due consideration, in preference to any other.[2] The intention, in using it, was to give the red cross emblem the same standing as official arms.

It should be noted that quite apart from the stipulations in Article 53 of the Geneva Convention,[3] the misuse of official arms is prohibited by the Union Convention of Paris, March 20, 1883, for the protection of industrial property (revised in 1925 and again under revision at the present time).

ARTICLE 39 — USE OF THE EMBLEM

Under the direction of the competent military authority, the emblem shall be displayed on the flags, armlets and on all equipment employed in the Medical Service.

This Article reproduces Article 20 of 1929, with slight changes of wording.

1. *The protective sign*

A fundamental distinction must now be made, to which we shall return at greater length when dealing with Article 44. It concerns the two distinct uses to which the red cross on a white ground[4] may be put. In the first case—which is the one and the only one—to which Article 39 relates—the sign is a virtually constitutive element of protection

[1] The Turkish Red Crescent has defined its emblem by statute: it consists of a red crescent on a white ground, the points being turned towards the left. On the flag, however, the points of the crescent are turned in the direction away from the flagpole. The flag and crescent have the same dimensions and proportions as the Turkish national flag, as fixed by law.

[2] Proceedings of the 1906 Conference, Committee IV, Fifth meeting.

[3] See below, page 380.

[4] This expression will henceforth be understood to cover also the red crescent and the red lion and sun, in respect of the countries which use these emblems.

under the Convention. For brevity's sake we shall refer to it as the protective sign. It has this connotation when displayed on buildings, persons and objects entitled to respect under the Convention.

In the second case—which follows from Article 44, paragraph 2—the sign is purely indicatory, i.e. it is only used to designate persons or objects connected with the Red Cross; this does not, and is not intended to, imply the protection of the Convention.

The emblem has its essential significance when used as a protective sign. It is then known as the "emblem of the Convention". Its use becomes of practical importance in time of war, particularly in the zone of military operations.

In principle, a red cross on a white ground should be displayed on the buildings, persons [1] and objects protected by the Convention. If enemy troops at a distance are really to be able to accord these persons, objects or buildings—especially the latter—the respect required by the Convention, they must be in a position to recognize them for what they are.

We use the qualification "in principle" for two reasons. In the first place there is no obligation on a belligerent to mark his units with the emblem. Sometimes, in front-line positions, a commander will camouflage his medical units in order to conceal the presence or real strength of his forces. But as the enemy can respect a medical unit only if he knows of its presence, respect for the camouflaged unit will be purely theoretical. The unit will be exposed to long-range enemy fire and will thus lose a large part of its security. But in case of occupation, for instance, the enemy, recognizing the medical unit for what it is, must obviously respect it. It is for this reason that we stated above that the emblem was a *virtually* constitutive element of protection under the Convention.

The second reason is that it will not always be physically possible to mark an object with the emblem. Small surgical instruments are a case in point. But such articles will form an integral part of a larger unit, which will be marked.

The distinctive sign under the Geneva Convention is not a red cross alone: it is a red cross on a white ground. The red cross should therefore be displayed on a white ground; this will not only obviate disputes but, by the contrasting colours, give better visibility. Should there be

[1] "Persons" clearly means medical and religious personnel, and not the wounded and sick themselves.

some good reason, however, why an object protected by the Convention can only be marked with a red cross without a white ground, belligerents may not make the fact that it is so marked a pretext for refusing to respect it.

2. *Control by the military authority*

The initial phrase of Article 39 is most important: use of the emblem is to be "under the direction of the competent military authority". This replaces the 1929 wording which read: "With the permission of the competent military authority".

The new wording is to be preferred; it shows, quite as clearly as the old, that it is the military commander who controls the emblem and can give or withhold permission to use it; moreover, he alone, as we shall see, can order a medical unit to be camouflaged.

The new wording also shows that the military authority is at all times responsible for the use made of the emblem, must keep a constant check on it, and see that it is not improperly used by the troops or by individuals. Again, the earlier expression could give rise to the false idea that special permission was necessary each time the sign was used, whereas, in actual practice, a general order is usually given once for all. So far as the Medical Service of the armed forces is concerned, the authorization must be largely presumed.

Who is the "competent military authority"? In 1929, a definition was deliberately avoided, so as to allow of flexibility. The question is a private one for the armed forces of each country. If an officer exceeds his competence, he is responsible to his superiors alone. The wounded cannot be allowed to suffer thereby; and an enemy could scarcely plead lack of competence, to justify his denying protection to a medical unit which fulfilled the requirements of the Convention.

What is essential is that all armed forces should exercise official control over every use of the emblem.

ARTICLE 40 — IDENTIFICATION OF MEDICAL AND RELIGIOUS PERSONNEL

The personnel designated in Article 24 and in Articles 26 and 27 shall wear, affixed to the left arm, a water-resistant armlet bearing the distinctive emblem, issued and stamped by the military authority.

Such personnel, in addition to the identity disc mentioned in Article 16, shall also carry a special identity card bearing the distinctive emblem. This card shall be water-resistant and of such size that it can be carried in the pocket. It shall be worded in the national language, shall mention at least the surname and first names, the date of birth, the rank and the service number of the bearer, and shall state in what capacity he is entitled to the protection of the present Convention. The card shall bear the photograph of the owner and also either his signature or his fingerprints or both. It shall be embossed with the stamp of the military authority.

The identity card shall be uniform throughout the same armed forces and, as far as possible, of a similar type in the armed forces of the High Contracting Parties. The Parties to the conflict may be guided by the model which is annexed, by way of example, to the present Convention. They shall inform each other, at the outbreak of hostilities, of the model they are using. Identity cards should be made out, if possible, at least in duplicate, one copy being kept by the home country.

In no circumstances may the said personnel be deprived of their insignia or identity cards nor of the right to wear the armlet. In case of loss, they shall be entitled to receive duplicates of the cards and to have the insignia replaced.

PARAGRAPH 1. — THE ARMLET OR BRASSARD

1. *Wearers*

The only change from the 1929 text as regards the armlet or brassard —the distinguishing mark which allows medical personnel to be recognized from far off—is that it is to be water-resistant.

As before, all permanent medical personnel and chaplains are entitled to wear the armlet, whether they belong to the Medical Service, a Red Cross Society or any other recognized relief society of either a

belligerent or neutral country. These persons are designated in Articles 24, 26 and 27. The arrangements made for temporary medical personnel, who may now wear a special armlet, will be seen when we come to Article 41.

Under Article 44, paragraph 2, National Red Cross Societies may not make use of the armlet in wartime for activities which are not protected by the Geneva Convention—that is, other than their work with the Medical Service. The armlet, consequently, is always a protective sign.

2. *Description*

As in 1929, the brassard is to "bear the distinctive emblem". This being a red cross on a white ground, there is no necessity, in theory, for the armlet itself to be white. On the other hand, it is expressly laid down in Article 41 that the special armlet worn by temporary medical personnel is to be white.

In any case, it is now the custom everywhere for all medical personnel to be provided with a white armlet bearing a red cross and it is to be hoped that this practice will remain. Besides being easier to manufacture, such armlets are the only ones which give good visibility, owing to the contrast of colours.

The armlet is to be "water-resistant". This provision, which aims at keeping it in good condition, must be regarded as being in the nature of a recommendation. The fact that an armlet is not waterproof could obviously not be held to deprive it of its protective value.

As in the case of the red cross generally, the form and dimensions of the brassard are not specified—and for the same good reasons. It is again laid down, however, that it is to be affixed to the left arm—"affixed", because it is not intended to be taken off and put on again at will, and the risk of loss must be avoided; "on the left arm", because it is desirable that it should be worn in a stated position, where the eye will naturally look for it. Here again, a belligerent could not claim the right to deny protection to a medical orderly who for some plausible reason wore the brassard on his right arm.

3. *Stamp of the military authority*

What is above all essential is to ensure the *bonafides* of the wearer: the armlet must only be worn by those who are entitled to do so under the Convention.

The brassard is not in itself sufficient evidence; as has been remarked, it is a simple matter to make an armlet and to slip it on—in which case the wearer is liable to a penalty, even if he wears the brassard for its legitimate purpose while coming to the assistance of the wounded. The belligerents must have proper safeguards.

The armlet will have no protective value, and cannot be lawfully worn, unless it has been stamped and issued by the military authority. This time the condition is an essential one, admitting of no exception. Issue alone no longer suffices, as it did in 1864; the official stamp must be there to show that the armlet has been issued by, and on the responsibility of, the military authority. The enemy can, of course, only satisfy himself on this point in case of capture; but a possible check of this sort is most valuable and should prevent abuses.

What "military authority" is competent to stamp and issue the armlet? As we pointed out in reference to Article 39, where the expression "competent military authority" is used, this point was deliberately left vague in 1929, and with good reason.

In 1929, even the word "competent", which had formerly appeared in the provision that now corresponds to Article 40, was deliberately dropped, on the ground that the issue of armlets might be particularly urgent in certain circumstances, and should therefore be facilitated. We feel, however, that the subtle distinction thus drawn was an unreal one. Article 39 has a general sense, and applies also to the brassard. Besides, the need for displaying the emblem on buildings or vehicles might be quite as urgent as the issue of armlets. Most important of all, the question of competence, as we said in reference to Article 39, is a private matter for the armed forces of each individual country.

Whether or not the word "competent" appears in the text, the use of the emblem must clearly be controlled by an official military authority fully aware of its responsibility, and cannot be left to the initiative of the first comer. What is necessary under the present Article is that an official military authority, whose name appears on the stamp, should be responsible for issuing the armlet.

We now turn to the question of whether a commander is entitled to issue the armlet to persons to whom he has appealed, in the sense of Article 18, to help care for the wounded. In view of the restrictive character of the provisions governing the use of the emblem (Articles 40,

paragraph 1, and 44, paragraph 1), we believe that in general the answer is "No", but circumstances may justify exceptions.[1]

4. *Use of the flag by medical personnel*

Useful though the brassard is, it cannot be said to be perfect as a means of identification. Being small, it will not always be sufficiently visible at a distance to ensure the safety of those wearing it. A practice frequently adopted by medical orderlies and stretcher-bearers who are detailed to collect the wounded between the lines, is for one of them to carry and wave a white flag bearing the red cross.

There is nothing to prevent this in the Convention. A group of medical orderlies, however small—one, even—must be regarded as a medical unit. Use of the flag in such circumstances must naturally be absolutely *bona fide* ; it may not under any circumstances be used to cover fighting troops.

The best way to ensure the security of medical personnel would undoubtedly be for them to wear a special uniform, the same in all countries and different as regards colour from the uniforms worn by fighting troops. This idea was suggested when the Red Cross was first founded ; but it has not so far been adopted. Perhaps one day it will be taken up again.

PARAGRAPHS 2 AND 3 — THE IDENTITY CARD

The armlet is not in itself sufficient to etablish the status of the wearer. If he falls into enemy hands, he must be able to prove that he is entitled to wear it. He must also be in a position to prove that he is a member of the medical or religious personnel, in order that he may enjoy the status accorded to him under the Convention, and be eligible for repatriation. A special identity card is therefore necessary.

1. *Standardization*

The rules regarding identity documents in the 1929 text have been radically altered. The former system lacked simplicity and was not

[1] See above, page 188.

uniform. Official personnel proved their identity either from an entry in their pay-book, or by a special document; it was only personnel of National Red Cross Societies and other relief societies assisting the Medical Service of the armed forces, who were required to carry a certificate with a photograph. During both the First and Second World Wars the above rules were observed very perfunctorily. Medical personnel who were taken prisoner were often unable to have their status and their right to repatriation recognized, and the International Committee had endless trouble in helping them establish their identity.

To eliminate these serious drawbacks, the 1949 Conference adopted a proposal in the revised drafts, to make the identity card uniform throughout the same armed forces. All permanent staff, both medical personnel and chaplains, and whether they belong to the forces or to a Red Cross Society, will now have the same type of identity card.

It is also recommended that the card should be of the same type in all armed forces. A specimen is annexed to the Convention as a model.[1] It is hoped that the Powers will use it. At all events, the Parties to the conflict must, at the outbreak of hostilities, inform one another of the model they are using.

Identity cards should be made out, if possible, in duplicate, one card being issued to the bearer and the other kept by the home country. If he is taken prisoner and has lost his card, it will be possible to prove his status by referring to the duplicate. This precaution was recommended by the International Committee of the Red Cross, and should help to avoid disputes. During the preparatory work of revision, certain experts had proposed that duplicates of all identity cards issued should be sent to the International Committee. This course did not appear feasible, however, as Governments are not always prepared to disclose the exact numbers of their medical personnel.

2. *Description*

The various features of the identity card designed by the Conference and the information it is to contain make it a document of real practical value.

First of all, it is to bear the red cross emblem.

[1] The model will be found on page 430 below.

To make it more durable, the card, like the armlet, is to be water-resistant. In some countries it is now entirely covered by a transparent, non-inflammable plastic coating which cannot be removed.

The card is to be pocket-size. There is a good reason for this; it was found that when identity cards were too big, their owners were apt to keep them in their packs—which are not normally worn on the battlefield—or to leave them in their billets.

The card must be worded in the national language. For practical reasons, the Conference rejected an earlier proposal which would have made it obligatory for the items to be given in several languages; this may obviously still be done if desired, and countries with little-known languages will probably prefer to use a second and more generally known language in addition to their own. Countries with more than one national language will be in a similar position.

The particulars which must be given are the surname and first names of the bearer, his date of birth, his rank and his service number. States may add whatever further details they desire.

The card must also indicate in what capacity the bearer is entitled to the protection of the Convention. As a minimum, it would appear necessary to state whether he is a member of the medical personnel or chaplains' branch, the medical staff proper or the administrative staff, whether he belongs to the official Medical Service or to a recognized relief society, and, in the latter case, whether the society is from a belligerent or neutral country.

Further details seem highly desirable in the interest of the wounded and sick. It should be possible for captured medical staff to be detailed at once for employment in accordance with their particular qualifications. At the Conference, the delegation which proposed this provision had suggested that the "qualification and/or medical duty for which trained" should be specified. This expression does not appear in the final text, but we feel the idea should be kept in mind. Not only would it be useful to distinguish between physicians, surgeons, dentists, medical orderlies, stretcher-bearers, etc., but also to subdivide physicians still further into eye specialists, neurologists, and so on.

The card must bear the photograph of the owner. This essential means of identification, which was considered too complicated in 1929, is now so widely used that it was accepted without discussion at the Conference.

The same thing was not true in the case of fingerprints. The proposal to make them obligatory was rejected, even though they offer a surer means of identification than photographs, and are more easily obtained. The difficulties were of a sentimental nature: in some countries only criminals, or at all events those accused of offences, have their fingerprints taken, and the public has this association in mind. With time, this prejudice will probably disappear.

At present, fingerprints are optional; so is the bearer's signature, because illiteracy still exists, in the 20th century, to a greater extent than is generally supposed. Consequently, Governments may decide to have either the bearer's fingerprints, or his signature, or both, on the card; but one or other must appear. It cannot be too highly recommended to have both whenever possible, as this will provide a double check.

The final condition imposed by the Convention is the most important: the card must be embossed with the stamp of the military authority. It is this stamp which makes the card, like the armlet, authentic. It will be noted that the word "embossed"—i.e. stamped by pressure—is used; experience has shown that the usual ink stamps can rub off, and can be imitated with comparative ease.[1]

3. *The identity disc*

At the beginning of paragraph 2, in the sentence which lays down that medical personnel are to carry an identity card, we find the words "in addition to the identity disc mentioned in Article 16". These words refer to the disc—preferably double—which all military personnel must wear, so that their bodies can be identified in case of death. Further details are given in the commentary on Article 16.[2]

PARAGRAPH 4 — CONFISCATION PROHIBITED. REPLACEMENT

The Conference retained, and rendered more explicit, the 1929 provisions under which medical personnel may keep their identity papers and wear the armlet in all circumstances, i.e. even when retained by the adverse Party to assist their fellow countrymen who are prisoners.

[1] In a final Resolution the Diplomatic Conference recommended that States and National Red Cross Societies should take all necessary steps, in time of peace, to provide medical personnel with their identity cards and armlets. See below, page 432.

[2] See above, page 171.

The provision is a necessary one. In both World Wars medical personnel sometimes had their armlets and cards taken from them—a convenient way for the capturing State to evade its obligations. Such practices must be strictly forbidden; the special insignia and cards of medical personnel can only be withdrawn by the military authorities of their own armed forces.

Should the brassard be lost or destroyed, the owner should be issued with a new one. If he loses his identity card, he is entitled to a duplicate. This provision lays an obligation not only on the home Power, but also on the capturing Power which must do all it can to facilitate the transmission of new cards and armlets for captured enemy medical personnel who are found to be without them. During the recent war a large number of identity cards were transmitted to medical personnel in captivity, through the intermediary of the International Committee of the Red Cross.

ARTICLE 41 — IDENTIFICATION OF AUXILIARY PERSONNEL

The personnel designated in Article 25 shall wear, but only while carrying out medical duties, a white armlet bearing in its centre the distinctive sign in miniature; the armlet shall be issued and stamped by the military authority.

Military identity documents to be carried by this type of personnel shall specify what special training they have received, the temporary character of the duties they are engaged upon, and their authority for wearing the armlet.

Article 40, which we have just examined, referred to permanent medical personnel only; Article 41 deals with the identification of auxiliary medical personnel—as defined in Article 25—who are only employed on medical duties for part of their time. Trained to act as hospital orderlies, nurses or auxiliary stretcher-bearers, they are detailed in case of need to search for and assist the wounded. For the remainder of their time they may be employed on any other form of military work. Up to now, such troops have generally been bandsmen.

As has been seen in connection with Article 25, [1] auxiliary medical

[1] See above, page 222.

personnel were not, strictly speaking, protected on the battlefield under the 1929 Convention, but they were entitled to repatriation if taken prisoner. The position is now radically different: they are protected whilst on medical duty at the front, but once captured, are not entitled to repatriation. The clauses dealing with their identification had therefore to be altered.

PARAGRAPH 1 — THE SPECIAL ARMLET

The 1929 Conference did not accord the protection of the Convention to auxiliary medical personnel on the battlefield, because it was not considered possible to allow them to wear the armlet. Abuses were feared, and the Conference refused to entertain the idea of the armlet being removed and replaced by the wearers according as they were combatant or not. The Conference did not wish to make the emblem "removable".

The authors of the 1949 Convention felt that protection could be accorded to auxiliary personnel while they were actually carrying out their medical duties on the battlefield. On the other hand, they, too, felt that there would be a risk of abuse if such personnel were authorized to use the brassard normally worn by permanent medical personnel. They compromised by deciding to have a special armlet for auxiliary personnel.

A new emblem was not adopted, as it was feared that this might cause confusion. The idea of having the initial letters of the words "Auxiliary Personnel" on the armlet was, for example, dropped. The letters would in any case have had to vary with the language used.

Recourse was therefore had to the distinctive sign—either the red cross or one of the special emblems authorized by the Convention. The emblem on the new brassard is, however, to be in miniature, to distinguish it from that appearing on the armlet worn by permanent personnel.

The Convention, it may be noted, specifies that the temporary armlet shall be white; this detail is not given in the case of the permanent armlet. The Convention also lays down that the distinctive sign in miniature is to be placed in the centre of the armlet.

This brassard must, like the other, be issued and stamped by the military authority (see above, under Article 40).

Although ingenious, the solution adopted has the very real drawback of making the red cross less visible from a distance. The armlet is in

any case far from perfect as regards visibility, and a reduction in the size of the emblem tends to defeat the whole object of the provision, which is to protect auxiliary medical personnel. There is also a considerable risk of confusion between the two types of armlet.

In other words, if the cross on the special armlet is very small it may be difficult to see; if it is large, there will be a tendency to ignore the distinction between the special and the ordinary armlet. A *via media* has therefore to be found and it will no doubt be well to make this the subject of practical experiment. In any case, it is desirable that the ordinary armlet worn by the permanent medical personnel should be wide and that the red cross on it should be as large as possible. The special armlet could then have a cross which, although appreciably smaller, was still sufficiently visible. If the cross on the special armlet had arms half the length of those on the ordinary armlet it would probably still be recognizable.

PARAGRAPH 2 — IDENTITY DOCUMENTS

Once in enemy hands, auxiliary medical personnel are prisoners of war, and not entitled to repatriation (see above, under Article 29). The experts therefore considered it unnecessary to provide them with a special identity card.

However, as the Detaining Power may employ auxiliary personnel on medical duty when occasion arises, their ordinary identity documents are to specify the medical training they have received, the temporary nature of the duties they are engaged upon, and their authority for wearing the special armlet. Reference should be made here to Article 17, paragraph 3, of the Third (Prisoners of War) Convention of 1949, which lays down that every person liable to become a prisoner of war must be provided with an identity card, an exact description of which is given.

ARTICLE 42 — MARKING OF MEDICAL UNITS AND ESTABLISHMENTS

The distinctive flag of the Convention shall be hoisted only over such medical units and establishments as are entitled to be respected under the Convention, and only with the consent of the military authorities.

In mobile units, as in fixed establisments, it may be accompanied by the national flag of the Party to the conflict to which the unit or establishment belongs.

Nevertheless, medical units which have fallen into the hands of the enemy shall not fly any flag other than that of the Convention.

Parties to the conflict shall take the necessary steps, in so far as military considerations permit, to make the distinctive emblems indicating medical units and establishments clearly visible to the enemy land, air or naval forces, in order to obviate the possibility of any hostile action.

PARAGRAPH 1 — USE OF THE FLAG OF THE CONVENTION

Although the Convention does not define "the distinctive flag of the Convention", there can be no doubt that what is meant is a white flag with a red cross in its centre. This is a matter of common-sense. One cannot imagine the red cross on a white ground being placed in its turn on a flag of another colour. What might conceivably be possible in the case of the armlet, is here excluded by the very fact that we are speaking of a flag, and that the proportions are different to those of the armlet. The need for good visibility also requires this interpretation. The flag of the Convention will thus have the general appearance of the Swiss flag with the colours reversed.

The word "flag" must be taken in its broadest sense. It is not necessarily made of bunting. Hospitals are often marked by one or several red crosses on a white ground painted on the roof.

The emblem should be flown by mobile units, as well as by fixed establishments attached to the Medical Service, in order to ensure that they receive the protection and respect to which they are entitled. The consent of the military authority is, however, nesessary, in application of the general principle expressed in Article 39. The reader is referred to the comments on that Article.

As we have seen, the armlet must be stamped by the military authority, but a similar measure was not proposed in the case of the flag; stamping would in any case be impracticable where the emblem is painted on a roof.

What is important is that the military authority should take particular care to ensure that the flag is used only on buildings entitled to

protection. And the military authority may alone decide to "camouflage" a medical unit (by not marking it) when it considers that such a course is necessary.

During the preparatory work on the Conventions, a number of experts pointed out that modern tactics often prevented the marking of front line units, for fear that this might provide the enemy with information concerning the position and number of troops engaged. As we noted under Article 39, nothing forbids such a practice; but medical units which are camouflaged in this manner can, obviously, be respected by the enemy only in so far as he can recognize them for what they are.

The 1937 Commission devoted considerable attention to this question. With its own report it included, as an annex, a report by General Schickelé, to which reference should be made. The writer recommended that medical units should not be camouflaged any longer than was absolutely necessary to keep military operations secret; when the actual fighting began, there would be nothing further to hide, and the units should be marked. This recommendation should be acted upon.

PARAGRAPH 2 — USE OF THE NATIONAL FLAG

The 1906 Convention laid down the general rule that the national flag was to be flown over mobile units and fixed establishments of the Medical Service. This rule was maintained in 1929 for fixed establishments only, being made optional in the case of mobile units. In 1949, it was made optional for both to fly the national flag with that of the Convention.

This solution appears reasonable. It has already been pointed out that on a battlefield, the national flag is a symbol of belligerency and is therefore likely to provoke attack.

PARAGRAPH 3 — UNITS IN ENEMY HANDS

Article 19 provides that medical establishments and units which fall into the hands of the adverse Party may continue to function as long as the capturing Power has not itself ensured the necessary care for the

wounded and sick contained in them. During this period they will only fly the flag of the Convention.

There is no provision here for flying a national flag beside the red cross emblem, as there are objections to flying either the flag of the home country or that of the captor.

Although the paragraph only speaks of "medical units", we believe that this expression covers fixed establisments as well as mobile units. Their position since 1949 is so similar that a distinction in regard to the flag would be pointless.

PARAGRAPH 4 — MARKING

This provision is identical with the corresponding text of 1929.

The recommendations made are fully justified. The distinctive emblem is serving its most important purpose when it is displayed over mobile units and fixed establishments—particularly the latter. The large capacity of such buildings means that the safety of a great many people is at stake. Precautions must, moreover, be taken against air raids.

The emblem must be visible from a distance and from all sides. Rigid panels may be used, placed horizontally, vertically, or at an angle to the ground; and large red crosses on a white ground may be painted on the roof and walls, or marked out on the ground using suitable materials.[1]

The emblems must be of an adequate size. Experiments carried out by one Government at the request of the International Committee of the Red Cross have shown, for example, that a red cross on a white ground, five metres square, placed on a roof, could hardly be distinguished from altitudes over 2,500 metres.[2]

It is naturally desirable that medical units and establishments should be indicated by night, using, for example, a string of lights to outline the crosses. But the military command is most unlikely to give its consent, a total black-out being the most effective practical means of safeguarding an area against air attack. If medical units whose positions had been

[1] For further details, see the Report by General Schickelé: "Visibilité, signalisation et camouflage des formations sanitaires", attached to the Draft Revision of the Geneva Convention drawn up by the 1937 Commission of Experts.

[2] See *Revue internationale de la Croix-Rouge*, May 1936, page 409 (inset).

spotted during the day were lighted up at night, enemy aircraft would be provided with useful landmarks. Lighting might, however, conceivably be used only in case of attack.[1] As noted under Article 19, paragraph 2, the safety of medical units is best assured by keeping them well away from military objectives.

ARTICLE 43 — MARKING OF UNITS OF NEUTRAL COUNTRIES

The medical units belonging to neutral countries, which may have been authorized to lend their services to a belligerent under the conditions laid down in Article 27, shall fly, along with the flag of the Convention, the national flag of that belligerent, wherever the latter makes use of the faculty conferred on him by Article 42.

Subject to orders to the contrary by the responsible military authorities, they may, on all occasions, fly their national flag, even if they fall into the hands of the adverse Party.

This Article has been amended to bring it into line with the new Article 42.

PARAGRAPH 1 — THE FLAG OF THE BELLIGERENT

The Article concerns units belonging to neutral countries, which have been authorized to lend their services to a belligerent under the conditions laid down in Article 27. Paragraph 1 states that such units shall fly, along with the flag of the Convention, the national flag of the belligerent, if the belligerent commander has decided that his medical units shall do so. (Under the terms of Article 42, paragraph 2, this is not compulsory.)

This is commonsense. If a belligerent is flying his national flag over his medical units and establishments, it should also be flown by neutral units attached to his Medical Service; if he does not fly it, there is no reason why neutral units in his service should do so.

[1] General Schickelé's Report also mentions this possibility.

PARAGRAPH 2 — THE FLAG OF THE NEUTRAL COUNTRY

The right of a neutral unit to fly its own flag in addition to those of the Convention and of the belligerent with whom it is working, was introduced in 1929. It has been objected to for reasons of principle which are not, in our opinion, convincing.[1]

Under the 1949 text, a neutral unit may fly its national flag even—and this is new—if captured.[1]

A proviso is, however, added by the words: "subject to orders to the contrary by the responsible military authorities". Unlike the solution adopted in the case of the national flag of the belligerent, this phrase does not mean that the belligerent can decide whether or not neutral units generally are to fly their own flags. It implies a restriction made, in particular cases and for a limited period only, for tactical reasons, such as the necessity for concealing medical units in forward areas.

That is, we believe, the only interpretation that can be given to this provision. Moreover, it corresponds to the intention of those who drafted the provision. With any other interpretation, the phrases "subject to orders to the contrary" and "they may on all occasions" would represent a contradiction in terms and the paragraph would have no real meaning.

ARTICLE 44 — RESTRICTIONS IN THE USE OF THE EMBLEM. EXCEPTIONS

With the exception of the cases mentioned in the following paragraphs of the present Article, the emblem of the red cross on a white ground and the words "Red Cross", or "Geneva Cross" may not be employed, either in time of peace or in time of war, except to indicate or to protect the medical units and establishments, the personnel and material protected by the present Convention and other Conventions dealing with similar matters. The

[1] See Paul DES GOUTTES, *Commentaire de la Convention de Genève du 27 juillet 1929*, Geneva, 1930, page 171.

same shall apply to the emblems mentioned in Article 38, second paragraph, in respect of the countries which use them. The National Red Cross Societies and other Societies designated in Article 26 shall have the right to use the distinctive emblem conferring the protection of the Convention only within the framework of the present paragraph.

Furthermore, National Red Cross (Red Crescent, Red Lion and Sun) Societies may, in time of peace, in accordance with their national legislation, make use of the name and emblem of the Red Cross for their other activities which are in conformity with the principles laid down by the International Red Cross Conferences. When those activities are carried out in time of war, the conditions for the use of the emblem shall be such that it cannot be considered as conferring the protection of the Convention; the emblem shall be comparatively small in size and may not be placed on armlets or on the roofs of buildings.

The international Red Cross organizations and their duly authorized personnel shall be permitted to make use, at all times, of the emblem of the red cross on a white ground.

As an exceptional measure, in conformity with national legislation and with the express permission of one of the National Red Cross (Red Crescent, Red Lion and Sun) Societies, the emblem of the Convention may be employed in time of peace to identify vehicles used as ambulances and to mark the position of aid stations exclusively assigned to the purpose of giving free treatment to the wounded or sick.

The corresponding provision in the 1929 Convention (Article 24) was most unsatisfactory. It did not make the fundamental distinction between the two uses of the red cross emblem, which is absolutely necessary if one is to grasp the real significance of the emblem and solve the complex problems there are in regulating its use. This distinction, obvious as it seems, was put into words only recently; the fact that it was ignored long obscured the whole question and misled a number of people, especially during the Diplomatic Conference of 1929.

There are two distinct uses of the red cross on a white ground—uses so fundamentally different that their only common element is the outward form of the sign. In the first case, when the emblem has its essential significance, it is the visible sign of the protection accorded by the Convention to persons or things. It is then a virtually constitutive element of protection under the Convention, and we shall refer to it for

short as the *protective sign.* It must be large in proportion to the object it is to mark.

We have advisedly used the qualification *virtually*, because marking is not in fact a *sine qua non* of protection. A medical unit which does not display the sign openly is still protected in theory. It is clear, however, that the protection can be effective only in so far as the enemy has recognized the unit for what it is—in case of occupation, for example.[1]

In the second case, the sign is *purely indicatory*. It is only used to show that a person or object is connected with the Red Cross, without implying the protection of the Convention or any intention to invoke it. It is, for example, used in this way to draw public attention to premises or publications. The emblem should then, as a rule, be small in size, and the conditions under which it is used should preclude all risk of its being confused with the protective sign.

Failure to recognize the distinction led the 1929 Diplomatic Conference to decide that, apart from their work with the Medical Service, National Red Cross Societies should only be entitled to use the sign in time of peace. This amounted to saying that on the outbreak of war a National Society must prevent the use of the sign by all persons, and on all buildings or objects, not used for the military wounded or attached to the Medical Service of the armed forces. In practice, this stipulation usually remained a dead letter.

Article 44 draws a clear distinction between the protective and the purely indicatory sign, and successfully reconciles the two needs which had become apparent. For it surrounds the use of the protective sign with the strictest safeguards, and at the same time allows National Red Cross Societies to make extensive use of an emblem which has become popular and to which they have an obvious right.

PARAGRAPH 1 — THE PROTECTIVE SIGN

1. *Persons and objects protected.*

As we have said, it is when the emblem has protective force that it assumes its primary importance; it is then known as the "emblem of the Convention". It was through the 1864 Geneva Convention that the emblem entered into positive international law, and the Convention has

[1] See above, page 307.

given it its high significance, making it the symbol of the immunity accorded to wounded and sick members of the armed forces.

Paragraph 1 lays down that the distinctive sign may not be employed —with the exception of cases mentioned in the following paragraphs, which mainly concern the indicatory sign—either in time of peace or in time of war, except to mark medical units and establishments, personnel and material protected by the Convention or by other Conventions dealing with similar matters.

While Articles 38 and 39 stipulate that the sign of the red cross is the emblem of the Medical Services of armed forces and that it should appear on everything connected with them, Article 44 specifies that it should appear on nothing else. All use of the sign other than as laid down in the Geneva Conventions is strictly forbidden. "The prohibition is absolute, and is not one that can be lifted by this or that authority", wrote Louis Renault.[1] Neither Governments nor National Societies can get around this prohibition; it binds them as it does individuals— a fact which was again stressed by authoritative opinion at the 1929 Conference.[2]

Similarly, paragraph 1 provides—always with the exception of cases mentioned in the following paragraphs—that the words "Red Cross" or "Geneva Cross"[3] may only indicate [4] the buildings, personnel or material protected by the Conventions.

The second sentence of the paragraph confirms that the same provisions naturally apply to the red crescent and the red lion and sun, for countries using these emblems.

The following are entitled to the protective sign under the present Convention:

(a) Mobile medical units and fixed medical establishments of the armed forces and of aid societies (Articles 19 and 42);

(b) Medical units of neutral societies assisting a belligerent (Articles 27 and 43);

(c) Permanent medical personnel and chaplains of the armed forces and of relief societies, including administrative staff (Articles 24, 26 and 40);

[1] See *Actes de la Conférence de revision réunie à Genève en 1906*, Geneva, 1906, p. 265.

[2] See *Actes de la Conférence diplomatique de Genève de 1929*, Geneva, 1930, pages 306, 307, 311 and 317.

[3] See above, page 298.

[4] In the text of this Article the world "indicate" should refer to the words "Red Cross", and the word "protect" to the emblem; as a result of a clerical error, they have been printed in the wrong order. See also below, page 395.

(d) Medical personnel of neutral societies assisting a belligerent (Articles 27 and 40);

(e) Auxiliary medical personnel of the armed forces, while on medical duty (wearing the special armlet) (Articles 25 and 41);

(f) Medical equipment of the armed forces and of aid societies (Articles 33, 34 and 39);

(g) Medical convoys and transport (Articles 35 and 39);

(h) Medical aircraft (Article 36).

In addition, the Draft Agreement relating to Hospital Zones and Localities, annexed to the Convention, lays down in Article 6 that the zones and localities in question are to be marked by means of red crosses on a white background. The Draft is not binding, however, its entry into force being subject to the conclusion of an agreement between the Powers concerned.[1]

Although the red cross emblem is essentially bound up with the First Convention, and its use is most fully dealt with there, the Second and Fourth Conventions also have provisions concerning it.

The following are entitled to the protective sign under the Second Geneva Convention of 1949:

(a) Hospital ships utilized by States, relief societies and private persons (Articles 22, 24 and 43);

(b) Hospital ships utilized by relief societies and private persons from neutral countries and assisting a belligerent (Articles 25 and 43);

(c) Lifeboats of hospitals ships, coastal lifeboats and all small craft used by the Medical Service (Articles 27 and 43);

(d) Fixed coastal installations used by lifeboats (Articles 27 and 41);

(e) Sick-bays of ships (Articles 28 and 41);

(f) Medical and religious personnel and crews of hospital ships (Articles 36 and 42);

(g) Medical and religious personnel of the navy and mercantile marine (Articles 37 and 42);

(h) Medical equipment (Article 41);

(i) Medical aircraft (Article 39).

[1] See below, page 422.

And the following, under the Fourth Geneva Convention of 1949:

(a) Civilian hospitals (Article 18);

(b) Staff of civilian hospitals (Article 20);

(c) Convoys of vehicles or hospital trains on land or specially provided vessels at sea, conveying wounded and sick civilians (Article 21);

(d) Civilian medical aircraft (Article 22).

In addition, the Draft Agreement relating to Hospital and Safety Zones and Localities, annexed to the Fourth Convention, provides, in Article 6, that zones reserved exclusively for the wounded and sick may be marked by means of the red cross emblem. The observation made above in regard to the Draft Agreement annexed to the First Convention also applies here.

2. *Organizations to benefit.*

What organizations are entitled to the protective sign under the First Convention, which we are examining here?

In the first place, the Medical Service of the armed forces. Even before the red cross on a white ground became the emblem of the Red Cross qua institution, the Convention had adopted it as the international sign for military Medical Services.

Secondly, recognized aid societies which assist the Medical Service of the armed forces under the terms of Article 26. These are first and foremost the National Red Cross Societies—happily mentioned explicitly in the 1949 text. But, quite apart from the Medical Service, the Red Cross Societies have no monopoly of the distinctive emblem. Governments may authorize other societies to assist the Medical Service, and these societies, even when they have no connection with the National Red Cross, are entitled both in peacetime and in wartime to use the red cross sign. There are, in fact, only a few such societies. Examples which we have mentioned are the Knights of Malta and the Order of St. John of Jerusalem.

The last sentence of the paragraph under review emphasizes the fact—and it was necessary to do so—that Red Cross Societies and other recognized societies are entitled to the protective sign only within the limits set out in the paragraph. This means that such societies may

employ the *protective* sign only for that part of their personnel and material which assists the official Medical Service, is employed exclusively for the same purpose as the latter, and is subject to military laws and regulations—or, in other words, which forms, for practical purposes, part of the Medical Service. Even then, they can use it only with the consent of the military authority.

It follows that the directors and staff of a National Red Cross Society are not entitled to the protective sign, and cannot wear the armlet, except in so far as they themselves are protected by the Geneva Convention. For that, their duties must contribute to the care of the military wounded and sick, and correspond to those set out in Article 24. Otherwise, as we shall see in paragraph 2, they are only entitled to wear the purely indicatory sign. Similarly, the red cross cannot be painted on the roof of a building belonging to the Society, unless the building in question is protected under the Convention, that is to say, unless it is a hospital or a store containing medical equipment for the wounded and sick of the armed forces.[1]

Under Article 44, paragraph 3, the international Red Cross organizations and their duly authorized personnel are permitted to use the red cross emblem at all times. As we shall see below [2] the sign will then have protective value when circumstances and the nature of the work require.

It may be noted, finally, that according to the letter of Article 44 the right to use the words "Red Cross" or "Geneva Cross" is bound up with the right to employ the emblem itself. A Medical Service would therefore appear to have the same right to use these designations as a National Red Cross Society.

This is no doubt due to a drafting error, and is completely illogical. The names in question should be reserved exclusively to Red Cross bodies. In any case it is difficult to see how the Medical Service would in practice have any reason for employing these names.

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[1] Under Article 18 of the Fourth Geneva Convention of 1949, a civilian hospital—which may belong to a National Red Cross Society or other relief society—is entitled to the protective sign if recognized by the State and authorized to use the sign. Similarly, under Article 20 of the same Convention, the directing staff or members of a Red Cross Society are protected, and may wear the armlet, if they are regularly and solely engaged in operating or administering a civilian hospital authorized by the State.

[2] See below, page 336.

PARAGRAPH 2 — THE PURELY INDICATORY SIGN

1. *Nature and limits as to use*

As stated above, the red cross emblem has a purely indicatory value when it is used to show that a person or object has a connection with the Red Cross, without implying protection under the Geneva Convention or any intention to invoke it. The sign should then be small in proportion to the person or object, and the conditions under which it is used should preclude all risk of confusion with the sign which affords immunity against enemy action.

In view of the profound difference between the two uses of the emblem, it may well be asked whether at the outset it would not have been better to adopt two distinct emblems: one as the visible sign of the protection conferred by the Convention, the other as the flag of the National Red Cross Societies for their work as a whole. We have seen some of the drawbacks to having one sign with two distinct meanings, and shall see more when we examine the question further. But, at the same time, the advantages must be kept in mind. The red cross has become, in people's minds, the universal symbol of impartial aid to all who suffer, and the welfare work done by the Red Cross, under the cover of the emblem, amongst the population as a whole, benefits by the standing the emblem has acquired as a symbol of immunity. Conversely, esteem for the Red Cross heightens the prestige of the protective sign.

In any case, it is obviously now too late to think of introducing a new symbol; but care must be taken that the distinction between the two uses of the red cross is always clearly drawn.

Under the 1929 Convention, the National Red Cross Societies should, as soon as war broke out, have removed the sign from every person, building or object not devoted to the military wounded; this provision has for the most part remained a dead letter. The Proceedings of the 1929 Conference show that the Plenipotentiaries had no intention of preventing National Societies from using the sign for their so-called "peacetime activities", when these continued during wartime. The provisions they adopted are nevertheless formal.

Once a distinction had at last been drawn in 1949, in the Convention

itself, between the protective sign and the purely indicatory marking, use of the indicatory sign could be extended without any danger.

National Red Cross (Red Crescent, Red Lion and Sun) Societies may in peacetime, in conformity with their national legislation, make use of the name and emblem of the red cross for their activities other than assistance to the Medical Service of the armed forces. In wartime—and the innovation is highly important—they may continue to use the emblem for these activities, but only under conditions such that it cannot be considered as implying the protection of the Convention.

There must be no possibility of the enemy being confused and attributing protective value to a sign which is merely indicatory; the emblem must be comparatively small in size and may not be placed on armlets or on the roofs of buildings. This latter provision avoids the risk of confusion between persons bearing the indicatory sign and the medical personnel of the armed forces, or between buildings not entitled to protection, belonging to the Red Cross, and medical establishments which have immunity under the Convention.

These restrictions apply only in wartime. National Societies cannot, however, be too strongly urged to employ the smaller sign even in peacetime for activities other than relief to the sick and wounded of the armed forces. Should war break out, they would then be spared the task of reducing the size of the signs, a costly process, difficult to carry out at short notice, and which, if not done properly, might lead to serious incidents.

For practical reasons, the Conference rejected a proposal that it should lay down the maximum dimensions of the indicatory sign. It merely stipulated that it should be comparatively small in size—that is, small in proportion to the protective sign used for any given category of persons or objects. Common sense must decide the actual size. Thus, a flag one metre square [1], placed over the door of a building, would pass as an indicatory sign; an emblem of the same size, displayed on a vehicle would appear to be a protective sign and would have to be reduced to, say, 20 cm. square. An emblem of this latter size would in turn be too large to be worn by individuals, who would have to rest content with a sign one or two centimetres across.

Although recognized relief societies other than National Red Cross

[1] One metre is equivalent to 39.37 inches; 20 cm. is just under 8 inches; 1-2 cm. equals 0.4 - 0.8 inches, or, roughly speaking, ½-1 inch. — TRANSLATOR.

Societies can use the protective sign, only the latter are entitled to the indicatory sign, which marks their connection with the Red Cross.

The Convention, in granting the emblem to National Red Cross Societies for activities other than those with the Medical Services of armed forces, stipulates that such activities must be "in conformity with the principles laid down by the International Red Cross Conferences". These words were not added without reason; they provide the solution to a problem which was discussed at length during the preliminary work of revision.

The activities of National Societies, limited at first to caring for the sick and wounded of the armed forces, were later extended until they embraced practically all forms of human suffering. But their work was always that of aiding the direct victims of war or social disaster. During the Second World War, however, Red Cross Societies in certain countries entered a new field, undertaking work of a social or patriotic nature, such as sending parcels to men at the front, organizing welfare schemes and recreation for the troops, teaching army personnel to swim, helping the families of enlisted men, and so forth. For the first time the Red Cross looked after persons who were not really victims of war.

Without wishing to criticize such eminently useful activities, the International Committee pointed out that they might imperceptibly bring the Red Cross to cover with its name and emblem work which, in the last analysis, was only remotely connected with its real character and essential mission.

It soon became clear that the field of Red Cross action could not be defined by listing activities permitted and forbidden. Each individual case—each new operation envisaged—would have to be considered on its merits, applying fixed criteria. The fundamental principles of the Red Cross, as defined by past and future International Red Cross Conferences, offer the desired yardstick.

2. *The different uses*

The purely indicatory uses of the symbol may be classified as the *appurtenant*, the *decorative*, and the *associative*.

A. *The appurtenant emblem.* — This shows that persons or objects belong to a Red Cross organization. Reproduced on flags, door plates

or number plates, it indicates Red Cross buildings or vehicles. As a badge on a nurse's head-dress or worn in a buttonhole, it distinguishes the staff of the organization. It is used as a stamp or printed mark on publications, writing-paper and parcels. The emblem is, as a rule, accompanied by the name of the organization which uses it.

While active members of National Red Cross Societies must wear the badge, the question arises of whether it may also be worn by the numerous members or supporters of a Society who merely pay a small yearly subscription, without any actual service being required of them.

Only very rarely does municipal legislation deal with this question. National laws in most cases merely grant the use of the emblem to a Red Cross Society. Sometimes it is to be reserved "for the members"; sometimes the context makes it clear that members doing humanitarian work are alone intended. In some countries, legislation is more precise; for instance, the New Zealand law provides that the button and brooch may be worn only by members in uniform. In Germany, members of the Society are forbidden by law to use the emblem for private purposes.

The present-day practice of Red Cross Societies varies considerably from one country to another. Some Societies forbid their members to wear the emblem; others only allow them to display it in certain circumstances, as, for example, during Red Cross assemblies. On the other hand, certain Societies allow their members to wear it as they think fit, some even selling it in the streets in return for subscriptions.

The question must be considered in the light of general Red Cross principles. There is no doubt that the general tendency of the regulations governing the emblem is to reserve it for use in circumstances in which its essential significance, as a symbol of impartial charitable aid, is involved. The XIIth International Red Cross Conference (Geneva, 1925) adopted a Resolution, confirmed at Brussels in 1930, which recommended "that National Red Cross Societies should authorize their members to wear a Red Cross brooch only when engaged in their duties; this measure should, in particular, be very strictly enforced in regard to members of the Junior Red Cross". Paul Des Gouttes wrote: "The emblem belongs to the Society and not to individual members... Its use by these should not be tolerated except when they are actually on duty"[1]. The Committee can only endorse this view, and recommend National

[1] See Paul DES GOUTTES, *Commentaire de la Convention de Genève du 27 juillet 1929*, Geneva, 1930, page 181.

Societies not to allow the emblem to be worn by non-active members, except possibly during meetings of the Society.

B. *The decorative emblem.* — Red Cross Societies use the decorative emblem on their medals and other awards, on publicity material such as posters or pamphlets, and for the interior decoration of their premises. In the last instance, the emblem may be large in size, despite the usual rule. At Conferences, a huge red cross flag almost invariably hangs above the platform. As this flag is displayed inside the building, no one can possibly imagine that its purpose is to secure protection against aircraft or artillery action.

C. *The associative emblem.* — This name is given to the red cross when it is used for first-aid posts and ambulances which may have no connection with the National Red Cross Society, but are authorized by it to display the sign. This case will be considered in connection with paragraph 4.

3. *The appearance of the sign*

The protective sign, consisting of a red cross on a white ground, as prescribed by the Geneva Convention, should always be displayed in its original form, without alteration or addition. It is highly desirable that this should also apply—with the exception of the name of the organization, which may be used—to the appurtenant emblem, as it symbolizes the unique character and inherent dignity of the Red Cross as an institution. Further, to preserve its full significance in the public mind and to avoid confusion, the emblem should not be coupled with that of any institution not connected with the Red Cross.

In order to retain its full power of suggestion, the associative emblem should also be kept, as far as possible, in its original form.

The artist's imagination has, on the other hand, been allowed free rein in most countries in the treatment of the decorative emblem. The red cross is sometimes cut out and set in gold or accompanied by a motto. This need cause no misgiving, provided that restraint and good taste are observed, and that the decorative emblem alone is concerned.

4. *Prestige of the emblem*

Discussion of the measures to be taken to prevent misuse of the emblem [1] comes naturally under Article 53. It is not sufficient, however, to combat misuses that are legally forbidden. The emblem must retain its high significance and prestige in all circumstances, and any practice likely to lower it in the eyes of the public must be scrupulously avoided.

To take only one example, Red Cross organizations, to raise funds, have sometimes sold objects bearing the red cross. Such practices are likely to lessen, in varying degrees, the standing of the emblem, and are therefore prejudicial to the good name of the Red Cross as a whole.

While the first care must be to guard against misuse of the protective sign, misuse of the purely indicatory sign must also be prevented, as misuse of the latter will indirectly diminish the respect accorded to the former. It should be remembered that the emblem, whatever its legal significance in any given case, is always a red cross on a white ground. Every portrayal of the red cross reinforces or weakens, to a certain extent, the spiritual significance of the sign, in its highest connotation of disinterested aid to the suffering.

The new Convention has granted Red Cross organizations wide prerogatives in regard to the use of the sign. Conscious of the honour, as well as the responsibilities, which this implies, they must jealously watch over what has been entrusted to them. What hope is there of successfully resisting commercial interests which make unscrupulous use of the prestige attaching to the emblem, if those directly interested, and its natural guardians, use it recklessly and bring it into disrepute. It is far better to have to fight unremittingly against abuses which arise precisely from the fact that the sign is widely known, than to see such abuses cease, because it has lost its authority.

PARAGRAPH 3 — INTERNATIONAL RED CROSS AGENCIES

Under the 1929 Convention, the International Committee of the Red Cross was not in theory entitled to use the emblem which it had itself deisgned and which it was the first to employ. In Switzerland, however, it was authorized to do so by a municipal law which was more in accordance with the spirit than the letter of the Convention. In any case, in view

[1] See below, page 380.

of the important work which the Committee is called upon to do in wartime, no one has ever contested its right to make use of the emblem. It may be noted that the same oversight existed in the case of the League of Red Cross Societies.

During the last World War, the International Committee thought it advisable, in the immediate interest of war victims, to propose to Governments that, in given cases and with their formal consent, the sign should be displayed on certain forms of transport used for conveying food for undernourished prisoners of war and civilians. It was mainly ships exclusively employed in relief transport, and sailing under the control of the International Committee or of a National Society, which were affected. In the final stages of the war, the sign was also used on rail and road convoys which the Committee organized at short notice to bring supplies of food to prisoners of war and civilian deportees in Germany.

The 1949 Conference made good the curious oversight in the 1929 Convention, and the international Red Cross organizations are now officially authorized to use the red cross sign.

The authorization is without reservation. Consequently—as the discussions at the Conference clearly show [1]—the sign may have protective value when circumstances and the nature of the work require.

The four Geneva Conventions of 1949 entrust many important duties to the International Committee of the Red Cross. They also recognize the work which the Committee does, outside their actual provisions, for the protection of the victims of war. Most of these activities are not, strictly speaking, "protected" by the Geneva Conventions, in the way that those of the Medical Service of the armed forces are. But the extension of the use of the protective sign to cover them is fully justified; such activities largely result from mandates given to the Committee under the terms of the Conventions themselves, and there is a major humanitarian interest in facilitating them.

Wherever circumstances do not demand the use of the protective sign—that is in the majority of cases—the sign will be purely indicatory. The international organizations should, like the National Red Cross Societies, be careful to exercise the right, so freely granted to them, with due circumspection and only when it is really necessary to do so.

[1] See, *inter alia, Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-A, page 198 (Report of Committee I to the Plenary Assembly).

PARAGRAPH 4 — AMBULANCES AND FIRST-AID STATIONS

The 1929 Convention provided that the purely indicatory sign might be used, with the authorization of the National Red Cross Society concerned, to mark, in peacetime, the position of first-aid posts intended exclusively for the free treatment of sick or injured civilians, even where the first-aid posts in question were not in any way connected with the said Society.

At public meetings and wherever crowds are assembled, first-aid stations are marked in this way. In the same way, everyone knows the first-aid posts which are placed at intervals along main roads, for use by motorists in case of accidents. Recourse was had to the red cross sign because of its very real suggestive power—because a red cross on a white ground calls to mind the idea of aid within the reach of everyone as automatically as an arrow indicates a direction to be followed.[1]

The 1949 Conference retained this exceptional use of the emblem and extended it, under the same conditions, to motor ambulances. In many countries ambulances, like fire engines, are legally entitled to priority on the roads; they should therefore be clearly and uniformly marked. In any case, this new provision did no more, on the whole, than bring the law into line with actual practice.

Paragraph 4, which is after all a derogation from the guiding principle of the Convention in regard to the emblem, was not adopted without hesitation by the 1929 Conference, which introduced very strict safeguards in order to limit the scope of the provision as much as possible and avoid abuses. The same hesitation did not exist in 1949; but the precautions were maintained. They are as follows:

(a) The emblem may be employed only as an exceptional measure. Its use cannot be extended to cases other than those specified.

[1] The Convention concerning the Unification of Road Signals of March 30, 1931, has, in annex, a recommendation regarding the sign to be used to indicate a nearby first-aid station. It is recommended that the sign should consist of a rectangle, the shorter (horizontal) side of which should measure two-thirds of the longer side, the body of the plate being of a dark colour, surrounded by a white stripe, and the centre of the plate bearing the red cross emblem within a white square, the sides of which are not less than 30 cm. in length. A sketch attached as a model shows the body of the plate in blue, and this colour seems to have been generally adopted.

We refer also to the work of the Standing International Commission on Highway First Aid, set up by the XIVth International Red Cross Conference (Brussels, 1930).

(b) The use of the sign must be in conformity with national legislation. Governments thus have the possibility of restricting it or of making it subject to such additional safeguards as they may consider desirable (consent of an official agency, supervision, etc.).

(c) Use of the emblem is subject to express authorization. Tacit agreement is therefore not enough. Subject to what we have said under *(b)*, such authorization can only be given by the National Red Cross (Red Crescent, Red Lion and Sun) Society. This right to give permission does not belong to any other society or even to the State; nor can the Red Cross Societies themselves delegate it.

(d) The first-aid posts must be used exclusively for the sick and injured, and the aid furnished must be free. In this way the idea which attaches to the emblem is safeguarded. From the moment a charge is made or medicines sold, permission to use the emblem should be withdrawn.

(e) This use of the emblem is permissible only in peacetime. As soon as a country becomes a Party to a conflict, such emblems must disappear throughout its territory. This may appear harsh, when it is considered that the purposes for which permission is given are equally useful in wartime. The stipulation is, however, quite definite. It must be remembered that the essential value of the red cross is in wartime, when it becomes a symbol of immunity. Everything else must be subordinated to this consideration.

Red Cross Societies, whenever they grant permission in accordance with these provisions, would do well to exercise a very careful check on the use made of the authorization given, in order that there may be no abuses to diminish the prestige which the emblem must retain in all circumstances.

We have seen that the red cross is most often used, under this paragraph, to mark first-aid stations in places where public meetings take place, and to indicate first-aid posts on highways. In some countries, however, the emblem also appears on small boxes containing first-aid kit for use by the victims of accidents or people who are taken ill; these boxes are found in public buildings such as large stores, in factories, railway carriages, and aircraft.

So long as the provisions of paragraph 4 are duly observed, this practice does not infringe either the spirit or the letter of the Convention. But

it represents an important extension of the use of the red cross sign, and every extension involves a more than proportional increase in the risk that the prestige of the emblem will suffer. Red Cross Societies, before giving the permission on which every fresh use depends, would be well advised to make certain that no prejudice will result from it; they might even refuse their authorization unless satisfied that they can exercise effective and permanent control.

The question has also been raised in certain countries, of whether the red cross sign can appear on first-aid boxes and kits sold commercially for private use—especially by motorists. Although it might, perhaps, be useful to be able to identify such boxes or kits quickly in cases of accident or sudden illness, we feel that the practice should be discouraged.

Such a practice would exceed the limits set by the Convention. The use of the emblem would increase and its value diminish; and commercial advertising would enter in. But the greatest objection of all, in our opinion, would be the absence of any form of control. There is no guarantee that the containers would always be used for their original purpose. They might well be used, once empty, as handy tool boxes and still proudly flaunt their red cross! Surely they could be distinguished just as easily if they bore the words "first aid" or "dressings".

We may conclude by recalling the words of the General Rapporteur of the 1929 Conference:[1] "In adopting these texts the Commission wishes to give solemn evidence of its desire to preserve, complete and undiminished, the universal prestige of the emblem of the Convention and the high moral significance of the principles it represents in the eyes of all peoples".

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[1] *Actes de la Conférence diplomatique de Genève de 1929*, Geneva, 1930, page 619.

CHAPTER VIII

EXECUTION OF THE CONVENTION

ARTICLE 45 — DETAILED EXECUTION. UNFORESEEN CASES

Each Party to the conflict, acting through its Commanders-in-Chief, shall ensure the detailed execution of the preceding Articles and provide for unforeseen cases, in conformity with the general principles of the present Convention.

Article 45 reproduces the text of Article 26 of the 1929 Convention with one change which will be noted below. The same provision is to be found in the 1906 Convention, and even, in part, in that of 1864.

Although the Geneva Convention has become, with the lapse of time, much more explicit than it once was, it is still primarily an expression of major principles, whereas the matter with which it deals is of a preeminently live and varied nature. The Convention must therefore be implemented, in practice, by a great many executive measures designed to regulate in minute detail the actual situations which arise — situations which it will sometimes be impossible to foresee.

Under the present Article the Contracting Parties, acting through their Commanders-in-Chief, must, in the first place, ensure the detailed execution of the preceding Articles. The States remain fully responsible for this duty and for the acts of their Commanders-in-Chief. The 1949 text emphasizes the point, thus improving on the 1929 text, which appeared to put the whole of the responsibility on the Commanders-in-Chief.

The Contracting Parties will have, for example, to take the following action: fix the proportion of medical personnel and equipment to be left

with wounded who have to be abandoned (Article 12, paragraph 5), organize the search for the wounded and make local arrangements for their collection and evacuation (Article 15), appeal to the charitable zeal of the inhabitants (Article 18), determine the percentage of medical personnel to be retained (Article 28, paragraph 1), arrange for the emblem to be worn by medical personnel and to be displayed on buildings and equipment (Article 39), and so on. A whole series of other Articles might be cited, in connection with which instructions have to be given and practical steps taken in execution of the general rules laid down.

Secondly, the Contracting Powers will have to provide, in the same way, for cases which are not catered for in the Convention. For the latter could not make specific provision for all the possible situations which might arise during a conflict. Article 45 gives us the criterion which should be applied in order to find a solution in such cases—namely, that the general principles of the Convention must always be followed. We feel that it is unnecessary to enumerate these principles here, as they have already been defined sufficiently clearly in the foregoing pages [1]; there is one which summarizes them all: it is that the wounded and sick are to be protected in all circumstances and cared for without distinction of nationality.

It is by their compliance with this dual duty of detailed execution and provision for unforeseen cases that the Powers will meet in full the obligation they have incurred under Article 1 of the Convention [2], of which the present Article is a complementary part.

ARTICLE 46 — PROHIBITION OF REPRISALS

Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited.

1. *General*

Reprisals, in international law, are acts committed by a State to the prejudice of another State in order to put an end to offences committed

[1] See, for example, the comments on Articles 3, 12, 14, 16, 17, 18, 19, 24, 26, 30, 33, 34, 35 and 38.

[2] See above, page 24.

by the latter to the prejudice of the former, or to obtain reparation for them. The acts in question are not normally legal, but they are regarded as being legal in the particular circumstances which exist at the time. We may take, as an example, the action of a belligerent who makes use of poisoned weapons, which are prohibited under Article 23 of the Hague Regulations of 1907, in reply to similar action by his adversary. A distinction is generally made between reprisals and retortion; the latter is also a form of retaliation, but the measures taken do not break the law, and are in reply to acts which are themselves generally admitted to be lawful. The acts in question on both sides are matters within the competence of the States concerned. A case of retortion would, for example, be the withdrawal by one belligerent from retained personnel of privileges accorded over and above those accorded under the Convention, where the adverse Party had withdrawn privileges, whether in the same or in another connection, from the corresponding personnel in his hands.

The majority of jurists regard reprisals as a means of coercion under international law; as such, they are an example of the inorganic character of international law, inasmuch as they allow each State to take the law into its own hands.

Major wars have the general effect of paralysing the more highly developed institutions of international society, and in particular the legal processes which enable States to assert their rights without resorting to reprisals. Reprisals accordingly assume increased importance in time of war, and further become more dangerous, since experience has shown that the freedom left to belligerents to make use of them as a means of coercion may easily lead, in the tension of war psychology and by an inevitable train of events, to serious abuses, while at the same time completely failing to attain its object—namely, the reassertion of rights.

Attempts were accordingly made, first at the Brussels Conference of 1874 and later by the Institute of International Law meeting at Oxford in 1880, to regulate reprisals. The Institute in its Manual of the Laws of War on Land laid down, in particular, that they "must conform in all cases to the laws of humanity and morality". [1]

In spite of this call for humanity in the application of reprisals, the reprisals in the First World War involved so much increased hardship

[1] See *Resolutions of the Institute of International Law*, Oxford Session of 1880, The Laws of War on Land, Articles 85 and 86.

for the victims of the conflict—in particular, prisoners of war—that the idea of finally prohibiting all reprisals against the latter continued to gain ground, and found official endorsement in special agreements concluded between belligerents towards the end of the war. The idea had already been voiced by the International Red Cross Conference of 1913, and had been again brought to the notice of the belligerents by the appeal of the International Committee of the Red Cross in 1916.[1] It was proposed at the Diplomatic Conference which drew up the Geneva Conventions of 1929 that reprisals should be authorized in exceptional cases, but that the Protecting Power should at the same time be charged with the elimination, if possible, of the causes of such reprisals; but in the end the Conference adopted the rule that reprisals against prisoners of war must be prohibited in all circumstances, and thus introduced a principle of international law of far-reaching significance.

In the Second World War this rule was generally observed, thanks (it must be said) to incessant efforts by the Protecting Powers and the International Committee of the Red Cross to eliminate both the effects and the causes of reprisals. During the preliminary work on the revision of the 1929 Conventions certain of the Government experts recognized the ineffectiveness of recourse to such measures as a means of protecting nationals who have fallen into the hands of the enemy [2], and the International Committee's proposal that the prohibition should be inserted

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[1] The following is the substance of this memorable appeal: "Where a belligerent has reason to believe that his soldiers in the hands of the enemy are not being treated as they should be, or that one of them appears to have been wrongly convicted, he does not attempt to appeal to the generosity of his adversary. Nor does he appeal to neutrals to put considerations of humanity and justice to his enemy. No! He resorts at once to the *lex talionis*—and that, in a measure exceeding his own grievances. He wishes his reprisals to be so severe that his adversary will be forced to give way; and, if the latter responds instead by increased severity, he, in his turn, will be more severe still. The result is, as we see today, that reprisals against prisoners become a barbarous form of auction, the motive of which is vengeance, while the price is paid by defenceless and innocent men until such time as their cry of suffering induces the authorities in their home country to give way, and cancel the measures they have taken against the prisoners in their hands. The fact that reprisals of this kind are often based on inaccurate information makes them all the more cruel and unjust." For particulars of the action taken by the International Committee of the Red Cross in regard to reprisals in the First and Second World Wars, see *Report of the International Committee of the Red Cross on its activities during the Second World War* (September 1, 1939—June 30, 1947), Vol. 1, pages 365-372.

[2] See *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* (Geneva, April 14-26, 1947), Geneva, 1947, page 188.

in all four Conventions was approved unanimously without opposition of any sort.

The fact that this prohibition was not also inserted in 1929 in the Convention dealing with the wounded and sick—not explicitly, that is to say, for it follows by implication from the principle of the respect to which they are entitled—can only have been due to an oversight. The public conscience having disavowed reprisals against prisoners of war, that disavowal is *a fortiori* applicable to reprisals against military personnel who, like the wounded and sick, are defenceless and entitled to protection.

To fill the gap, the Commission of Experts convened by the International Committee of the Red Cross in 1937 to study the revision of the Geneva Convention of 1929, advocated a clause prohibiting reprisals, not only against medical personnel and the wounded and sick, but also, by a logical extension, against material and property intimately bound up with the safeguarding of those concerned. This idea appeared to the Commission to be in accordance with the principle already enunciated that the Convention was applicable "in all circumstances".[1]

The Commission of 1937 did not at the time decide where exactly the new clause was to appear in the Convention. It left the point for decision by the Diplomatic Conference, and the latter adopted the arrangement in the International Committee's draft, which placed the clause in the Chapter dealing with the execution of the Convention; the Conference rightly decided, however, to make the clause into a separate Article.

One would certainly have liked to see a principle of such importance placed at the beginning of the Convention among the other fundamental principles. But the necessity, on the one hand, of avoiding changes in the arrangement of Articles in Chapter I, which was common to all four Conventions, and on the other hand, of inserting the principle at a point where it could cover the whole body of persons and property to which it was to apply, led to the clause being left where it appeared in the draft, i.e. in Chapter VIII. It is desirable that it should, at any rate, be restored to its proper place when the Convention is being studied or disseminated.

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[1] See *Report on the Interpretation, Revision and Extension of the Geneva Convention of July 27, 1929*, submitted by the International Committee of the Red Cross to the XVIth International Red Cross Conference (London, 1938), pages 32-33.

2. *Scope of the provision*

The prohibition of reprisals is absolute, and remains so when an offence, which would formerly have justified reprisals under international law, is committed—no matter what the nature of the offence may be.

When the offence has no connection whatsoever with persons or property covered by the Geneva Convention—for example where one of the belligerents violates the rule prohibiting the pillage of a locality—it is, as a rule, readily agreed that retaliation, if any, by the adverse Party cannot be against the wounded and sick or the medical personnel in his hands. On this point the prohibition is in full accordance with public sentiment, as reflected, in the attempts to produce rules governing reprisals, by the principle of proportionate action.

But the prohibition goes further than that. It applies equally to a form of reprisals which public opinion, basing itself on the *lex talionis*, would be more readily inclined to accept—namely, reprisals against persons or property protected by the Geneva Convention, where such reprisals are in reply to an offence of the same nature. A belligerent may sometimes be tempted to reply to an offence by taking identical, or at any rate similar, action. The temptation may be increased—quite mistakenly—by a desire for rapid results, or by the pressure of excited public opinion, or even by the opinion of jurists who regard reciprocity as the basis of humanitarian law.[1]

A. *Theoretical and practical justification of the prohibition of reprisals.* — The Government concerned should therefore realize, and make its population realize, that recourse to reprisals exposes protected persons on each side of the conflict to the risk of rapid and disastrous increases in the severity of the measures taken against them, and that it is essential to resort instead to the various means afforded by the Convention for the settlement of differences (good offices of the Protecting Powers, enquiry procedure, etc.). The Government concerned must also insist on the formal and absolute nature of the obligation it assumed on becoming a Party to the Convention, and on the fact that to violate the latter with

[1] For example, Alfons Waltzog, in his work *Recht der Landkriegsführung*, Berlin, 1942, justifies reprisals against prisoners of war in spite of the prohibition of 1929, even when the offence leading to the reprisals was of an entirely different nature.

the idea of asserting one's rights is only to add a further offence of one's own to the offence for which the enemy is blamed.

It should also be remembered, and brought home to others, that one reason why the Convention was able to exclude the traditional system of reprisals was that it introduced in their place more advanced methods of asserting rights—in particular, control by the Protecting Powers and the universal obligation to punish individuals responsible for grave breaches. And quite apart from legal measures, there are certain other means, such as an intensification of the war or appeals to neutral public opinion, by which a belligerent can reply to breaches by the adverse Party.

The ability of a Government to resist the forces which urge it to resort to reprisals, will therefore depend on the extent to which its public has been informed, in advance, of the underlying reasons which have led to the prohibition of reprisals in the humanitarian Conventions, and, above all, of the new character which this prohibition, in conjunction with other principles, has given these Conventions.

The prohibition of reprisals is in fact closely connected, as the 1937 Commission realized, with those provisions (such as Articles 1, 6 and 7) which, by affirming the applicability of the Convention "in all circumstances", have changed its character. For, thanks to those Articles, the Convention is no longer a legal instrument dependent on the will of States and subject to considerations of reciprocity, but is essentially concerned with human rights. When once the authors of the Convention had presented it as a corpus of inalienable rights conferred upon the wounded and sick and upon medical personnel, there could no longer be any question of those rights being liable to withdrawal or restriction as a result of a violation with which the above persons had absolutely nothing to do.

Reprisals were, in short, a collective punishment inflicted on those who least deserved it. In future it is the author of the offence who is to be punished. The penalty is no longer collective, but individual. The cardinal importance of the step forward marked by the new Geneva Conventions will be apparent.

B. *Scope of the prohibition in the case of retortion.* — One last point calls for comment. A distinction was made at the beginning of the commentary on the present Article between reprisals and measures of

retortion. Should the Article be interpreted as applying equally to the latter?

As already stated, retortion is, in principle, only concerned with acts which are in themselves lawful. Suppose, for example, that in two opposing countries medical personnel have been granted certain privileges over and above the treatment to which they are entitled under the Convention. If one of the two countries withdraws these privileges, is the other entitled to do the same by way of retortion? It has already been pointed out that the treatment to be accorded to protected persons is not a question of reciprocity, and the International Committee of the Red Cross has always endeavoured to bring the conditions in which they live up to the most favourable, and not down to the least favourable, standard. It would therefore appear to be desirable that measures of retortion should also be banned in this connection.

What matters most, however, is that there should be no infringement of the rules of the Convention, that is to say, no interference with the rights of the persons protected, considered as a minimum. In the case of benefits which go beyond this minimum, it is admissible that a belligerent should not agree to accord them except on a basis of reciprocity. There might even be a risk of discouraging the granting of such benefits, if it were insisted that they should in no case be subject to retortion. It therefore appears more prudent to conclude that Article 46 applies only to reprisals as defined at the beginning of the commentary on the present Article.

ARTICLE 47 — DISSEMINATION OF THE CONVENTION[1]

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.

[1] Article common to all four Conventions. Cf. Second Convention, Article 48; Third Convention, Article 127; Fourth Convention, Article 144.

In subscribing to Article 1 the Powers undertook to respect and to ensure respect for the Convention in all circumstances. But a knowledge of law is an essential condition for its effective application. One of the worst enemies of the Geneva Conventions is ignorance.

It was important, therefore, that the Contracting Parties should be required to disseminate the text of the Convention as widely as possible in their respective countries. This is the purpose of Article 47 which originated in a provision of the 1906 Convention (Article 26); this provision was reproduced in 1929, and was amplified and made more specific during the last revision of the text.

The obligation imposed on States under Article 47 is general and absolute. It has to be complied with both in time of peace and in time of war. Two specific measures are to be taken—namely, military instruction and civil instruction, on both of which the Convention lays special emphasis.

The very first essential is that the Convention should be known by those who will be called upon to apply it—by those who may have to account for their lapses in so doing before the courts, but may, on the other hand, reap the benefits of it in certain eventualities. The study of the Convention should accordingly find a place in the training programmes of the whole of the armed forces, the instruction given being adapted to the rank of those for whom it is intended. It may be sufficient to teach recruits and members of the rank and file the guiding principles —namely, protection of the wounded and of medical units and personnel, and respect for the distinctive emblem. On the other hand, Commanding Officers must have a very thorough knowledge of the Convention. Refresher courses in the essential elements of the instruction given should be held on mobilization, so as to implant a knowledge of the Convention firmly in the minds of the troops called up.

In certain countries the essential provisions of the Convention are printed in the Army Book of every member of the armed forces. This arrangement should be general.[1]

Article 47 expressly mentions two classes of persons other than combatants, who require special instruction—namely, medical personnel

[1] In 1951 the International Committee of the Red Cross arranged for the publication of a short summary of the Geneva Conventions of 1949 for the use of military personnel and of the general public, in the form of a booklet issued in French, English and Spanish.

and chaplains. As these persons enjoy *rights* under the Convention, they ought to make a special point of scrupulously observing the corresponding *duties* which the Convention imposes on them.

It is also necessary to disseminate the Convention widely amongst the civilian population; for civilians are concerned in certain of its provisions [1]. Moreover it is from among civilians that the armed forces are recruited. But there is a further consideration: man should be made familiar from childhood with the great principles of humanity and civilization, so that they may become deeply rooted in his consciousness.

Here again, therefore, in the case of civilians, provision is made for the inclusion of the study of the Convention in programmes of instruction.

The provision is, however, qualified by the words "if possible", not because the Diplomatic Conference of 1949 thought civilian instruction any less imperative than military instruction, but because education comes under the provincial authorities in certain countries with federal constitutions, and not under the central Government. Constitutional scruples, the propriety of which is open to question, led some delegations to safeguard the freedom of provincial decisions. [2]

Everyone, whether military or civilian, should have a good knowledge of the Convention, and should themselves be imbued with the sentiments of which it is so profound an expression. That is the best means of guaranteeing that the Convention will be respected. No stone should be left unturned in the pursuit of so all-important an aim. The States, to whom the fulfilment of the practical tasks which the Article imposes presents few difficulties, will assuredly be alive to their duty in this respect.

Widespread dissemination of the Geneva Conventions will not merely facilitate their application in time of war. It will also spread the principles of humanity, and thus help to develop a spirit of peace among the nations.

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[1] e.g. Articles 13, 18, 22, 26, 27, 35 and 44.

[2] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, pages 70 and 112.

ARTICLE 48 — TRANSLATIONS. LAWS IN APPLICATION[1]

The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof.

Under this Article the Contracting Parties will have to communicate to one another the official translations of the Convention, as well as the laws and regulations they make to ensure its application. The communication will be made in time of peace through the Swiss Federal Council, as the depositary of the Geneva Conventions, and in time of war through the Protecting Powers.

What is meant by the expression "official translations" of the Convention? It refers to translations made by the executive authority under a provision of municipal law. There may therefore be several translations to communicate in countries which have more than one national language. The expression should not, however, be taken to include the French, English, Spanish or Russian texts, inasmuch as the first two are the authentic texts of the Convention, and the last two are translations made officially by the Swiss Federal Council under Article 55.[2]

As to the "laws and regulations" which are also to be communicated, the expression should be understood in its broadest sense. It covers all legal instruments emanating from either the executive or the legislative authorities, which have anything to do with the application of the Convention. States will have, for example, to communicate to one another legislative measures adopted in virtue of Articles 23, 26, 44, 49, 53 and 54. But they will also have to communicate laws and regulations which they have adopted without being obliged to do so under the Convention.

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[1] Article common to all four Conventions. Cf. Second Convention, Article 49; Third Convention, Article 128; Fourth Convention, Article 145.

[2] See below, page 401.

CHAPTER IX

REPRESSION OF ABUSES AND INFRACTIONS

This Chapter, consisting of six Articles, contains important new matter in addition to earlier provisions. Articles 49, 50 and 51, which prescribe penal sanctions for breaches of the Convention, are almost entirely new. They have been incorporated in the same form in all four Geneva Conventions of 1949.

Article 52 deals with the procedure for enquiries into alleged violations of the Convention; it corresponds to Article 30 of the 1929 Convention. Articles 53 and 54 deal with the misuse of the distinctive emblem of the Geneva Convention; they already figured, in a simpler form, in the Conventions of 1906 and 1929.

Before discussing Articles 49, 50 and 51 individually, it is necessary to make some general observations and describe the developments of law and fact which have led to their insertion in the Geneva Conventions. In view of the importance of the subject and the novel character of the provisions, a fair amount of space has been devoted to this general survey.

PENAL SANCTIONS

(ARTICLES 49 TO 51)

1. *General*

The Geneva Convention forms part of what are generally known as the laws and customs of war, breaches of which are commonly called "war crimes". We do not propose to give here a historical record of this vast subject, which has for years engaged the attention of jurists

and courts of law in many countries. The numerous publications which have appeared on the subject, especially since 1944, have had sufficient circulation among the public to make any further reproduction of their contents superfluous.

The idea of repressing breaches of the laws and customs of war is not altogether new. The 18th and 19th centuries both afford examples of the trial and punishment of offences of this nature; but such instances were few and far between, and could hardly be said to constitute a corpus of case law. Nor did the codifications of the laws of war, first at Geneva in 1864, and later at The Hague in 1899 and in 1907, result in the establishment of international rules in this particular connection.

It is true that the Fourth Hague Convention of 1907 respecting the laws and customs of war on land had stipulated (in Article 3) that a belligerent party which violated the provisions of the Regulations annexed to the Convention should, if the case demanded, be liable to pay compensation, and should be responsible for all acts committed by persons forming part of its armed forces. But the responsibility thus imposed on the belligerent State was purely pecuniary. States were left completely free to punish, or not, acts committed by their own troops against the enemy, or, again, acts committed by enemy troops, in violation of the laws and customs of war. In other words, repression depended solely on the existence or non-existence of national laws repressing the acts in question.

When the First World War ended, however, this system was felt to be anything but satisfactory, and provision was made in the Treaty of Versailles for punishing nationals of the conquered countries who had committed acts, against the Allied troops, which were contrary to the laws and customs of war. The sequel to this provision and the decisions of the Leipzig Court are matters of public knowledge.

When the Convention relative to the treatment of prisoners of war was adopted in 1929, the question of the repression of violations of that Convention was again passed over in silence, and it was chiefly during the Second World War and the years that followed that the problem of punishing war criminals arose. The numerous violations committed in the course of the war had made the question a burning one, in which public opinion and the authorities in the different countries were intensely interested.

The absence of international legislation and the meagre character of internal legislation on the subject led the majority of States to promulgate special laws for the repression of war crimes committed by the enemy against the civilian population and troops of the legislators. Although in most cases public opinion thought it natural and just that those convicted under this *ad hoc* legislation should be punished, there remained nevertheless a certain element of doubt as to the regularity of the sentences passed. There is, moreover, no unity of inspiration between the different penal systems. In the Anglo-Saxon countries it would appear that the existence of a rule of international law, whether explicit or customary, and whether it makes provision for penal sanctions or not, entitles national tribunals to pass sentence when the rule is violated. In the countries of the European continent, on the other hand, a penal law can only be applied if it embodies a normative rule, and further carries explicit provisions with regard to the nature and severity of the penalty. In these latter countries the maxim *nulla poena sine lege* has lost none of its force.

Whatever one's views may be on the repressive action taken after the Second World War, it will be agreed that it would have been more satisfactory, had it been possible to base it on existing rules without being obliged to have recourse to *ad hoc* measures.

2. *The system adopted in the First Geneva Convention*

In the history of the laws and customs of war the Geneva Convention was the first instrument to incorporate a coherent system of rules for the repression of violations of its provisions. It is true that the 1864 Convention was silent on the subject. The Government representatives who met in Geneva had no doubt failed to foresee the possibility of such violations occurring, since they rejected a clause in the draft, which was designed to repress certain infractions; the clause, it is true, was much too narrow in scope.[1] After the war of 1870, however, Gustave Moynier, the President of the International Committee of the Red Cross, suggested the establishment of an international jurisdiction for the

[1] Article 10 of the draft Convention was worded as follows: "Persons without the right to wear the armlet, who assume it for the purpose of committing acts of espionage, shall be punished with the full rigour of military law". A similar proposal was made to the Diplomatic Conference of 1868, which considered the revision of the Geneva Convention, but it was again rejected.

prevention and repression of breaches of the Geneva Convention. Reverting to these suggestions and developing them some years later[1], he proposed that the desired reform should be introduced in two distinct stages. The first step would be to fix the nature and scale of the penalties for violations of the different Articles of the Convention. In the second stage an acceptable judicial organ was to be selected, in spite of the unusual character which it would certainly be necessary to impart to it.

On the first point Moynier, noting the opposition which his proposal to promulgate an international law had encountered, proposed that a model law should at least be adopted. He defended his attitude as follows:

> ... By leaving each State completely free to draft its own penal legislation independently—that is to say to determine the acts to be considered as infractions and the manner in which their authors are to be dealt with—we forfeit the principal advantage which an international law would have afforded—namely, the assurance that every ill-intentioned individual will know in advance the risk he is incurring by defying the Convention. His punishment will depend on the hazards of the war. It is possible that the offender will be judged by his nationals; for if they know of his offence, they are bound to convict him and impose the penalty for which their own legislation provides. But on the other hand, he may be captured by the enemy who has been the victim of his offence, and being then subject to the jurisdiction of the enemy's courts and liable to the penalties which the enemy's laws imposes, may, perhaps, be dealt with either more or less harshly than he would have been by his compatriots. This regrettable consequence of capture would be mitigated if a model law were prepared by competent persons and submitted unofficially to the various Governments with an invitation to adopt it in so far as it is not inconsistent with the principles which they profess. Complete uniformity could not be expected; but something approaching it might be attained.

On the second point what Moynier had in view was neutral jurisdictions responsible for investigating breaches and deciding questions of guilt; it should, he suggested, be left to national courts to pass sentence and inflict penalties. Moynier's study of the question concludes with the draft of a proposed Convention.

In 1895 the problem was discussed at a meeting at Cambridge of the Institute of International Law. The idea of an international penal law was rejected, but the proposal for an international Convention under which each State would undertake to enact penal legislation for the

[1] See G. MOYNIER, *Considérations sur la sanction pénale à donner à la Convention de Genève*, Geneva, 1893.

repression of breaches of the Geneva Convention, was adopted. The idea of a model law was also approved; it was to be drawn up by the Institute of International Law to serve as a guide to national legislators.

There was, however, no agreement on the subject of the international jurisdiction advocated by Moynier. The discussion led rather to the idea of a body to control the execution of the Convention, and to note violations; the name of the International Committee of the Red Cross was put forward in this connection. The idea, which was to reappear in 1929 [1], is not relevant here, and we shall not, therefore, trace its subsequent development.

When the Geneva Convention was revised in 1906, the problem of the repression of breaches of the Convention was once more raised, and was referred to in the *questionnaire* attached to the invitation issued by the Federal Council. After an interesting discussion [2], a large majority voted for the inclusion in the Convention of a provision requiring the Contracting States to enact legislation for the repression of breaches. The Fourth Committee adopted a text providing for the repression of all breaches without distinction; but in the Drafting Committee's Final Report this text was replaced by Article 28, which only provides for the repression of two particular cases of violation—namely, (1) individual acts of pillage and ill-treatment of the wounded and sick of armed forces, and (2) abuse of the Red Cross flag or armlet, which is to be punished as an unlawful use of military insignia. The difference, the Final Report explains, is to prevent misunderstandings, but is only a difference... of form!

The Hague Conventions of 1899 and 1907 did not mark any appreciable progress in the matter of repression. They contain a number of prohibitions; but they do not impose on the Contracting States any obligation to promulgate penal ordinances for the repression of infractions. The most that they do in this connection is to provide, in Article 1 of the Fourth Convention (respecting the laws and customs of war on land), that the contracting Powers are to give their armed land forces instructions which are in conformity with the annexed Regulations. This provision implies that, if instructions have in fact been given to the

[1] See Paul DES GOUTTES, *Commentaire de la Convention de Genève du 27 juillet 1929*, Geneva, 1930, page 212.

[2] *Actes de la Conférence de revision réunie à Genève en 1906*, Geneva, 1906, pages 158-200.

armed forces, infringements must at least involve disciplinary penalties. But it is clear that such a formula cannot cover cases in which the offences have been committed under orders given or general instructions issued; nor can it extend to acts committed by the enemy [1]. The Tenth Hague Convention of 1907 (for the adaptation to maritime warfare of the principles of the Geneva Convention) has provisions (in Article 21) similar to those of the 1906 Convention.

In general the invitation in the 1906 Convention to promulgate penal provisions for the repression of two major breaches of the said Convention, met with very little response. In 1929 the Swiss Federal Council, in its capacity as depositary of the Convention, had only received two penal laws, promulgated by Norway and the Netherlands respectively. A number of military penal codes, however, which had been revised in the interval, contained clauses repressing abuse of the red cross emblem in wartime as an unlawful use of military insignia, as well as acts of pillage and ill-treatment of the wounded and sick of armed forces. A provision of the Swiss Military Penal Code of 1927 (Chapter VI) might be quoted in this connection; and reference might also be made to the Rumanian Law of 17 May 1913, which punishes not only unlawful use of the red cross emblem and acts of pillage and ill-treatment of the wounded, but also offences against medical personnel. In the same way, the law concerning military offences, promulgated by the USSR on 27 July 1927, deals with the matter very fully, and a Cuban Decree of 15 August 1910 expressly penalizes these infractions. [2]

In 1929, when the revision of Article 28 of the Geneva Convention came up for discussion, the idea of providing for the repression of all breaches of the Convention and not merely of the two specified in 1906, was again put forward. The draft of the International Committee of the Red Cross added at the end of Article 28 of the 1906 Convention the following words: "and in general all acts contrary to the provisions of the Convention". In the course of the discussion the United States Delegate proposed an amendment to Article 28, which reproduced the sense of the Committee's text—though in a different form. The Amer-

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[1] The Regulations of 1907 (Article 23 (f)) forbids the improper use of the distinctive badges of the Geneva Convention.

[2] See *Recueil de textes relatifs à l'application de la Convention de Genève et à l'action des Sociétés nationales dans les Etats parties à cette Convention*, Geneva, 1934.

ican amendment was preferred; and it became Article 29 of the 1929 Convention.[1]

The States party to the 1929 Convention do not seem, however, to have done any more than in 1906 to give effect to the obligation to promulgate penal provisions for the repression of *all* breaches of the Convention, clear and imperative as the text of Article 29 was. The failure on the part of certain States to comply with the Article, and to promulgate laws for the repression of all infractions, was no fault of the Convention itself.

It may further be noted that the Commission on Responsibilities appointed by the Allies on the morrow of their victories in 1918 drew up a list of the violations of the laws and customs of war which called for repression. This list was taken by the War Crimes Commission of the United Nations as a working basis. The list includes murders and massacres, pillage, deliberate bombing of hospitals, violation of other rules relating to the red cross, and ill-treatment of the wounded. It is thus clear that the Commission on Responsibilities meant to cover the most serious breaches of the 1906 Convention, and the list undoubtedly influenced the authors of the 1929 Convention when they drew up Article 29.

3. *The 1949 Convention and the work in preparation for it*

The events of the Second World War convinced the International Committee of the Red Cross that any future international Convention on the laws and customs of war must necessarily include a separate Chapter on the repression of violations of its provisions. This conviction was strengthened by the numerous appeals which it received for intervention on behalf of prisoners of war who were accused of war crimes and tried (as has been pointed out) under legislation *ad hoc*, in the absence of any appropriate legislation duly drawn up before the outbreak of hostilities. On the other hand, the Committee could not remain indifferent to the argument that complete and loyal respect for the Conventions must be based on the imposition of effective penalties on those guilty of violating them.

Accordingly the International Committee, though naturally reluctant to propose punitive measures, drew the attention of the Conferences of

[1] See *Actes de la Conférence diplomatique de Genève de 1929*, pages 332-336.

Experts which met at Geneva in 1946 and 1947, to this important issue. The Conferences asked the Committee to make a more thorough study of the question.

In 1948 the International Committee submitted the following draft Article (Article 40) to the XVIIth International Red Cross Conference:

> The Contracting Parties shall be under the obligation to search for persons charged with breaches of the present Convention, whatever their nationality. They shall further, in accordance with their national legislation or with the Conventions for the repression of acts considered as war crimes, refer them for trial to their own courts, or hand them over for judgment to another Contracting Party.

The proposed Article provided, therefore, that certain violations of the Convention were to be considered as war crimes, and laid down the manner in which those guilty were to be punished. The text was based on the principle *aut dedere aut punire*, the validity of which is often admitted in cases of extradition. In submitting its proposal to the Conference, the International Committee had stated that it did not regard its study of the question of penalties as having been completed. It proposed to enquire further into the question, in view especially of the development given to the repression of war crimes by a whole series of different countries and by the United Nations themselves.

The XVIIth International Conference requested the International Committee to continue its work on the question, and submit proposals to a later Conference.

In response to this request the International Committee invited four Government experts to meet at Geneva at the beginning of December 1948, and made with them a thorough study of the question. The outcome was a draft of four new Articles, to be included in each of the four Conventions, on the penalties applicable to persons guilty of violating the provisions of the Conventions [1]

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[1] The text of the four Articles was as follows:

I. *Legislative measures*

The High Contracting Parties undertake to incorporate the present Convention as part of their national law, to ensure the prosecution of any act contrary to its provisions, and to enact provisions for the repression, by criminal penalties or appropriate disciplinary measures, of any breach of the Convention.

Within two years after the ratification of this Convention, the High Contracting Parties undertake to communicate to the Swiss Federal Council, for transmission to all signatory or adhering States, the laws and other measures adopted in pursuance of this Article.

The booklet *Remarks and Proposals submitted by the International Committee of the Red Cross*, specially prepared for the Diplomatic Conference of 1949, contains (on pages 18-23) a brief statement of the reasons which led the Committee to submit these draft Articles. The experts agreed that breaches of the Geneva Conventions must not be allowed to go unpunished. Each Contracting State was therefore required to promulgate the necessary legislation within two years, the implementation of this obligation being automatically controlled by a provision requiring the communication of the measures taken to the depositary State (Switzerland).

The universality of jurisdiction in cases of grave violation justifies the hope that such offences will not be left unpunished; and the obligation

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II. *Grave violation*

Without prejudice to the provisions of the foregoing Article, grave breaches o the Convention shall be punished as crimes against the law of nations by the tribunals of any of the High Contracting Parties or by any international jurisdiction, the competence of which has been recognized by them. Grave breaches shall include in particular those which cause death, great human suffering, or serious injury to body or health, those which constitute a grave denial of personal liberty or a derogation from the dignity due to the person, or involve extensive destruction of property, also breaches which by reason of their nature or persistence show a deliberate disregard of this Convention.

Each High Contracting Party shall in conformity with the foregoing Article enact suitable provisions for the extradition of any person accused of a grave breach of this Convention, whom the said High Contracting Party does not bring before its own tribunals.

III. *Superior order*

The fact that the accused acted in obedience to the orders of a superior or in pursuance of a law or regulation shall not constitute a valid defence, if the prosecution can show that in view of the circumstances the accused had reasonable grounds to assume that he was committing a breach of this Convention. In such a case the punishment may nevertheless be mitigated or remitted, if the circumstances justify.

Full responsibility shall attach to the person giving the order, even if in giving it he was acting in his official capacity as a servant of the State.

IV. *Safeguards*

The High Contracting Parties undertake not to subject any person accused of a breach of this Convention, whatever his nationality, to any tribunal of extraordinary jurisdiction. They also agree that they will not apply any penalty or repressive measure which is more severe than those which are applied to their own nationals or which is contrary to the general principles of law and humanity. They shall grant any person accused all rights of defence and appeal recognized by common law.

The safeguards of proper trial and defence shall not in any case be less favourable than those provided by Article 95 and the following Articles of the Convention relative to the Treatment of Prisoners of War.

Safeguards of a similar nature shall apply if the accused is charged before any international jurisdiction.

to extradite will help to make their repression general. The effect of the existence of orders from a superior, or of an official law or regulation, on the responsibility of the author of the offence committed is, moreover, considered and defined. Furthermore, the experts agreed that, in spite of the censure that such acts occasion, accused persons were entitled to safeguards of proper trial and defence. The International Committee had had an opportunity of informing the experts of its own experience in this connection.

At the Diplomatic Conference of 1949 the problem of the provision of penal sanctions for violation of the Conventions was entrusted to the so-called Joint Committee appointed to consider all the provisions common to all four Conventions. It had not been possible for the draft texts prepared by the International Committee of the Red Cross to reach the Governments until just before the opening of the Conference, with the result that certain delegations objected to their being taken as a basis for discussion. The Netherlands Delegation, however, submitted them as its own, so that they came officially before the Conference nevertheless, their consideration merely being postponed for some weeks.

In the comments which follow on each of the new Articles we shall have occasion to recall the discussions which led to their adoption. Reference need only be made here to the large amount of preparatory work which took place outside the Conference; a special tribute is due to Judge N.W. Mouton, a member of the Netherlands Delegation, who was mainly responsible for it. In the end ten delegations submitted a joint text which was, with certain minor changes, adopted by the Conference.[1]

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[1] The text of this amendment, as given in the *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. III, page 42, is as follows:

Article A. "The High Contracting Parties, insofar as this Convention cannot be otherwise implemented, undertake to enact in accordance with their respective Constitutions, legislation to provide effective penalties for persons committing or ordering to be committed any of the grave breaches defined in the following Article.

"Each Contracting Party shall be under the obligation to search for persons alleged to have committed or to have ordered to be committed any of the above mentioned grave breaches and shall, regardless of their nationality, bring before its own courts all persons committing or ordering to be committed such grave breaches, or if it prefers, and provided that a *prima facie* case has been made out by another High Contracting Party concerned, hand them over for trial to such Contracting Party.

"Each High Contracting Party shall take measures necessary for the repression of all acts contrary to the provisions of the present Convention other than the above mentioned grave breaches."

4. *Future prospects*

The Congress for the Unification of Penal Law, which met at Brussels in 1947, considered the problem of the punishment of war crimes.

The United Nations for their part instructed the International Law Commission to prepare a draft code of offences against the peace and security of mankind. This code, the text of which was completed by the International Law Commission at its 1951 Session, provides for the repression of a series of offences, including (Article 2, sub-paragraph 11) acts in violation of the laws or customs of war.

It is significant that the International Law Commission based its labours on the view that such violations are bound to mar the relations existing between peoples, and are liable to aggravate still further the disagreements which have led to war, thus rendering the reestablishment of peace more difficult.

The Commission did not, however, draw up a list of the violations of the laws and customs of war which should be regarded as war crimes, because it did not consider that the laws and customs of war were sufficiently clearly defined to allow of any such list. It preferred a general form of wording which could be adapted to the development of international law.

The work of the Commission shows that there is a possibility of developing, side by side with the Geneva Conventions, international penal regulations for the repression of breaches of the said Conventions. The punishment of such breaches would thus be doubly ensured.

In addition to the work of the International Law Commission, the General Assembly of the United Nations at its 1950 Session appointed a special Committee to draw up a scheme for the establishment of an international criminal court. The Committee met in the summer of 1951, drew up draft statutes for an International Criminal Court and

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Article B. "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention:

Wounded and Sick Convention

"the wilful killing, torture or maltreatment, including biological experiments, the wilful causing of great suffering or serious injury to body or health, and the extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly."

discussed the question of the type of offence with which the Court should deal. The wording adopted was very general; but breaches of the laws and customs of war were to be included within the jurisdiction of the Court.

ARTICLE 49 — PENAL SANCTIONS — GENERAL [1]

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie *case.*

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

Article 49 lays the foundations of the system adopted for suppressing breaches of the Convention. The system is based on three fundamental obligations, which are laid on each Contracting Party—namely, the obligation to enact special legislation on the subject, the obligation to search for any person accused of violation of the Convention, and the obligation to try such persons or, if the Contracting Party prefers, to hand them over for trial to another State concerned.

The Article is completed by a reference to the list of "grave breaches" in Article 50, and by a clause providing accused persons with safeguards of fair trial.

[1] Article common to all four Conventions. Cf. Second Convention, Article 50; Third Convention, Article 129; Fourth Convention, Article 146.

PARAGRAPH 1 — SPECIAL LEGISLATION

Paragraph 1 repeats the obligation laid on the Contracting States under Article 29 of the 1929 Convention, to promulgate suitable measures in the event of their own penal legislation being inadequate. The obligation has, however, been made considerably more imperative. The Contracting Parties are more strictly bound to enact the necessary legislation than in the past.

Of the States which were the first to ratify the present Convention, two to our knowledge have already complied with the obligation embodied in this paragraph. The Swiss Military Penal Code has been partially revised to include, in addition to the clauses it already contained on the subject of violations of international law, a new general provision (Article 109), under which anyone violating the provisions of international Conventions concerning the conduct of war or the protection of war victims is to be punished as for a breach of military duty, save in so far as other more severe provisions of the Military Penal Code are applicable. This solution has the advantage of covering all breaches of the Convention though it would, perhaps, have been better to define the most serious breaches, and provide a specific penalty for each of them.

Yugoslavia has also made changes in her Penal Code, adapting it to the new Geneva Conventions. A penal law of 27 February 1951 provides for the repression of war crimes against the wounded and sick (Article 126), for the repression of inhuman treatment of the wounded and sick (Article 131), and for the repression of abuses of the red cross emblem in the combat zone (Article 133). The Articles in question go into considerable detail and reproduce to a large extent the wording of Article 50 of the present Convention.

It is desirable that States which have ratified or acceded to the Convention, should take steps without delay to give effect to the obligation incurred by them under Article 49. The arrangements to be made are undoubtedly complicated, and will take time. The International Committee of the Red Cross is therefore following the work of the International Association of Penal Law with considerable interest. The Association has placed the problem of penal sanctions in the case of international humanitarian Conventions on the agenda of the Sixth International Congress of Penal Law, which is to take place in Rome at the end

of 1952, and the International Committee of the Red Cross hopes that the discussions of this learned body will help the Committee to draft a model national law for the repression of violations of the Geneva Conventions, as it has already done in connection with the repression of abuses of the red cross emblem [1].

In general the Geneva Conventions apply in the situations provided for in Articles 2 and 3, that is to say, in case of war, occupation or civil war. But the provision which we are now considering is one which should be implemented in peacetime without waiting for the above situations to arise. The legislation enacted on the basis of this paragraph should, in our opinion, specify the nature and extent of the penalty for each infraction, taking into account the principle of due proportion between the severity of the punishment and the gravity of the offence. It will not be enough to leave it to the judge to fix the penalty. [2]

Paragraph 1 refers to Article 50, which gives a list of infractions regarded as "grave breaches". This list will be considered in our comments on Article 50.

Under the provision which we are considering the penal sanctions which are to be provided are for persons committing grave breaches or ordering them to be committed. The joint responsibility of the author of an act and of the person ordering its commission is thus established. They are both liable to prosecution as accomplices. But there is no reference to the responsibility of those who fail to intervene, in order to prevent or suppress an infraction. In a number of such cases sentences of "guilty" have been passed by Allied courts. In view of the silence of the Convention it must be assumed that the matter is one which must be settled by national legislation, either by express provision or by applying the general provisions contained in the country's penal code.

In the proposals which it drew up in consultation with experts and submitted to the Diplomatic Conference, the International Committee of the Red Cross had included a special Article dealing with the effect on the guilt of the author of a criminal act of his having acted in obedience to the orders of a superior or in pursuance of a general law or regulation

[1] See below, page 395.

[2] We do not agree on this point with the Anglo-Saxon system, which was adopted by the international tribunal at Nuremberg and by a number of national legislatures after the Second World War. We cannot, for example, endorse the view put forward in Oppenheim-Lauterpacht that all war crimes, irrespective of their gravity, are punishable by death (6th edition, Vol. II, page 456).

to which he was subject. The Diplomatic Conference did not pursue this idea, however, preferring to leave the solution of the problem to national legislation. A considerable number of military penal codes contain provisions dealing with the point, while others are silent. Whatever view is taken in the matter, it is to be hoped that the responsibility of the author of an offence committed in obedience to orders or in pursuance of a general law or regulation will be treated in the same way in the case of a national as in the case of an enemy. The International Law Commission of the United Nations, which studied the question when drawing up its Draft Code of Offences against the Peace and Security of Mankind, arrived after lengthy discussion, at the following formula: "The fact that a person charged with an offence defined in this Code acted pursuant to order of his Government or of a superior does not relieve him from responsibility, provided a moral choice was in fact possible to him". [1]

The conclusions of the International Law Commission tally closely with the proposals of the International Committee of the Red Cross. The latter had recommended that in assessing responsibility an effort should be made to determine whether the accused had, or had not, reasonable grounds to assume that he was committing a breach of the Convention. The International Law Commission preferred to make the criterion the possibility of moral choice—a broader conception, since it covers not only cases where the accused has committed a legal offence, but also cases where he has acted under moral or physical constraint.

PARAGRAPH 2 — SEARCH FOR, AND PROSECUTION OF OFFENDERS

The obligation imposed on the States to enact any necessary legislation implies the applicability of such legislation to any person, whether a national or an enemy, who commits a grave breach. This is a point on which a number of national laws which already penalize certain cases of violation by their nationals of the Geneva Convention, require to be supplemented.

The obligation imposed on the Contracting Parties to search for persons accused of grave breaches of the Convention implies activity on their part. As soon as one of them is aware that a person on

[1] Article 4 of the Draft Code. See Draft Report of the International Law Commission, covering its Third Session.

its territory has committed such an offence, it is its duty to see that such person is arrested and prosecuted without delay. It is not, therefore, merely at the instance of a State that the necessary police searches should be undertaken: they should be undertaken automatically, and the proceedings before the courts should, moreover, be uniform in character, whatever the nationality of the accused. Nationals, friends and enemies should all be subject to the same rules of procedure, and should be judged by the same courts. The creation of special tribunals to try war criminals of enemy nationality is thus excluded.

The obligation to extradite is limited by the national laws of the country in which the accused is, the Convention making an express reservation to that effect. Extradition is, moreover, to be subject to a special condition: the Contracting Party who requests that an accused person be handed over to it, must furnish evidence that the charges against the accused are "sufficient". We find a clause to that effect in most extradition laws and in the international treaties dealing with the subject. But what exactly is meant by "sufficient charges"? The answer will as a rule rest with national legislation; but in general it may be assumed to mean a case in which the facts would justify proceedings being taken in the country to which application is made for extradition. Legal authorities in the Anglo-Saxon countries speak in such cases of a "*prima facie* case" being made out against the accused; and this term is used in the English text of the Article.

Most laws and international treaties refuse to extradite accused persons who are nationals of the country holding them. In their case the spirit of Article 49 clearly demands that the State holding them should bring them before its own courts.

At the same time there is nothing in the paragraph to exclude the handing over of the accused to an international penal tribunal, the competence of which is recognized by the Contracting Parties. On this point the Diplomatic Conference declined expressly to take any decision which might hamper future developments of international law. The Report dealing with the penal provisions, which was presented to the Joint Committee, may be quoted in this connection: "The Diplomatic Conference is not here", it says, "to work out international penal law. Bodies far more competent than we are have tried to do it for years".[1]

[1] *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, page 115.

PARAGRAPH 3 — REPRESSION OF OTHER INFRACTIONS

Article 50 defines "grave breaches" of the present Convention. But Article 29 of the 1929 Convention called for the punishment of *all* acts contrary to the provisions of the Convention, and there could be no question of the Diplomatic Conference of 1949 not going as far as in 1929. Hence the present paragraph. Its form, it must be confessed, is not very precise. The expression "*faire cesser*", employed in the French text, is open to various interpretations. In our opinion it covers everything a State can do to prevent the commission, or the repetition, of acts contrary to the Convention. The Special Committee of the Joint Committee had at first proposed the wording "*prendre les mesures nécessaires pour la suppression de*" in the French text and the word "suppression" in the English text. In the course of the discussions in the Joint Committee the word "suppression" was left in the English text, with "*redressement*" as its equivalent in the French. In the end the Plenary Assembly of the Diplomatic Conference adopted the expression "*faire cesser*" for the French, again leaving "suppression" unchanged in the English. The English word "suppression" corresponds more or less exactly to the French word "*répression*" (though not to the French word "*suppression*"). The French and English texts do not therefore correspond exactly. There can, however, be no doubt that the primary purpose of the paragraph is the *repression* of infractions other than "grave breaches", and that the administrative measures which may be taken to ensure respect for the provisions of the Convention on the part of the armed forces and the civilian population are only a secondary consideration.

Apart from the "grave breaches" enumerated in Article 50, it is easy to think of other infractions which are also serious, such as the improper use of the red cross emblem in time of war. The Law Reports of Trials of War Criminals record the case of a combatant who was sentenced to six months' imprisonment for wrongful use of the red cross emblem in a combat zone. They also quote the case of a medical officer who was sentenced to 10 years imprisonment for mutilating the body of a dead soldier and leaving his corpse unburied. Other accused were actually condemned to death for acts of cannibalism committed on the persons of dead enemy soldiers [1].

[1] *Law Reports of Trials of War Criminals*, Vol. XIII, pages 151-152.

It is thus clear that *all* breaches of the present Convention should be repressed by national legislation. At the very least, the Contracting Powers, having arranged for the repression of the various grave breaches and fixed an appropriate penalty for each, must include a general clause in their national legislative enactments, providing for the punishment of other breaches of the Convention. Furthermore, under the present paragraph the authorities of the Contracting Parties should issue instructions in accordance with the Convention to all their subordinates, and arrange for judicial or disciplinary proceedings to be taken in all cases of failure to comply with such instructions.

In conclusion it may be noted that Article 54 is to some extent a duplication of the present paragraph, inasmuch as misuse of the emblem, for the repression of which Article 54 provides, is a breach of the Convention. The reason why the authors of the Convention nevertheless thought it necessary to keep Article 54 in addition to the present paragraph was that the repression of misuse of the red cross emblem is a traditional principle already embodied in the 1906 and 1929 Conventions. A whole body of legislation on the subject already exists in the different countries; and it was thought wisest not to introduce too many changes. Nevertheless, if a country were to recast its entire penal code, there would be nothing to prevent all infractions, including those in connection with the use of the emblem in peacetime, being dealt with in one and the same legislative enactment.

PARAGRAPH 4 — SAFEGUARDS OF PROPER TRIAL AND DEFENCE

In the years which followed the War the International Committee of the Red Cross was concerned in various countries, in the absence of Protecting Powers, with the affairs of a number of prisoners accused of war crimes. The Committee has even on occasion been appealed to for legal assistance; and some countries, such as France, have granted it certain facilities for carrying out such work. The experience of the Committee in this connection has shown that certain safeguards of proper trial and defence are essential in all cases where persons are accused of war crimes. These safeguards are particularly necessary where the accused person is tried by an enemy court. Accordingly, the International Committee included a special Article on the subject in the pro-

posals which it submitted to the Diplomatic Conference. The Conference did not, however, take up the suggestion, at any rate at first. Many delegates thought the solution should be left to the national legislation of each country. It was also pointed out that most accused persons tried by their enemies would be prisoners of war, and would, as such, automatically enjoy adequate safeguards in view of the wording of Article 85 of the Third Convention. The French Delegation, however, realizing the desirability of placing all accused on the same footing, whatever their individual status, proposed the present additional paragraph in the course of the discussions in the Joint Committee. The Joint Committee approved the French proposal, and it was adopted by the Conference itself without being modified in any way.

A complete analysis of the safeguards of fair trial embodied in the Third Geneva Convention [1] would be out of place here. But we may mention the principal rights which it accords to prisoners of war in case of judicial prosecution. Article 87 provides that prisoners of war may not be sentenced to any penalties except those provided for in respect of members of the armed forces of the country by which they are detained, who have committed the same acts. Under Article 99 the accused must have an opportunity to present his defence and the assistance of a qualified advocate or counsel. Article 101 provides that if the death penalty is pronounced on a prisoner of war, the sentence is not to be executed before the expiration of a waiting period of at least six months. The rules governing confinement while awaiting trial are laid down in Article 103. Article 105 establishes in detail the rights of defence, and Article 106 accords prisoners the same rights of appeal as those enjoyed by members of the armed forces of the Detaining Power. Lastly—and this a point of paramount importance—accused persons in enemy hands are entitled to the assistance of the Protecting Power.

The Diplomatic Conference acted wisely when it decided to refer to the rules already established for prisoners of war. It preferred not to make new law, but to refer instead to an existing body of law which had stood the test of time and would provide the accused with sure and certain safeguards.

It may be asked in connection with this paragraph whether persons accused of war crimes can, or should, be brought to trial during hostil-

[1] The International Committee of the Red Cross also proposes to publish a Commentary on this latter Convention.

ities. The International Committee of the Red Cross has had occasion to point out more than once, for example to the Government Experts who met at Geneva in 1947, how difficult it is for an accused person on trial by an enemy court to prepare his defence while hostilities are still in progress. How is he to produce evidence attenuating, or even disproving, his responsibility? Cases sufficiently clear to allow of a verdict being brought before the end of the war will undoubtedly always be the exception [1].

It would seem, therefore, that persons accused of war crimes should not, properly, be tried at a time when it is not possible for them to produce evidence attenuating or disproving their responsibility.

ARTICLE 50 — GRAVE BREACHES [2]

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention : wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destructions and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

The idea of including a definition of "grave breaches" in the actual text of the Convention came from the experts called in by the International Committee of the Red Cross in 1948. It was thought necessary to establish what these grave breaches were, in order to be able to ensure universality of treatment in their repression. Violations of certain of the detailed provisions of the Geneva Conventions might quite obviously be no more than offences of a minor or purely disciplinary nature, and there could be no question of providing for universal measures of repression in their case.

[1] In certain instances during the Second World War, proceedings were taken against prisoners of war while hostilities were still in progress. The Japanese authorities, for example, prosecuted and convicted American airmen whom they accused of attacking other than military objectives. After the war the Japanese judges who sentenced the airmen, were themselves punished as war criminals by allied courts.

[2] Article common to all four Conventions. Cf. Second Convention, Article 51; Third Convention, Article 130; Fourth Convention, Article 147.

It was also thought desirable—as a warning to possible offenders—to draw public attention to the list of infractions, the authors of which were to be searched for in all States. This idea was embodied in the draft of Article 40, which defined these grave violations in more or less general terms. [1]

The joint admendment [2] submitted to the Diplomatic Conference by a number of delegations, contained, for each Convention, a list in which the offences were defined more precisely. It was this text, with certain slight changes of form, that was in the end adopted by the Conference.

The actual expression "grave breaches" was discussed at considerable length. The USSR Delegation would have preferred the expression "grave crimes" [3] or "war crimes". The reason why the Conference preferred the words "grave breaches" was that it felt that, though such acts were described as crimes in the penal laws of almost all countries, it was nevertheless true that the word "crimes" had different legal meanings in different countries.

The *persons protected* by the Convention are the wounded and sick, as defined in Article 13, and medical personnel and chaplains, as defined in Articles 24 to 26. The *property protected* by the Convention is defined in various Articles (in particular Articles 33 to 36).

As regards the list of "grave breaches" itself, it has already been pointed out [4] that it is not to be taken as exhaustive, although a large number of these offences would certainly appear to be covered.

Wilful killing covers all cases in which the wounded or sick are put to death without any resistance on their part. It also covers any attempts on the life of medical personnel or chaplains, whether serving with their country's forces or when captured or retained by the enemy to care for prisoners.

In addition to the act of killing there may be cases of killing by failing to take action—for example, by letting wounded persons die for want of the care which would have saved them, or by allowing protected persons to starve to death. The provision we are discussing covers such cases, provided the intentional character of the infraction is clearly established.

[1] See above, page 358.

[2] See above, page 360.

[3] Textually "heavy crimes".

[4] See above, page 367.

On the other hand it does not cover cases of mere negligence or of actual physical impossibility.

The expressions *torture, inhuman treatment,* and *biological experiments* are clear enough in themselves and need no detailed comment [1]. It may be noted, however, that the text as originally drafted said "maltreatment"; it was thought better to replace this term by the more precise expression "inhuman treatment".

Wilfully causing great suffering or serious injury to body or health. This phrase is intented to cover acts which, without amounting to "torture or inhuman treatment", are liable to affect the physique or health of wounded or sick persons, medical personnel or chaplains. We might take as an example the mutilation of the wounded or their exposure to useless and unnecessary suffering. The phrase duplicates to some extent the words which precede it.

Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. This definition covers, in particular, cases of destruction of buildings or material belonging to enemy medical units, in violation, for example, of Article 33, paragraph 3 [2]. It also covers cases where medical material or transport are seized without the prescribed conditions being respected. It should, incidentally, be noted that the plea of military necessity may not exceed the limits fixed by the definition of military necessity contained in Articles 33 to 36 [3]. Article 40 cannot be invoked in justification of unfettered resort to destruction or appropriations which are prohibited elsewhere in the Convention.

ARTICLE 51 — RESPONSIBILITY OF CONTRACTING PARTIES [4]

No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by

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[1] On the meaning to be given to the words "biological experiments" see the comments on Article 12 (above, page 139).

[2] See above, page 276.

[3] See above, pages 271 to 293.

[4] Article common to all four Conventions. Cf. Second Convention, Article 52; Third Convention, Article 131; Fourth Convention, Article 148.

another High Contracting Party in respect of breaches referred to in the preceding Article.

This is an entirely new Article. It was inserted in all four Conventions on the proposal of the Italian Delegation, who contended that it was a logical sequel to the preceding Article. The State, in their view, was responsible for breaches of the Convention, and could not refuse to admit liability on the grounds that the authors of the breaches had been punished. It was, for example, still bound to pay compensation. The Italian Delegation had previously endeavoured unsuccessfully to introduce the idea in Article 6 relating to special agreements.

The Article, the sense of which is not altogether clear, was not adopted too readily by the Conference, the Joint Committee only approving it by eighteen votes to thirteen, with three abstentions.

In order to bring out the meaning of this provision more clearly, it should be compared with Article 3 of the Fourth Hague Convention of 1907, which reads as follows:

> A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts commited by persons forming part of its armed forces.

In our opinion, the purpose of Article 51 is to prevent the defeated party from being compelled in an armistice agreement or peace treaty to abandon all claims due for infractions committed by persons in the service of the victor. In this matter of material reparation for infractions of the Convention it is not possible, at any rate as the law at present stands, to imagine an injured party being able to bring an action individually against the State in whose service the author of the infraction was. Only a State can put forward such claims against another State. These claims fall in the ordinary way into the category of what are called "war reparations". It would seem unfair that individuals should be punished, if the State in whose behalf—and often on the instructions of which—they have acted were absolved of all responsibility.

This provision does not, of course, affect the obligation to prosecute and punish the authors of infractions, since that obligation is absolute under Article 49. If any doubt still existed, however, the present Article would remove it.

ARTICLE 52 — ENQUIRY PROCEDURE[1]

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

HISTORICAL INTRODUCTION

It was in 1929 that a provision similar to the one quoted above was introduced into the Convention. It gave rise at the time to considerable discussion, and the text was only approved by the Diplomatic Conference of 1929 after much hesitation. Many delegates were afraid of opening a door, in the Convention, to possible sanctions against States.

The provision adopted in 1929 was an important step forward, for there had been no provision of the kind in the previous Conventions of 1906 and 1864—nor in the Hague Conventions of 1899 and 1907. Nevertheless, in 1934, at the XVth International Red Cross Conference, it was pointed out that application of the Article would be difficult, as it presupposed agreement between the Parties to the conflict; some practically automatic procedure ought therefore to be provided.

The Commission of Experts convened in 1937 by the International Committee of the Red Cross to consider the revision of the Geneva Convention, studied the problem in detail. It received the benefit of the opinion of several international jurists, such as MM. A. Hammarskjöld, D. Schindler, J. Basdevant, F. Donker-Curtius and C. Gorgé, and elucidated certain principles which were to be defined in a new Article. Its conclusions were adopted with practically no alteration

[1] Article common to all four Conventions. Cf. Second Convention, Article 53; Third Convention, Article 132; Fourth Convention, Article 149.

by the XVIth International Red Cross Conference, which met in London in 1938 [1].

When the International Committee of the Red Cross resumed work on the revision of the Geneva Conventions after the Second World War, these conclusions served as a basis for the proposals put forward. Thus, at the Conference of Government Experts held in Geneva in 1947, the International Committee made the following recommendations:

1. That the procedure of enquiry be initiated as rapidly as possible and in a practically automatic fashion.

2. That the enquiry may be demanded by any Party to the Convention concerned, whether belligerent or neutral.

3. That a single, central and permanent authority, for which provision is made in advance in the Convention, be entrusted with the nomination of the whole or part of the Commission of Enquiry.

4. That the Commission of Enquiry be appointed for each particular case, immediately the request is made, following an alleged violation of the Convention.

5. That the members of the Commission of Enquiry be appointed by the aforesaid authority from lists, kept up-to-date, of qualified and available persons, whose names have been submitted beforehand by Governments.

6. That special agencies be appointed in advance to undertake, in case of need, any immediate investigation of the facts which may appear necessary.

7. That the report of the Commission of Enquiry contain, where necessary, not only a record of the facts established, but also recommendations to the Parties concerned.

The Government Experts were opposed to the idea of setting up a special authority, provided for in advance in the Convention. They preferred that members of the Commission of Enquiry should be appointed by the President of the Hague Court.

The International Committee, basing itself on the Government Experts' conclusions, submitted the following text to the XVIIth International Red Cross Conference in Stockholm, in 1948:

ARTICLE 41 — INVESTIGATION PROCEDURE

Independently of the procedure foreseen in Article 9, any High Contracting Party alleging a violation of the present Convention may demand the opening of an official enquiry.

[1] See *Conférence diplomatique pour la revision et la conclusion d'accords relatifs à la Croix-Rouge. — Revision de la Convention de Genève du 27 juillet 1929*, Berne, January 1939, pages 51-55 and 83 ff. (Preliminary Document No. 2).

This enquiry shall be carried out as soon as possible by a Commission instituted for each particular case, and comprising three neutral members selected from a list of qualified persons drawn up by the High Contracting Parties in time of peace, each Party nominating four such persons.

The plaintiff and defendant States shall each appoint one member of the Commission. The third member shall be designated by the other two and should they disagree, by the President of the Court of International Justice or, should the latter be a national of a belligerent State, by the President of the International Committee of the Red Cross.

As soon as the enquiry is closed, the Commission shall report to the Parties concerned on the reality and nature of the alleged facts, and may make appropriate recommendations.

All facilities shall be extended by the High Contracting Parties to the Commission of enquiry in the fulfilment of its duties. Its members shall enjoy diplomatic privileges and immunities.

The Stockholm Conference only made one slight alteration to the above Article.

The Diplomatic Conference of 1949 decided from the first to entrust the study of the provision to the so-called Joint Committee, to which all the provisions common to all four Conventions were submitted. The Joint Committee referred the Article to its Special Committee, where it was dealt with by the Working Party responsible for problems concerning the settlement of disputes which might arise in connection with the application of the Conventions.

There was practically no discussion on the subject. In its report to the Joint Committee, the Special Committee expressed itself in the following terms:

The Special Committee considered that Articles 41 and 45 [1] of the Stockholm drafts set up a procedure for recruitment which was too complicated, and that it would be appropriate to revert once more to the provision contained in Article 30 of the Wounded and Sick Convention of 1929, while defining its terms more clearly.

In the text submitted by the Special Committee, the initiative for the enquiry procedure belongs to either one of the belligerents and not to all the Contracting Parties. The membership of the Commission of enquiry was determined by agreement between the Parties and not from a previously established list. The enquiry procedure was not closed by a mere recommendation, but by findings which were mandatory for the Parties.

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[1] The corresponding Article in the draft Maritime Warfare Convention.

The Special Committee, moreover, decided by 9 votes for, 2 against with 1 abstention, to propose the introduction of the same provision into the Prisoners of War Convention and the Civilians Convention.[1]

The Article proposed by the Special Committee was approved, as it stood, by the Joint Committee and the Plenary Assembly without discussion, as was the decision to embody it in all four Conventions.

The Conference did not feel, therefore, that it could adopt, either as a whole or in part, the conclusions reached by the experts consulted by the International Committee of the Red Cross. That is not very surprising when one realizes the difficulties that any procedure of this kind encounters. War gives such a rude shock to the whole legal system that, if the means by which the rule of law is upheld are too vulnerable, its very authority may be endangered.

The Delegate of Monaco at the Diplomatic Conference, Professor Paul de La Pradelle, who was Chairman of the Working Party instructed to consider problems relating to disputes which might arise in connection with the Conventions, devoted an interesting chapter to these questions in his recent book.[2] He points out that under the existing text the conclusions of the Commission of Enquiry will be binding, as in the 1929 text. This was not provided for in the Stockholm drafts. On the other hand, he does not mention the fact that no progress was made in regard to the automatic operation of the procedure of enquiry or the choice of those responsible for carrying it out. And that is undoubtedly the greatest obstacle to the application of the present Article.

PARAGRAPH 1 — INSTITUTION OF THE ENQUIRY

This paragraph repeats word for word the first sentence of Article 30 of the 1929 Convention. The wording used makes it clear that the holding of the enquiry is compulsory once one of the belligerents has asked for it. However, according to paragraph 2, the Parties concerned must reach agreement on the actual procedure for the enquiry. It is to be expected that when requesting the institution of an enquiry,

[1] See *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. II-B, pages 119 and 120.

[2] *La Conférence diplomatique et les nouvelles Conventions de Genève du 12 août 1949*, Paris, 1951, pages 265-284.

the Party to the conflict will also suggest the way in which it is to be carried out.

This provision, which, as we have seen above, already existed in the 1929 Convention, has never to our knowledge been applied.[1] We have already pointed out more than once the difficulty of securing agreement between States in time of war; that difficulty is greatly increased when it is a matter of investigating an offence of which one of them is alleged to have been guilty, and opening that State's frontiers to *ad hoc* investigators.

The request of an interested party will doubtless be made through the Protecting Power, as the latter provides the normal channel for such communications in war-time. The introduction into the First Convention of provisions dealing with the activities of Protecting Powers is calculated to facilitate such representations.

The introduction of the principle of supervision by the Protecting Powers of the application of the Convention may, it is true, reduce the number of cases in which a Party to the conflict requests an enquiry. The Protecting Powers must, under Article 11, lend their good offices with a view to settling cases of disagreement as to the application of the Convention, and it may be assumed that they will attempt to settle such disputes by conciliation. Violations may, moreover, often be established by the Protecting Power itself, without any special procedure being necessary.

It is to be hoped that Articles 49 and 50, whereby States undertake to suppress all breaches of the Convention, will make enquiries unnecessary in the majority of cases. If a State finds that persons depending on it have violated the Convention, it must punish them, whether an enquiry has or has not been requested by the adverse Party. The institution of an enquiry is therefore only necessary if the violation is contested.

PARAGRAPH 2 — ENQUIRY PROCEDURE

This paragraph is new. It is intended to provide for cases where the Parties to the conflict do not reach agreement on the procedure for the enquiry. But in such cases it is still necessary to agree on the choice

[1] An attempt was made to apply Article 30 of the 1929 Convention during the Italo-Abyssinian War of 1935-1936.

of an umpire who will decide upon the procedure to be followed. The Article does not say what should be done if the Parties to the conflict do not reach agreement on the appointment of an umpire. The XVIIth International Red Cross Conference had intended to avoid that possible danger by granting certain powers to the President of the Hague Court. It is possible that where agreement is not reached on the choice of an umpire, the dispute might be referred to the Hague Court in accordance with Resolution 1 of the Diplomatic Conference.[1]

In practice, the agency which seems best qualified to carry out an enquiry is naturally the Power protecting the interests of the State which complains of a violation; diplomatic representatives of other neutral States in a position to act quickly might also take part. In such cases, the efficacity of the procedure depends, of course, upon its speed.

PARAGRAPH 3 — ACTION ON FINDINGS

This paragraph is taken, as it stands, from the 1929 text.

Breaches of the Convention may be of a permanent or of an occasional nature. It they are permanent—for instance, if the red cross emblem is placed on a building which is not entitled to protection under the Convention—the Power responsible must put the matter right. In the example given, the distinctive emblem must be removed. If the case is one of occasional violation, such as the bombardment of a hospital, all possible steps must, of course, be taken to prevent a repetition; but the main sequel to the violation will be the punishment of those guilty, and perhaps reparation for the damage suffered.

Repression should, of course, be in accordance with the rules laid down in Articles 49 and 50. In these Articles the Contracting Parties have already undertaken to suppress any violations of the Convention. The idea is thus repeated in the Article under study.

It follows from paragraph 3 that the Commission of Enquiry which is set up will be competent both to establish facts, and to assess the facts established. There is, however, no reason why the appointment of two distinct agencies should not be provided for in the special agreement mentioned in paragraph 2: one to establish the facts of the case, and the other to determine whether those facts did or did not constitute a violation of the Convention.

[1] See above, page 131.

ARTICLE 53 — MISUSE OF THE EMBLEM

The use by individuals, societies, firms or companies either public or private, other than those entitled thereto under the present Convention, of the emblem or the designation "Red Cross" or "Geneva Cross", or any sign or designation constituting an imitation thereof, whatever the object of such use, and irrespective of the date of its adoption, shall be prohibited at all times.

By reason of the tribute paid to Switzerland by the adoption of the reversed Federal colours, and of the confusion which may arise between the arms of Switzerland and the distinctive emblem of the Convention, the use by private individuals, societies or firms, of the arms of the Swiss Confederation, or of marks constituting an imitation thereof, whether as trade-marks or commercial marks, or as parts of such marks, or for a purpose contrary to commercial honesty, or in circumstances capable of wounding Swiss national sentiment, shall be prohibited at all times.

Nevertheless, such High Contracting Parties as were not party to the Geneva Convention of July 27, 1929, may grant to prior users of the emblems, designations, signs or marks designated in the first paragraph, a time limit not to exceed three years from the coming into force of the present Convention to discontinue such use, provided that the said use shall not be such as would appear, in time of war, to confer the protection of the Convention.

The prohibition laid down in the first paragraph of the present Article shall also apply, without effect on any rights acquired through prior use, to the emblems and marks mentioned in the second paragraph of Article 38.

General

A. *Two kinds of misuse.* — As we saw in connection with Article 44 [1], the sign of the red cross on a white ground can be employed in two entirely different senses. When it appears on persons or property which the Convention lays down should be respected, the sign has protective value; when it merely indicates that a person or thing is connected

[1] See above, page 324.

in some way with the Red Cross, but not in the sense of being entitled to the protection of the Convention, the sign is indicatory only.

A distinction must therefore be drawn between abuse of the protective sign and abuse of the indicatory sign. The first, in time of war, is infinitely the more serious, because it may endanger human lives. The gravity of the offence will vary with circumstances—from the thoughtless action of a doctor who wears a red cross armlet in good faith although not a member of the medical personnel, to acts of treachery such as the placing of large-sized emblems on an ammunition dump in order to mislead the enemy. Between these extremes, one can conceive of abuses of every possible degree of gravity.

Typical examples of misuse of the indicatory sign are the unauthorized use of the badge of a Red Cross Society, or the use of the emblem by chemists, or in trade-marks.

B. *Historical background.* — Abuses of the red cross emblem are almost as old as the Geneva Convention itself.

The 1864 Convention has no provision dealing with the repression of infractions, and is silent too on the subject of abuses of the distinctive sign.

Abuses occurred during the war of 1866, and still more so in 1870-71, but they affected the protective sign only. By 1880, however, the indicatory sign was being unlawfully used in many ways. Chemists, manufacturers of medical apparatus, invalid nurses, and even barbers had adopted the red cross as their sign, and it was being used on boxes of pills and mineral water advertisements.

The International Committee and the National Red Cross Societies undertook an unremitting campaign against such abuses, a campaign which still continues today.[1] The IIIrd International Red Cross Conference (1884) recommended that "energetic legislative or similar measures be taken, in all countries, to prevent abuse of the emblem of the Convention, the red cross on a white ground, in time of peace as in time of war". A similar Resolution was adopted by the IVth Conference (1887), and in 1888 the International Committee held a competition for the best

[1] A particular tribute must be paid here to the late Paul des Gouttes, Secretary-General and Member of the International Committee of the Red Cross, who was, throughout a career rich in achievement, one of the emblem's most untiring champions.

methods of preventing and suppressing abuses, the two winning essays being published.[1]

In spite of these efforts, the unlawful uses to which the sign was put, continued to multiply. Some traders were already using a slightly modified form of red cross, pretending hypocritically that they were not using the emblem of the Convention. Although States had accorded strict protection in their penal codes to such things as trade names and trade-marks, a highly significant symbol, which they had formally recognized when signing the Geneva Convention, was left defenceless. Some countries, it is true, enacted certain provisions for the legal protection of the emblem; but they were inadequate.

It was then suggested that the Convention itself should contain clauses prohibiting misuse of the sign and requiring States to enact appropriate legislation. This was done at the 1906 Conference, which profoundly modified the Geneva Convention. In the fairly detailed Article 27, Governments undertook to adopt or to propose to their legislatures the measures necessary to prevent, at all times, misuse of the Red Cross name and emblem. Article 28 [2] laid down, further, that abuse of the sign in wartime was to be punished "as an unlawful use of military insignia". The Convention thus forbade misuse of both protective and indicatory signs, although at the time no conscious distinction had yet been drawn between the two uses of the emblem.

Misuse of the protective sign in wartime had, incidentally, long been recognized as a punishable offence under international law. Article 23 of the Regulations annexed to the Second Hague Convention of 1899 forbade "improper use of ..... the distinctive badges of the Geneva Convention", and this clause was reintroduced in full in the same Article of the Regulations as revised in 1907 and still in force.

During the 1929 revision, attention was mainly centred on a problem which had arisen as a result of the adoption of the 1906 Convention —namely, protection of the emblem of the Swiss Confederation. In order to get over the 1906 prohibition, unscrupulous traders had made use of a white cross on a red ground, counting on the similarity between

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[1] *De l'emploi abusif du signe et du nom de la Croix-Rouge* by Professors Buzzati and Castori, Geneva 1890.

[2] The same provision was introduced the following year into the Tenth Hague Convention (Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention).

it and the red cross sign and the possibility of one being confused with the other.

Article 27 was retained, but this time imitations of the red cross emblem were also forbidden, which had not been the case in 1906. On the other hand, although the obligation to repress all infringements of the Convention was clearly laid down, the clause in Article 28 which dealt with the particular case of misuse of the protective sign was unfortunately dropped; thus disappeared, at least from the Geneva Convention, the distinction between these two forms of abuse, which are so utterly different in character. The wording used allowed measures to be taken against both, but created the impression that it only covered the so-called commercial abuses, which were the only ones expressly mentioned. In consequence, where national legislation has been introduced in fulfilment of obligations under the 1929 Convention, it generally covers commercial abuses only [1].

C. *Absolute character of the new Article.* — Article 53 of the 1949 Convention marks a real step forward. In the first place, it makes an absolute prohibition of what depended, in the corresponding Article of the 1929 Convention (Article 28), on measures which Governments were to "adopt or propose to their legislatures"—a qualification which weakened the effect of the provision very appreciably.

The new Article has the same standing as the various other prohibitions in the Convention (in regard to the wounded, medical units, and so on). Its proper place is therefore in Chapter VII (The Distinctive Emblem), and not in Chapter IX (Repression of Abuses and Infractions) where it actually is. It should come immediately after Article 44, or even form part of it. A delegation drew attention to this point, but, for reasons of procedure, the Conference let the matter rest [2].

[1] See *Recueil de textes*, published by the I.C.R.C. in 1934, giving laws and decrees relative to the application of the Geneva Convention, especially those concerning the repression of abuses of the emblem.

[2] This change would have had the added advantage of increasing the emphasis on the other provisions of Chapter IX. In 1929, protection of the distinctive emblem was unfortunately presented as the principal of the many obligations imposed by the Convention as a whole. Consequently, most national legislatures devoted most of their attention to that one point, although even there they did not go far enough. In actual fact the problem of protecting the wounded, and medical personnel and material, by more precise provisions than the general rules of penal law, against the attacks to which they are too often subject, required such attention just as urgently. Fortunately, the 1949 Conference placed much greater emphasis on the repression of infractions than had been the case in 1929.

PARAGRAPH 1 — MISUSE OF THE RED CROSS EMBLEM

1. *Object of the prohibition*

A. *Protective sign.* — The first paragraph, like Article 28 of the 1929 Convention, is primarily intended to prohibit misuse of the indicatory sign (e.g. its use for commercial purposes); it is, however, aimed too at abuse of the protective sign in wartime, which is also covered by Article 49 [1]. The prohibition applies to "any sign ... at all times ... whatever the object of such use".

But, as in 1929, no distinction is drawn between the two types of abuse. The very wording of Article 53 may cause confusion; it sets out in detail the so-called commercial abuses, and it might be inferred that these only are covered.

It is essential that States should not merely rely on the general provisions of their municipal legislation, but decree specific and severe penalties for abuse of the protective sign. The penalties should in this case be very much more severe than for illegal use of the red cross in trade names or trade-marks. The fact that buildings in a war zone display the red cross sign when they are not entitled to do so, may compromise the security of hospitals which display it legally, and undermine the respect due to the Convention. As we have already pointed out, human lives are at stake. The International Committee of the Red Cross suggested this improvement in the text to the 1949 Conference, but the matter was unfortunately overlooked [2].

In any case, even though the 1949 text might have been more precise, it is still adequate. Governments are responsible for making its provisions fully operative by adopting such legislative measures as are necessary to ensure the prevention and punishment of both forms of abuse.

B. *Indicatory sign.* — Although the first care must be to safeguard the protective sign, misuse of the purely indicatory sign must also be relentlessly put down, as it does serious harm to the Red Cross movement

[1] It should also be noted that Article 23 of the Regulations annexed to the Fourth Hague Convention of 1907, which is still in force, forbids the improper use in wartime of the distinctive badges of the Geneva Convention.

[2] There are grounds for holding that abuse of the protective sign should have been included among the "grave breaches" defined in Article 50.

and diminishes the prestige of the emblem. The public, seeing the red cross on articles that have nothing to do with any form of charitable work [1], may fail, in other circumstances of the most vital importance, to recognize its inviolable character.

C. *Protection of the title.* — It was obviously not enough merely to prohibit misuse of the red cross emblem. Protection had also to be extended to the words which form the official title of the great humanitarian institution known as the Red Cross. These words are as familiar to the public as the emblem, and must enjoy the same prestige. Since 1906, the title "Red Cross" and its synonym "Geneva Cross" have been protected in the same way as the emblem.

D. *Imitations of the emblem.* — A happy innovation in 1929 was to forbid unauthorized use not only of the originals, but of every sign or name which constituted an imitation of the emblem and title. This important clause was naturally maintained in 1949.

Commercial undertakings, debarred after 1906 from making use of the emblem without risk of prosecution, devised, with an ingenuity worthy of a better cause, signs which could not be said to be the red cross, but gave the impression that they were. This enabled them to claim for their products with impunity some at least of the prestige attaching to the emblem. As examples we may mention a red cross with a figure or another cross superimposed; a cross which had only the outline or part of it in red; backgrounds of different colours; a cross half red and half white on a ground in which the two colours were reversed; a red star which from a distance looked like a cross. Such practices, harmful to the emblem and to the organization, had to be eliminated.

It is the duty of the authorities in each country to decide if a given mark constitutes an imitation [2]. The decision may sometimes be a difficult one. The criterion should be whether there is a risk of confusion in the public mind between the mark and the red cross emblem, as it is precisely this that the clause is intended to prevent.

[1] A curious example may be given. In one army, where it was customary to mark gas shells with a coloured cross to denote their contents, some were actually marked with a red cross and called "red cross shells". This practice, fortunately, did not survive. See *Revue internationale de la Croix-Rouge*, July 1938, p. 558.

[2] It is clear, that any red cross, whatever its shape or background, constitutes an imitation and should be forbidden.

In order to assess the responsibility of the user, an attempt may be made to determine whether he had any actual intention of deceiving the public or exploiting the prestige of the emblem. In such cases the text should be interpreted in the manner most favourable to the Convention and the Red Cross. If the user means no harm, why should he choose a mark resembling the red cross? There can be no valid objection to substituting an entirely different symbol.

2. *Effect of the prohibition*

A. *On organizations and individuals.* — Use of the emblem is forbidden to everyone not expressly authorized by the Convention. Article 44 gives a limitative list of those entitled to use it. Amongst organizations, only Red Cross organizations and Societies and other recognized relief societies are mentioned. Private individuals may not use it. The sole exception—and this is accorded only with the express permission of the National Red Cross—is to identify an aid post or motor ambulance (Article 44, paragraph 4). Governments themselves may only employ the sign to identify the staff and material of their Medical Services [1].

B. *As regards employment.* — Use of the emblem (always apart from permitted cases) is forbidden "whatever the object of such use". We saw above that the prohibition applies to both the protective and the indicatory sign. It also means that the emblem cannot be utilized, except as provided for in the Conventions, for any object, however commendable, or for any other humanitarian purpose. If the red cross is sometimes exploited in a scandalous fashion in order to sell pseudo-medical rubbish, there are other abuses which, although illegal, have no moral taint. The case of doctors and chemists is the most obvious example.

It seems quite right that representatives of these two professions, both serving humanity, should have a distinctive and uniform emblem to designate their residences, their cars, or themselves personally. But

[1] We refer here to the limits set by the Convention with which we are dealing — the First; they are enlarged somewhat in the Second and Fourth Conventions (1949). Reference should be made to the commentary on Article 44, which gives a complete list of the cases in which the red cross emblem may be employed. See above, page 326.

instead of the inadmissible course of trying to take the red cross or the Swiss cross as their emblem, why should doctors not follow the recommendation of the medical authorities in certain countries and adopt the sign of Aesculapius (the staff and snake—not to be confused with the caduceus or wand of Mercury, which is the symbol of commerce)? Chemists, in their turn, could use the ancient sign of their profession: the snake, entwined round the cup of Hygeia, the goddess of health, daughter of Aesculapius [1].

A great deal of popular instruction is needed to root out the basic misconception of those who still believe that the red cross may be used to designate everything connected with the fight against disease.

C. *As regards time.* — In the first place, the prohibition is valid "at all times"—in peacetime as in war.

Secondly, unauthorized uses must disappear irrespective of the date of their adoption. This requirement was already clearly contained in the 1906 and 1929 Conventions [2]. Some States, however, following constitutional principles when legislating, made an exception in the case of rights acquired by prior use. It is therefore most fortunate that the wording should now be explicit. Trade-marks and commercial marks incorporating the red cross must disappear, even if they have been in use for a century or more. Commercial interests, however legitimate, must give way to the higher interests of humanity, whatever the cost may be.

[1] See *Revue internationale de la Croix-Rouge :* February, March and April 1933, pages 128, 218 and 310; February 1935, page 113; January 1942, page 77; February 1943, page 111.

[2] On this point we cannot agree with the opinion of Paul Des Gouttes (*Commentaire de la Convention de Genève du 27 juillet 1929*, Geneva, 1929, pages 206 and 207). The prohibition in Article 28 of the 1929 Convention was already absolute. There is no question of its having retrospective effect. Retroactivity would have existed if it had been intended to penalize those who used the sign before the Convention was drawn up. But the Convention provides only for the future. It lays down that after five years from its coming into force, no use of the emblem will be lawful, except as provided in the Convention. The only object of the last sentence of Article 28 is to prevent the registering of new unlawful signs during the intervening period. Finally, it may be noted that when ratifying the 1929 Convention, two States made reservations precisely with the idea of preserving the rights of previous users, as far as the emblem of the Swiss Confederation was concerned. They would not have done so if the Convention had spared such rights.

PARAGRAPH 2 — MISUSE OF THE WHITE CROSS ON A RED GROUND

A. *Forms of abuse.* — The formal prohibition—proclaimed in the 1906 Convention and given legal effect by national legislation—of the improper use of the red cross sign, led to the misuse of the Swiss arms by numerous commercial firms. A white cross on a red ground was, for example, adopted in several countries as a special sign for chemists. No longer entitled to use the red cross and wishing to continue to exploit its prestige, they chose the emblem which most nearly resembled it without actually being a red cross or what would in law be considered an imitation of one. The Swiss flag was an obvious choice, constituting as it does the prototype of the red cross emblem, with the colours reversed. Experience has shown that the man in the street nearly always confuses the two crosses. The Swiss armorial bearings began to crop up on all sorts of medical or pseudo-medical articles, including those of the cheapest variety.

The resulting damage to the emblem of the Convention and to the Red Cross movement was not any less for being indirect. The effect of such abuses was to mislead the public. A red cross, or a white cross on a red ground, is more or less consciously accepted by the general public as being in the nature of a guarantee that foodstuffs or pharmaceutical products on which it is displayed have been medically tested. Misuse of these signs is mere exploitation of the good fame of another. Moreover, the compliment the Diplomatic Conferences had intended to pay to Switzerland became a mockery, since its flag was desecrated [1].

State armorial bearings were not, however, entirely without international protection. The Union Convention of Paris of November 6, 1925, for the protection of industrial property, revising the earlier Convention of March 20, 1883, had taken an important step forward. Under Article 6 *ter*, the Contracting Parties undertook (1) to prohibit the use of State emblems, and imitations of such emblems from the heraldic point of view, either as trade-marks or as parts of trade-marks,

[1] The Danish flag has been outraged in the same way, though less frequently. It consists of a white cross on a red ground, but, unlike the Swiss cross, not humetty, the arms of the cross extending on all four sides to the edge of the flag.

and (2) to prohibit the use in trade of State armorial bearings when such use was of a nature to cause deception as to the origin of the goods.

These provisions were not in themselves sufficient to eliminate existing abuses. They were inadequately incorporated in municipal law, and they applied only to trade-marks. Moreover, the heraldic criterion appears particularly inappropriate. Heraldry is a complex science, known only to a few specialists, and depends on details so precise that the slightest change can rule out imitation, even where the public would observe no difference. It was rightly said that the heraldic criterion was ideal—for cheats! [1] Moreover, as the Swiss colours were little known abroad, it was difficult to show that their use could mislead the public as to the origin of the goods.

B. *Extent of the prohibition.* — It was clear, therefore, that the sign of the white cross on a red ground must be protected by introducing the requisite clauses into the Convention itself, and this was done at the Diplomatic Conference of 1929.

The clauses were maintained in 1949, with some additional details. It is no longer only "by reason of the tribute paid to Switzerland by the adoption of the reversed Federal colours" that the prohibition exists, but also, and especially, because "of the confusion which may arise between the arms of Switzerland and the distinctive emblem of the Convention". The fact that the principal object of the provision is to preserve the red cross sign from every sort of infringement, even indirect, is thus emphasized and attention is drawn to the deception practised by firms which exploit the resemblance between the two emblems in order to mislead the public.

Imitations of the Swiss cross are also prohibited, as in the case of the red cross itself, because here too the ingenuity of imitators has been given free rein [2].

The Federal colours are, however, less fully protected than the red cross. A general prohibition of the use of the Swiss cross is hardly

[1] The International Association for the Protection of Industrial Property is at present working on the revision of the Paris Convention. It is seeking *inter alia* to replace the heraldic criterion by the general criterion of the possibility of confusion with the emblem.

[2] While every red cross should be denounced as an imitation of the emblem whatever the colour of the background, we cannot consider every white cross to be an imitation of the Swiss flag.

feasible, since it is widely used by Swiss citizens as their national emblem. The prohibition therefore applies to its use as a trade-mark or commercial mark, or as a part of such marks, and also in cases where it is used for a purpose contrary to commercial honesty or in circumstances capable of wounding Swiss national sentiment.

A more definite form of wording, unreservedly preventing all improper use of the Swiss cross for commercial purposes, might have been preferable. But as it stands, the clause is sufficient to allow Governments to apply the letter and spirit of the Convention and eliminate every use of the Swiss cross which may lead to confusion with the red cross or imply a medical guarantee or semi-official recommendation.

Paragraph 1 prohibits the unauthorized use of the red cross "irrespective of the date of its adoption", but this phrase does not occur in paragraph 2 in reference to the Swiss arms. The question arises of whether this allows States to reserve the vested rights of those already using the white cross on a red ground. Although this was the intention of the delegation which proposed the deletion of the clause at the Diplomatic Conference, the answer, in our opinion, is "No". The present wording of paragraph 2 is absolute, and an explicit reservation would have been needed to make an exception in the case of prior users. As stated above [1], the corresponding provision in 1929 which, even with regard to the red cross sign, did not contain the words "irrespective of the date of adoption", already excluded any possibility of reserving vested rights. Moreover, State armorial bearings have, as we have just said, been protected for some time past under international and municipal law; abuses should therefore have all disappeared. If some still remain, it is because municipal law is inadequate, or the authorities insufficiently vigorous. There is no justification for prolonging further a situation which we have shown all along to be highly prejudicial.

PARAGRAPH 3 — PERIOD OF GRACE IN STATES NOT PARTY TO THE 1929 CONVENTION

The clauses prohibiting misuse of the red cross sign and misuse of the arms of Switzerland will take immediate effect (as from the entry into force of the Convention in each country) in the case of all States

[1] See above, page 387 (especially footnote 2).

party to the 1929 Convention, this latter treaty having already prohibited such abuses.

The very few States which were not party to the 1929 Convention [1] may grant prior users of the red cross sign up to three years grace, provided that during this period—and this innovation is happily conceived—the signs and emblems used are not such as would appear, in time of war, to confer the protection of the Convention; consequently the only signs which may remain in use for a limited period, are those of a purely indicatory type.

No time limit can be allowed in cases where improper use is made of the flag of the Swiss Confederation. This is commonsense, as State armorial bearings have in fact been protected for longer than the red cross itself.

PARAGRAPH 4 — PROTECTION OF THE ALTERNATIVE EMBLEMS

This provision is entirely new. Formerly, the red crescent and red lion and sun were protected, under municipal law, in the countries which used them instead of the red cross, but no obligation rested on other States; unlawful use of these two alternative emblems is now prohibited in all States party to the Convention.

As paragraph 4 refers back to paragraph 1, the scope of the prohibition is the same here as in the case of the red cross. Imitations are therefore also prohibited [2].

There is one essential difference, however: the prohibition concerning the two alternative emblems does not affect any rights acquired through prior use; it applies only to persons who claim the right to use the emblems after the Convention has come into force.

If this clause had not been inserted, paragraph 4 would never have been adopted. It would, indeed, have been impossible to eliminate

[1] Reference might also have been be made to the 1906 Convention, which already protected the red cross sign; but this Convention did not explicitly prohibit imitations.

[2] It was pointed out at the Diplomatic Conference that boxes of cigarettes manufactured by the Turkish State Tobacco Company were marked with a red crescent, accompanied by stars, on a white ground. This mark, by reason of its colour, appears to us to be an imitation, just as a red cross accompanied by stars or other additions would be.

throughout the world signs which are used as a symbol of neutrality in only a few countries.[1]

ARTICLE 54 — PREVENTION OF MISUSE

The High Contracting Parties shall, if their legislation is not already adequate, take measures necessary for the prevention and repression, at all times, of the abuses referred to under Article 53.

The clauses of the Convention which protect the emblem must be enforced in all States by national legislation, which will continue to be necessary until some kind of international control can be introduced. This is to be hoped for, but, in the present state of the world, seems a doubtful prospect.

Apart from the measures of an administrative nature which the competent authorities must take at all times, it is necessary for each country to enact legislation to prohibit and punish abuses, both collective and individual.

Offences against the protective sign in wartime come naturally under the penal legislation which deals with offences against the laws and customs of war. Other abuses will usually form the subject of special laws in application of the Geneva Conventions; being a part of public or administrative law, these will of course contain penal clauses.

As we have seen, Article 53 should have come in the Chapter on the distinctive emblem; Article 54, on the other hand, is in its proper place in the Chapter on the repression of abuses and infractions. It might even have been incorporated in Article 49 (which binds the Powers generally to take the measures necessary for the suppression of all acts contrary to the provisions of the Convention), and this course was suggested at the Diplomatic Conference of 1949. The point was, however, overlooked by the Committee dealing with the subject, and Article

[1] Iran alone uses the red lion and sun, and is not party to the 1929 Convention which first authorized the use of this alternative symbol. Not being party to the 1906 Convention either, she has contracted no obligation to protect the red cross or red crescent against misuse within her territory. It might, therefore, appear unreasonable to provide for the protection of the red lion and sun in other countries. It is to be hoped that early ratification by Iran of the 1949 Conventions will end this anomaly.

54 was accordingly drawn up as a separate Article to avoid re-opening discussion on Article 49 which had already been adopted.

Article 54 is mandatory, whereas the corresponding provision in 1929 (Article 28, paragraph 1) was not. The earlier clause merely laid down that Governments of Contracting Parties, whose legislation was inadequate, were to adopt or propose to their legislatures the measures necessary to prevent abuse of the emblem. This wording, which gave legislatures the option of refusing the Government's "proposals" partly or *in toto*, was rightly rejected. It is the Contracting Parties themselves —by definition, sovereign States, whose will is expressed by parliamentary votes—which, on ratifying an international Convention, accept all the obligations resulting from it. There is no reason why an exception should be made in so important a case as the protection of the red cross. This singular anomaly has fortunately now disappeared.

Wherever legislation is inadequate—and this is so in the case of all countries, even if only as regards the newly-prescribed protection accorded to the red crescent and the red lion and sun—it must be amended. The Convention sets no time limit. If at all possible, the necessary changes in the legislation of each country should already have been made by the time the Convention comes into force, that is, six months after ratification.

Apart from the improvements mentioned above, Article 53 follows the general lines of the corresponding provision of 1929. This is an advantage, as it will make it easier to introduce the necessary changes in the law.

In most cases, however, national legislation is still most inadequate, even in regard to the 1929 stipulations. It is therefore to be hoped that States, faced with the formal obligations laid upon them under the new text, will avail themselves of the opportunity afforded by its entry into force to enact really effective measures against abuses. For cases of misuse of the emblem and imitations of the emblem are still far too numerous.

There is a further point. The 1949 Conventions increased very considerably the authorized uses to which the emblem can be put. Previously reserved for certain clearly defined categories of persons and objects subject to strict military control, it now covers (with reduced safeguards) civilian hospitals, their staffs, and certain means of transport for sick civilians. The emblem is thus rendered more vulnerable than

before, and there is a vital need for its protection to be reinforced and the vigilance against misuse increased.

In writing of Article 53 we emphasized the various points upon which the internal legislation of States would have to be supplemented or made more specific. To make this important and complicated task easier for the authorities in the different countries, the International Committee of the Red Cross thought it advisable to repeat what it had done in 1932 in connection with the 1929 Convention, and draw up a model law upon which national legislation for the protection of the name and emblem of the Red Cross could be based. The text, which is only intended to serve as a general guide, is given below.

The purpose of the model law is not, however, to suppress abuses of the protective sign; for such abuses, being breaches of the laws of war (hostile acts committed under cover of the red cross, the placing of the red cross on buildings not protected by the Geneva Conventions, the wearing of the armlet by unauthorized persons in the presence of the enemy, etc.), are only possible in case of armed conflict. They are obviously much more serious than the offences covered by the model law and should be punished with greater severity. Penal legislation should therefore also make provision for the repression of the misuse of the emblem in time of war; it should in fact cover all breaches of the Geneva Conventions.

Finally, it is not sufficient merely to enact legislation, however adequate in itself. A close watch must be kept to ensure that abuses are discovered and those responsible prosecuted. It is hoped that in most cases illegal practices will end once a warning has been given. The public authorities responsible for enforcing the law will have a valuable ally here in the National Red Cross Societies. The emblem is in a large measure the heritage of these Societies, and they will do well to watch over it jealously. For it is only at the price of unremitting effort that the red cross symbol can be successfully defended and its profound significance preserved inviolate.

MODEL LAW FOR THE PROTECTION OF THE RED CROSS NAME AND EMBLEM [1]

To give effect to Articles 44, 53 and 54 of the (First) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, to Articles 43, 44 and 45 of the (Second) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, and to Articles 18 to 22 of the (Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949, be it enacted as follows: [2]

ARTICLE 1

The emblem of the red cross on a white ground and the words "red cross" or "Geneva Cross" shall be reserved at all times for the protection or indication of personnel and material protected by the First and Second Geneva Conventions of August 12, 1949 [3], that is to say establishments, units, personnel, material, vehicles, hospital ships and small craft of the Medical Service of the land, sea, and air forces, those of the ...[4] Red Cross and other relief societies duly recognized and officially authorized to aid the Medical Service of the armed forces, and chaplains.[5]

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[1] Revised translation. The English wording of the Articles reproduces the French legal terminology of the original draft, and should be taken only as a general guide.

[2] The Preamble may be longer than this, its form depending upon the normal practice followed in each country. It might, for example, draw attention to the fact that the State concerned has ratified the Geneva Conventions, and is thereby obliged to protect the red cross emblem.

[3] The Model Law is based on the 1949 Conventions, but it could also be used by States which are only party to the Geneva Convention of 1929 or the Tenth Hague Convention of 1907.

In countries which have no access to the sea, the references to the Second Geneva Convention and to objects protected by it may be omitted.

[4] The name of the country to be added wherever required.

[5] For the sake of uniformity this paragraph closely follows paragraph 1 of Article 44 of the Convention. It would, however, be more logical to reserve the words "red cross" for the exclusive use of Red Cross institutions (see above, page 329). Similarly, instead of speaking of "protection or indication" it would be preferable to include here the actual ideas which are in fact intended, namely the *wearing* of the emblem by persons and *its use as a marking* on buildings and material.

The emblem may be used for no other purpose, except as provided in Articles 2 to 5 hereunder.

ARTICLE 2

With the express authorization of the State,[1] the red cross emblem may be used to identify the buildings and staff of officially recognized civilian hospitals, hospital zones and localities reserved for the wounded and sick, small craft employed by officially recognized lifeboat institutions for coastal rescue operations, and convoys or specially provided trains, vessels or aircraft conveying wounded and sick civilians, the infirm and maternity cases.

ARTICLE 3

Apart from its work in aid of the military wounded and sick, the... Red Cross may at all times make use of the name and emblem of the red cross in any of its activities which are in conformity with the principles laid down by the International Red Cross Conferences, and in accordance with national legislation and its own Statutes. The conditions for the use of the emblem shall be such that it cannot, when so used, in time of war, be considered as conferring the protection of the Geneva Conventions; the emblem shall be comparatively small in size [2] and may not be placed on armlets or on the roofs of buildings.

The ... Red Cross shall issue regulations governing the use by it of the name and emblem of the red cross; these regulations shall be subject to government approval.

ARTICLE 4

The international Red Cross organizations and their duly authorized personnel shall be entitled to make use, at all times, of the name and emblem of the red cross.

[1] The reference to the State may be replaced throughout by an indication of the competent service. In time of war, it would appear to be necessary for the military authority to be in a position to control and regulate all uses of the red cross sign.

[2] The Geneva Convention does not lay down the maximum dimensions of the purely indicatory sign in terms of actual measurement, but there is no reason why national legislation should not do so. The maximum might, for example, be one metre square in the case of a flag flown over a building, twenty centimetres square for a flag on a vehicle, and two centimetres square in the case of badges worn by individuals.

ARTICLE 5

The red cross emblem may, as an exceptional measure, with the express permission of the ... Red Cross and the Government, be employed in time of peace to identify vehicles used as ambulances, and to mark the position of aid stations exclusively assigned to the purpose of giving free treatment to injured or sick persons.

ARTICLE 6

Any unauthorized person who wilfully makes use of the red cross emblem, or the words "red cross" or "Geneva cross", or any other sign or word constituting an imitation thereof, or liable to be confused therewith, whatever the object of such use, and irrespective of the date of adoption;

in particular anyone who causes such emblems or words to appear on signs, posters, advertisements, prospectuses, or commercial papers;

or who puts them on goods or wrappings, or sells, offers for sale or distributes goods so marked;

shall be liable to imprisonment or a fine.[1]

ARTICLE 7

By reason of the confusion which may arise between the arms of Switzerland and the red cross sign formed, as a compliment to that country, by reversing the Federal colours, the use of the arms of the Swiss Confederation or of marks constituting an imitation thereof, whether as trade-marks or commercial marks, or as parts of such marks, or for a purpose contrary to commercial honesty, or as any other sign used to identify goods, or as a trading sign, or as a means of advertising in whatever form, or in circumstances capable of wounding Swiss national sentiment, shall be prohibited at all times, irrespective of the date of adoption.

Offenders shall be liable to a fine.[2]

[1] The minimum and maximum penalties may be specified here. They must be in keeping with the penal legislation of the State concerned; although less than in the corresponding Article of the military penal code, they should be sufficient to act as a deterrent.

[2] Minimum and maximum penalties may also be specified here.

ARTICLE 8

Trade names, trade-marks and industrial designs or models, which do not conform to the requirements of the present law, shall be refused registration.[1]

ARTICLE 9

Should a corporate body commit an offence under Articles 6 and 7, the shareholders, members, directors, authorized representatives, employees, and members of the board of management or of a controlling or liquidating body, who have committed the said offence shall be liable to a penalty.

ARTICLE 10

The competent authority may order interim measures to be taken, including in particular the seizure of goods and wrappings bearing marks contrary to the present law.

The Court shall, even in case of acquittal, order the removal of unlawful signs and the destruction of tools and apparatus used exclusively for the affixing of such signs.

After the signs have been removed, the goods and wrappings which have been seized shall be returned to their owners.

ARTICLE 11

The present law shall be applicable at all times, without prejudice to those provisions of the military penal code which take effect in wartime.

ARTICLE 12

Articles 4 and 6, and 8 to 11, shall apply, by analogy, to the emblems of the red crescent on a white ground and the red lion and sun on a white ground, as well as to the words "red crescent" and "red lion and sun".

The rights of persons who have employed these emblems or words from a date prior to the entry into force of the present law shall, however, be reserved.

[1] Registration offices, whose exact designation will vary from country to country, might be expressly named. The terminology employed may also vary.

ARTICLE 13

Proceedings shall be instituted automatically by the judicial authorities in all cases of infringement of the present law.

Furthermore, the ... Red Cross shall be entitled to prosecute on its own account, before the competent Courts, persons responsible for infringements of the present law.[1]

ARTICLE 14

The present law shall be effective as from the date of its promulgation.

As from the above date, the law of ... shall cease to have effect.

The competent authority[2] shall be responsible for enforcing the present law.

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[1] The wording may vary according to the country. What is important is that the National Red Cross should be entitled to lodge complaints and be party to the judicial proceedings.

[2] Here indicate the competent authority.

FINAL PROVISIONS

The procedural or diplomatic provisions which it is customary to place at the end of any international Convention to settle the procedure for bringing it into effect, are grouped together under this heading [1]. They are similar in all four Geneva Conventions of 1949 and, except for Article 55 (Languages), correspond closely to the 1929 provisions.

ARTICLE 55 — LANGUAGES [2]

The present Convention is established in English and in French. Both texts are equally authentic.

The Swiss Federal Council shall arrange for official translations of the Convention to be made in the Russian and Spanish languages.

PARAGRAPH 1 — AUTHENTIC TEXTS

This provision begins by noting that the Convention has been drawn up in English and in French. It is a fact that throughout the Diplomatic Conference of 1949, and earlier during the preparatory work, two versions of the same Convention were drawn up simultaneously, French and English both being recognized, on an equal footing, as official working languages. The 1929 Convention had, on the other hand, been concluded in French only, as French was still the leading diplomatic language at that time.

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[1] For general remarks on the final provisions of multilateral Conventions, see Michael BRANDON, *Final Clauses in Multilateral Conventions*, in *The International Law Quarterly*, October, 1951, and the bibliography referred to in the above article.

[2] Article common to all four Conventions. Cf. Second Convention, Article 54; Third Convention, Article 133; Fourth Convention, Article 150.

The paragraph then lays down that both texts are equally authentic —in other words, that each carries the same weight and is as valid as the other. It was to the English version just as much as to the French that the Plenipotentiaries of 1949 appended their signatures. In the same way, ratifications and accessions will be valid for the two versions. States which are party to the Convention are thus bound by one as much as by the other.

The solution thus adopted conforms to the most recent international practice. What will its effect be? On the one hand, the interpretation of the Convention will be made easier, as the two texts can be compared and one will throw light on the other. There will, on the other hand, be an awkward problem to solve when the texts are divergent.

We know how difficult it is, generally, to give exact expression to the same idea in different languages. Moreover, owing to force of circumstances, the Diplomatic Conference was unable to ensure that the two versions corresponded exactly. To overcome the difficulty the International Committee of the Red Cross had proposed, in the drafts prepared by it, that where doubt existed as to the interpretation of a provision, the French version should be taken as the correct one. But this suggestion was not adopted by the Diplomatic Conference.

Where divergencies exist, those responsible for applying the Convention will have to find out what is known in municipal law as the intention of the legislator; in the case in point, this will be the joint will of the parties represented at the Conference. The method adopted will therefore have to be that of legal interpretation with the help of the Final Record of the Conference and the preliminary texts.[1]

PARAGRAPH 2 — OFFICIAL TRANSLATIONS

After drawing up the two authentic texts itself, the Diplomatic Conference entrusted the preparation of official translations into Russian and Spanish to the Swiss Federal Council.[2] This too is an innovation so far as the Geneva Convention is concerned, and has the particular advan-

[1] This procedure is generally followed in countries which, like Switzerland, promulgate their national legislation in several languages, each version being equally valid.

[2] There is also a translation into German made by the Swiss Federal Council, not at the request of the Diplomatic Conference, but under an obligation of Swiss law.

tage of avoiding the production of a variety of different versions in the numerous Spanish-speaking countries.

The official character of these translations resides in the fact that the source from which they are derived was specified in the Convention itself. But the Russian and Spanish texts, unlike the French and English, are not authentic. Should they vary from the French and English versions, it is the latter which will be regarded as correct.

ARTICLE 56 — SIGNATURE [1]

The Present Convention, which bears the date of this day, is open to signature until February 12, 1950, in the name of the Powers represented at the Conference which opened at Geneva on April 21, 1949; furthermore, by Powers not represented at that Conference, but which are parties to the Geneva Conventions of 1864, 1906 or 1929 for the Relief of the Wounded and Sick in Armies in the Field.

The procedure resorted to in order to make the Geneva Conventions a part of positive international law is the one normally adopted—the so-called compound procedure. It comprises two successive stages—namely, the conclusion of the treaty and its entry into force.[2] The first stage is complete when representatives of the Parties have drawn up a final text [3] and when this text has been signed [4] in the name of at least two States. It is the act of signature which is the subject of the Article under consideration. The procedure for bringing the Convention into force is dealt with in the subsequent Articles.

Article 56 begins by laying down that the Convention is to bear the date of the day of signature, viz. 12 August 1949. It should be noted that the other three Geneva Conventions born of the Diplomatic Conference of 1949 also bear this date.

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[1] Article common to all four Conventions. Cf. Second Convention, Article 55; Third Convention, Article 136; Fourth Convention, Article 151.

[2] Certain writers consider, however, that a treaty is not actually "concluded" until it has entered into force.

[3] Attention should be drawn here to the words introducing the Convention: "The undersigned ... have agreed as follows". See above, page 18.

[4] When the signatures are given *ad referendum*, they are subject to confirmation

The Article then gives States an opportunity of having the Convention signed in their name up to 12 February 1950, or within a period of six months.[1] This opportunity is, moreover, extended not only to Powers represented at the Conference but also to those which, although absent from Geneva, were party to the 1864, 1906 or 1929 Conventions.[2] The few States which are not covered by this provision may become parties to the Convention by acceding to it.

As we shall see when discussing the next Article, States are not bound by the Convention until they have ratified it. But the actual act of signature marks the agreement of their Plenipotentiaries to a text, which cannot thereafter be altered. The importance of this act cannot therefore be disregarded. Moreover, the Swiss Federal Council assumes its responsibilities as depositary of the Geneva Conventions, as from the date of signature.

Another point which should be mentioned is that certain delegations made reservations at the time of signature.[3] These reservations will not remain in force, however, unless they are confirmed when the instrument of ratification is deposited.[4]

ARTICLE 57 — RATIFICATION [5]

The present Convention shall be ratified as soon as possible and the ratifications shall be deposited at Berne.

A record shall be drawn up of the deposit of each instrument of ratification and certified copies of this record shall be transmitted by the Swiss Federal Council to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

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[1] Eighteen States signed the Convention on 12 August 1949. Twenty-seven did so on 8 December of the same year at a ceremony organized for the purpose by the Swiss Federal Council, and sixteen did so later within the time limit laid down. The total number of signatory States is thus sixty-one.

[2] Five States availed themselves of this opportunity, two of them having been represented at the Conference by Observers.

[3] For the text of these reservations, see *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. I, pages 342-357.

[4] See below, page 404.

[5] Article common to all four Conventions. Cf. Second Convention, Article 56; Third Convention, Article 137; Fourth Convention, Article 152.

PARAGRAPH 1 — RATIFICATION AND DEPOSIT

Ratification is the formal act by which a Power finally accepts the text of the Convention, which has been signed at an earlier stage by its Plenipotentiaries. This act, performed by the competent body under the municipal law of each country, can alone give the Convention obligatory force and make binding on the State.

The ratification is made effective by the deposit with the Swiss Federal Council, of a communication called the instrument of ratification, which shows the will of the State concerned towards the other States.[1]

The statement that the Convention "shall be ratified as soon as possible" is a pressing recommendation to each country to hasten the above procedure.

In accordance with normal practice, provision has not been made for the direct exchange of ratifications between signatory countries, but for their deposit with a Government which is made responsible for receiving them and for notifying the fact of their reception. This task has been entrusted to the Swiss Federal Council, the traditional depositary of the Geneva Conventions.

PARAGRAPH 2 — RECORD AND NOTIFICATION

Paragraph 2 lays down that the Swiss Federal Council is to draw up a record of the deposit of each instrument of ratification, and transmit a certified copy of this record to signatory and acceding Powers.

Both the record and copies will mention any reservation which may accompany the ratification, so that other States may be informed of them.

In so far as it is possible to follow rules in such a controversial matter, the absence of an objection to a reservation on the part of a State to which it is thus communicated may be taken as denoting assent.

What will be the effect of an objection, by a State party or signatory to the Convention, to a reservation which has been made? This prob-

[1] It is only the deposit of the ratification which has force under international law and not the authorization to ratify which, under the law of the majority of countries, must be given to the Government by Parliament.

lem is at present under discussion. Those in favour of the traditional system claim that such an objection prevents the Power making the reservation from participating in the Convention. On the other hand, those who follow the Pan-American system claim that the objection only prevents the Convention from entering into force as between the Party making the reservation and the State which put forward the objection. The International Court of Justice, in an opinion given in connection with the Genocide Convention, recommended an intermediate solution, in which the criterion adopted would be the compatibility or incompatibility of the reservation with the object of the Convention [1].

In any case, it is obvious that a reservation which is accepted, expressly or tacitly, will only affect the relations which the State making it maintains with other contracting Powers, and not the relations of those Powers among themselves.

As stated above, a reservation made at the time of signature is only valid if it is confirmed at the time of ratification.

ARTICLE 58 — ENTRY INTO FORCE [2]

The present Convention shall come into force six months after not less than two instruments of ratification have been deposited.

Thereafter, it shall come into force for each High Contracting Party six months after the deposit of the instrument of ratification.

PARAGRAPH 1 — THE FIRST TWO RATIFICATIONS

Under this clause, the Convention is to enter into force six months after two instruments of ratification have been deposited.[3]

The Convention will, of course, only enter into force, at this juncture, between the first two States which ratify the Convention, and then only after six months have elapsed from the date on which the second ratification was deposited.

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[1] See also above, page 302, footnote 1.

[2] Article common to all four Conventions. Cf. Second Convention, Article 57; Third Convention, Article 138; Fourth Convention, Article 153.

[3] The text says "*not less than* two instruments of ratification" to meet the improbable case of several States having ratified on the same day.

But that date marks an event of some importance; it is the date on which the Convention becomes an integral part of international law. Henceforward, the Convention exists as such, whereas without these two ratifications, it would never be more than a historical document. Now only does it become possible for a non-signatory State to become party to the Convention by acceding to it.[1]

When the Convention enters into force in a country, it does not follow that all its provisions must be applied immediately. The majority, as indicated in Articles 2 and 3 of the Convention, only require implementation in case of armed conflict.[2] Certain Articles must nevertheless be applied immediately, in peacetime; this is true, for example, of Articles 53 and 54 relating to the misuse of the red cross emblem.

The number of ratifications required before the Convention can enter into force has been reduced to a minimum, which is as it should be, since we are considering a humanitarian Convention of a universal character.

The six months which must elapse in the case of each State [3] before its ratification takes effect should give it time to take such preliminary measures, particularly in the legislative and administrative sphere, as are necessary in view of the new obligations it has assumed.

The Convention which we are studying entered into force on 21 October 1950, Switzerland having ratified it on 31 March 1950, and Yugoslavia on 21 April of the same year.

PARAGRAPH 2 — OTHER RATIFICATIONS

The Convention will enter into force, for each State which subsequently ratifies it, six months after the deposit of the instrument of ratification. From that date, the State in question will be bound by the Convention in its relations with all Powers which have ratified it not less than six months before. Thereafter, it will be bound in its relations with other Powers six months after each of them has ratified the Convention.

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[1] See below, page 459.

[2] See above, page 32.

[3] In practice, the waiting period will be longer in the case of the first State which ratifies the Convention, but only in that one case; the waiting period in this first case will be determined by the date of the second ratification.

Further reference should be made here to the comments on paragraph 1.

ARTICLE 59 — RELATION TO PREVIOUS CONVENTIONS [1]

The present Convention replaces the Conventions of August 22, 1864, July 6, 1906, and July 27, 1929, in relations between the High Contracting Parties.

The object of this Article is to determine how the new rules are to succeed the old ones. By its terms, the 1949 Convention replaces the Conventions of 1864, 1906 and 1929, in relations between the Contracting Parties. That means that the new Convention will only have mandatory force between States which are parties to it. The earlier Conventions will continue to bind, in their mutual relations, States which are party to them without being parties to the 1949 Convention. In the same way, they will govern the mutual relations between Powers which are parties to the earlier Conventions only and those which are parties both to the 1949 Convention and earlier ones.

As similar clauses are to be found in both the 1906 and 1929 Conventions, it follows that any two States will be bound in their mutual relations by the most recent of the Geneva Conventions to which both are parties.

The successive Geneva Conventions may, therefore, be said to coexist in international law. Article 59 does not have the effect of abrogating the earlier Conventions. Even supposing a time came when the latter no longer bound any State at all, they would still preserve a latent existence. For, in the improbable event of a State denouncing the 1949 Convention, the earlier Conventions would become operative once more, and again bind the denouncing Power in its relations with other States. One of the Geneva Conventions would only really disappear, therefore, if all the Powers denounced it formally.

What would be the position with regard to two States, one of which was party to the 1949 Convention only and the other to one of the earlier

[1] Article common to the First, Second and Third Conventions. Cf. Second Convention, Article 58; Third Convention, Article 134.

Conventions only? In strict law, they are not bound in their mutual relations by any Convention. The third paragraph of Article 2 of the Convention bears this out.

But the very nature of the Geneva Conventions demands a less academic and more humane interpretation. Everything points to the fact that we are not considering a number of different Conventions, but successive versions of one and the same Convention—the Geneva Convention, whose principles are concepts of natural law and which merely gives expression to the dictates of the universal conscience. In the example we have given, the two States must therefore consider themselves bound, at any rate morally, by everything which is common to the two Conventions, beginning with the great humanitarian principles which they contain. An effort should be made to settle by special agreement matters dealt with differently in the two Conventions; [1] in the absence of such an agreement, the Parties would apply the provisions which entailed the least extensive obligations.

ARTICLE 60 — ACCESSION [2]

From the date of its coming into force, it shall be open to any Power in whose name the present Convention has not been signed, to accede to this Convention.

We have seen that in the case of the signatory Powers, the Convention becomes binding following ratification by them. We now see that any Power which has not signed the Convention may accede to it.

No limitation or condition is imposed except that the Convention must have already entered into force. The invitation is addressed to all States, whether they are or are not parties to one of the earlier Conventions. The Geneva Convention, which draws its strength from its traditional universality is, as in 1929, pre-eminently a treaty open to all.[3]

[1] We are thinking, for example, of the status of medical personnel who have fallen into the hands of the adverse Party.

[2] Article common to all four Conventions. Cf. Second Convention, Article 59; Third Convention, Article 139; Fourth Convention, Article 155.

[3] The Geneva Convention of 1906 did not yet possess this characteristic in the same degree. (See Article 32 of the Convention in question.)

Accession is exactly the same in its effect as ratification, to which it is equivalent in all respects.

An accession can, however, only take place after the entry into force of the Convention, that is to say, six months after the first two instruments of ratification have been deposited. The Convention has thus been open to accession since 21 October 1951.

ARTICLE 61 — NOTIFICATION OF ACCESSIONS [1]

Accessions shall be notified in writing to the Swiss Federal Council, and shall take effect six months after the date on which they are received.

The Swiss Federal Council shall communicate the accessions to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

Unlike earlier practice, an accession operates today in the same manner as a ratification. Like the latter, it takes effect six months after it has been deposited, and it is once again the Swiss Federal Council which is responsible for receiving accessions and notifying the other Powers.

Article 61 does not specify, as Article 57 does in the case of ratifications, that the Federal Council is to draw up a record of each accession, nor that it must transmit a copy of the record to other States. But there is no reason, in practice, for not observing the same forms in both methods of becoming a party to the Convention.

If the accession is accompanied by reservations, the latter will be dealt with in the same manner as reservations made at the time of ratification.[2]

ARTICLE 62 — IMMEDIATE EFFECT [3]

The situations provided for in Articles 2 and 3 shall give immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation.

[1] Article common to all four Conventions. Cf. Second Convention, Article 60; Third Convention, Article 140; Fourth Convention, Article 156.

[2] See above, page 404.

[3] Article common to all four Conventions. Cf. Second Convention, Article 61; Third Convention, Article 141; Fourth Convention, Article 157.

The Swiss Federal Council shall communicate by the quickest method any ratifications or accessions received from Parties to the conflict.

Should war break out, or a similar situation arise—cases for which the Convention has been specifically designed—it is obvious that the entry into force of the latter cannot be subject to the six months waiting period which follows ratification or accession under normal peacetime conditions.

A ratification or the notification of an accession will therefore take effect immediately as far as the country or countries affected by such events are concerned. The Convention will enter into force from the outbreak of hostilities or the beginning of occupation if the ratification has already been deposited, or from the date of the deposit of the ratification if it is deposited later.

The 1929 Convention contained a similar provision, but only referred to "a state of war". The 1949 text refers to Articles 2 and 3, since an essential object of these two new Articles is to define the situations in which the Convention is to be applied—namely, cases of declared war or of any other armed conflict, even if a state of war is not recognized by one of the Parties (Article 2, paragraph 1) [1], the total or partial occupation of a territory, even if it meets with no armed resistance (Article 2, paragraph 2), and, lastly, armed conflicts not of an international character (Article 3).

The Article which we are studying also mentions that the Federal Council is to communicate ratifications or accessions to signatory States "by the quickest method". A serious turn of events demands the taking of urgent measures. The customary procedure, as laid down in Article 57, paragraph 2, is no longer required. Suitable means, such as a telegram, will be used.

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[1] The ratification or accession of a Power will also clearly take effect immediately where its opponent in the conflict is a Power which is not party to the Convention, even if that Power refuses to apply the latter's provisions. The third paragraph of Article 2, which raises the principle of reciprocity, only affects the application of the Convention and not its entry into force, and can in no way prevent the immediate effect of the ratification. The fact that a conflict has broken out or that a similar situation has arisen is the only determining factor here; the enemy's position with regard to the Convention does not affect the issue.

ARTICLE 63 — DENUNCIATION[1]

Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties.

The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, 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 release and repatriation of the persons protected by the present Convention have been terminated.

The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

PARAGRAPH 1 — RIGHT OF DENUNCIATION

This clause gives any Contracting Power the right to withdraw unilaterally from the community of States parties to the Convention. In the absence of such a provision, a withdrawal would not be possible except by consent of the other Contracting Parties.

The clause might be said to be a matter of form; for the Geneva Convention has been in existence for nearly a century and during that time no State has ever denounced it. Can it really be thought that in the future any Power may wish to repudiate such elementary rules of humanity and civilization? The most which one could possibly conceive of would be a denunciation made with the sole object of bringing an earlier version of the Convention into force.

[1] Article common to all four Conventions. Cf. Second Convention, Article 62; Third Convention, Article 142; Fourth Convention, Article 158.

Besides, even if a State were to denounce the Geneva Convention, it would still be bound by the principles of that Convention, which are to-day the essential expression of valid international law in this sphere.[1]

PARAGRAPH 2 — NOTIFICATION

Denunciations, like accessions, must be notified in writing to the Swiss Federal Council, in its capacity as depositary of the Geneva Conventions. The Federal Council will transmit them to the other Contracting Parties.

PARAGRAPH 3 — NOTICE

A denunciation will not take effect immediately; under normal peacetime conditions, it will only take effect after one year has elapsed.

Should the denouncing Power be involved in a conflict[2], the waiting period will be prolonged, the denunciation not taking effect until peace has been concluded[3], or even, where applicable, until the release and repatriation of protected persons is complete.[4] This clause is the counterpart of the preceding Article; it, too, is dictated by the best interests of the victims of war.

According to the actual letter of the Convention, the prolongation of the waiting period only affects denunciations notified "at a time when the denouncing Power is involved in a conflict" and not those notified before the conflict began, the latter being subject to a waiting period of one year. But the spirit of this Article, like that of the preceding one, demands that it should be applied in a broader sense and that a denunciation notified less than a year before a conflict breaks out should also have its effect suspended until the end of the conflict in question. This is the solution provided for in the corresponding Article of the 1929 Convention (Article 38, paragraph 3), and it is the only one which meets

[1] See comments on paragraph 3.

[2] The word "conflict" must obviously be understood in its broadest sense; it covers the various situations described in Articles 2 and 3.

[3] The wording used shows clearly that it is the formal conclusion of the peace treaty which is meant and not merely the ending of military operations. In cases of conflict not of an international character, it will mean the effective re-establishment of peaceful conditions.

[4] This provision may be compared with Article 5. See above, page 64.

humanitarian requirements. The restrictive character assumed by the 1949 text in regard to this point would appear to have resulted purely and simply from a drafting error.

PARAGRAPH 4 — EFFECT OF DENUNCIATION

The paragraph begins by laying down that the denunciation is to have effect only in respect of the denouncing Power. That is self-evident.

The next sentence, which did not exist in the earlier Conventions but originated in a proposal by the XVIIth International Red Cross Conference, is no less logical. It lays down that the denunciation is not to impair the obligations which the Parties to the conflict remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

Vague and self-evident as it undoubtedly is, such a clause is nevertheless useful, as it reaffirms the value and permanence of the lofty principles underlying the Convention. These principles exist independently of the Convention and are not limited to the field covered by it. The clause shows clearly, as we have said above, that a Power which denounced the Convention would nevertheless remain bound by the principles contained in it insofar as they are the expression of inalienable and universal rules of customary international law.

The provision takes its whole significance from the fact that the Convention contains no proper Preamble.[1] That is where it would have been most appropriately placed. Its affinity to the eighth paragraph of the Preamble to the Fourth Hague Convention of 1907—the so-called Martens clause—is evident.

ARTICLE 64 — REGISTRATION WITH THE UNITED NATIONS [2]

The Swiss Federal Council shall register the present Convention with the Secretariat of the United Nations. The Swiss Federal Council shall also inform the Secretariat of the United Nations of all ratifications,

[1] See above, page 22.

[2] Article common to all four Conventions. Cf. Second Convention, Article 63; Third Convention, Article 143; Fourth Convention, Article 159.

accessions and denunciations received by it with respect to the present Convention.

It is now laid down that the Geneva Convention of 1949 is to be registered with the Secretariat of the United Nations, just as it was provided previously that the Convention of 1929 was to be deposited in the archives of the League of Nations. States Members of the United Nations are obliged to have the international treaties which they conclude registered. If this were not done, they would not be able to invoke them before an organ of the United Nations [1], and there is always the possibility that a dispute regarding the application or interpretation of the Convention may be brought before the International Court of Justice, as a resolution of the Diplomatic Conference of 1949 in fact recommends.[2] Registration with the United Nations also helps to make treaties more widely known.

The obligation to register the Convention is not, however, a condition of its validity, which results solely from the procedure laid down in Articles 57 to 61, which we have just been studying.

It is naturally the Swiss Federal Council which has to arrange for the registration of the Convention with the Secretariat of the United Nations, just as it has to inform the latter of any ratifications, accessions and denunciations which it receives.

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[1] See Article 18 of the Covenant of the League of Nations and Article 102 of the United Nations Charter.

[2] See Resolution 1 below, page 431.

ANNEX I

DRAFT AGREEMENT RELATING TO HOSPITAL ZONES AND LOCALITIES

In our comments on Article 23 of the Convention, which invites Powers to establish hospital zones and localities to shelter wounded and sick members of the armed forces, we referred several times to the Draft Agreement which the Diplomatic Conference of 1949 decided to annex to the text of the Convention.[1]

As we have already seen, the Draft Agreement has only been proposed to States as a model. But the fact that it was carefully drafted at the Diplomatic Conference and that the latter finally adopted it, gives it a very real value. Its stipulations should therefore be taken as a basis without further discussion, whenever a hospital zone is to be established.

In view of its importance, brief comments on the Draft Agreement are given below.

ARTICLE 1 — BENEFICIARIES

Hospital zones shall be strictly reserved for the persons named in Article 23 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, and for the personnel entrusted with the organization and administration of these zones and localities and with the care of the persons therein assembled.

Nevertheless, persons whose permanent residence is within such zones shall have the right to stay there.

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[1] See above, page 206.

Article 1 determines the categories of persons who will be entitled to reside in hospital zones[1].

Paragraph 1 covers the same ground as Article 23 of the Convention, to which it refers. Reference should therefore be made to our comments on that Article, for particulars of the categories covered—namely, the wounded and sick, medical personnel and personnel responsible for the organization and administration of the zones.[2]

We should perhaps add that in our opinion the expression "personnel entrusted with the organization and administration of the zones" must be taken in a fairly broad sense, to include, for example, the police, the services responsible for preventing the entry into the zone of persons who have no right to reside there, and the fire and passive defence services, as well as members of the Commissions of control provided for in Article 8 of the Draft Agreement.

Paragraph 2 is concerned with the resident population which, although not mentioned in the Convention itself, must nevertheless be taken into account—especially when dealing with hospital zones of some magnitude. Residents in the zone have certain obligations which will be discussed in connection with the following Article.

The Monaco Draft[3] authorized the temporary residence in a hospital zone of members of the armed forces on leave who originally came from the area in question. This would appear to be allowed by the existing text, and the same facility might well be extended to workers back on holiday from factories engaged in war production.

ARTICLE 2 — PROHIBITED WORK

No persons residing, in whatever capacity, in a hospital zone shall perform any work, either within or without the zone, directly connected with military operations or the production of war material.

The Agreement we are discussing is only concerned with hospital zones reserved for military wounded and sick, and not with safety zones

[1] Under Article 13 of the Draft Agreement, the latter applies to hospital localities as well as to hospital zones. Everything said in regard to the zones should therefore be taken as also applying to localities.

[2] See above, page 213.

[3] See above, page 208.

for certain categories of the civilian population.[1] Consequently, the above provision will, with very few exceptions, appy in practice to the local population alone. The wounded and sick, and medical personnel, will quite obviously be unable to undertake productive work.

What is meant by "work directly connected with military operations"? A similar expression had already been used in the 1929 Prisoners of War Convention when describing work which prisoners could not be compelled to do. Owing to its vagueness, it was given various interpretations, and when the Third Convention was revised in 1949, the Diplomatic Conference made a point of defining the idea more fully in Article 50 which it may be profitable to refer to here. The Article in question authorizes the employment of prisoners of war on the following classes of work:

(a) agriculture;

(b) industries connected with the production or the extraction of raw materials, and manufacturing industries, with the exception of metallurgical, machinery and chemical industries; public works and building operations which have no military character or purpose;

(c) transport and handling of stores which are not military in character or purpose;

(d) commercial business, and arts and crafts;

(e) domestic service;

(f) public utility services having no military character or purpose.

There is less difficulty about the expression "production of war material". It goes without saying that the manufacture of arms is excluded, and so is the manufacture of any article, substance or apparatus which will be used solely by the army. There are, however, a number of doubtful cases—the manufacture of lorries, for example, since such vehicles may be used exclusively for civilian purposes, but may also be used by the armed forces.

As can be seen, the solution provided by Article 2 is not as complete as could have been desired. This is one of the points which States might deal with in greater detail when bringing the Agreement into force.

[1] Safety zones form the subject of another Draft Agreement, annexed to the Fourth Geneva Convention of 1949.

Nevertheless, in view of the difficulty of the question, it would, we feel, be well to make every effort to ensure that the local population in a hospital zone is always as small as possible.

ARTICLE 3 — PROHIBITED ACCESS

The Power establishing a hospital zone shall take all necessary measures to prohibit access to all persons who have no right of residence or entry therein.

This obligation, which follows naturally from Article 1, calls for no particular comment.

In practice, a fairly large police force will no doubt be required, since it is to be feared that under certain circumstances unauthorized persons may try to enter the zones in considerable numbers.

ARTICLE 4 — CONDITIONS

Hospital zones shall fulfil the following conditions :

(a) *They shall comprise only a small part of the territory governed by the Power which has established them.*

(b) *They shall be thinly populated in relation to the possibilities of accommodation.*

(c) *They shall be far removed and free from all military objectives, or large industrial or administrative establishments.*

(d) *They shall not be situated in areas which, according to every probability, may become important for the conduct of the war.*

This Article fixes the conditions which hospital zones must fulfil. We shall consider in turn the four conditions laid down.

(a) Size. — Hospital zones must only occupy a small part of the country's territory. It would obviously be inadmissible for a State to establish a hospital zone covering half the country. The very idea of zones of refuge implies a relatively limited area, and in any case the

adverse Party would be unlikely to accord recognition to very large zones which might seriously impede military operations.

(b) Population. — The requirement that hospital zones should be thinly populated in relation to the possibilities of accommodation in them brings out the necessity for organizing such zones systematically in advance. It might otherwise be difficult to find an area fulfilling the condition set here. Watering-places or spas with numerous hotels and clinics would no doubt be suitable.

Should there be a sudden increase in the number of persons requiring protection, it will be necessary to bear in mind the possibilities opened up by the Fourth Geneva Convention which, in its Article 15, authorizes the establishment of neutralized zones where wounded or sick combatants or non-combatants and able-bodied civilians can both be concentrated.

As we have already said, the permanent population of a hospital zone should be as small as possible; for if it were necessary to resort to transfers of population and evictions, serious difficulties might arise.

(c) Remoteness from military objectives.—The essential condition—the very essence of the whole scheme—is that there should be no military objective either within the zones or in their vicinity.

There was no reason to insert a definition of a military objective here; it was enough to use the term, which must be understood in its broadest sense. As the whole object is to provide those enjoying the protection of the zones with the greatest possible measure of safety, it is necessary to remove from the zone and its neighbourhood anything which the enemy might regard as a military objective, in order to avoid objections when the question of the recognition of the zone arises.

It is for this reason that the text also excludes "large industrial and administrative establishments"—which in no way means that they are to be regarded as being military objectives. Nor can lines of communication which serve the zone, and will not, under the Agreement, be utilized for military purposes, be considered possible objects of attack.

The Draft Agreement does not say at what distance the zones must be from such objectives and establishments. Here again, the criterion will be the safety of the zone in actual practice. States find no difficulty in solving a similar problem in peacetime when they fix the boundaries of the danger zone surrounding an artillery range.

(d) Choice of area. — The zones must not be situated in areas which, according to every probability, may become important for the conduct of the war. This condition sets States a particularly difficult problem. As a general rule, they do not know the strategical plans of the enemy, who will keep them secret for as long as possible. Often they do not even know which countries they will have to face. The most which the authorities responsible for deciding the location of the zones will know for certain, will be the plans of their own armed forces. It will be difficult for them to fulfil the present condition if they intend to take into account all possible moves by the enemy.

In most countries, however, there are certain areas which more or less answer this requirement by reason of their geographical configuration and lessons drawn from the past. The authors of the provision have, moreover, been wise enough to insert the words "according to every probability".

If a zone, contrary to the expectation of the State which established it, happened to acquire real military importance as a result of events, the adverse Party would admittedly be justified in declaring that it would no longer recognize it after the expiry of a reasonable period.

ARTICLE 5 — OBLIGATIONS

Hospital zones shall be subject to the following obligations :

(a) *The lines of communication and means of transport which they possess shall not be used for the transport of military personnel or material, even in transit.*

(b) *They shall in no case be defended by military means.*

In addition to the conditions which we have just considered, hospital zones must fulfil two obligations, which we shall examine in turn.

(a) Exclusion of military transport. — The 1938 Draft Convention [1], like the Monaco Draft, expressly authorized military convoys in transit to make temporary use of lines of communication and transport crossing a hospital zone. Certain experts had, however, opposed the provision, pointing out that the halting of a convoy in a zone might give rise to

[1] See above, page 209.

abuses and to disputes as to the duration of the halt and the strategical purpose served by it, quite apart from interfering with the proper functioning of the zone. Taking these important arguments into consideration, the International Committee of the Red Cross felt bound to exclude such utilization of the zone entirely when drawing up the Draft Agreement.

The same experts had also objected to the passage of convoys of civilians in transit. But later Conferences did not re-examine this problem and the text of Article 5, as it stands, does not appear to exclude such transit. The practice is not to be recommended, however, in view of the difficulties to which it may give rise.

A hospital zone may possess an aerodrome, provided it only serves the needs of the zone.

The obligation under the Article we are studying will undoubtedly influence the siting of any zones set up. Preference will be given to areas in which there are no main railway lines or roads, for fear of paralysing the system of communications, and interfering with the normal life of the country.

(b) Absence of military defence. — Since hospital zones must be respected and protected (Article 11 of the Draft Agreement) in the same way as a military hospital, they quite obviously may not be defended by military means. Should enemy forces penetrate to the boundaries of a zone, no resistance will be offered, and the enemy will have the right to assume control of the zone, but not to modify its organization. In the same way, batteries of anti-aircraft artillery may not be located in the zone.

On the other hand, the use of the phrase *by military means* implies that zones may be defended against other dangers. They will, for example, possess a police force capable of maintaining law and order; this police force may prevent individuals from penetrating unlawfully into the zone, either individually or in groups. Again, it is legitimate for a passive defence service to exist in the zone and for air raid shelters to be constructed there.

There is no mention, either in the Draft Agreement or the Convention, of the flight of aircraft over hospital zones. In the absence of any special provision, it must be assumed that both friendly and enemy aircraft may fly over them.

ARTICLE 6 — MARKING

Hospital zones shall be marked by means of red crosses (red crescents, red lions and suns) on a white background placed on the outer precincts and on the buildings. They may be similarly marked at night by means of appropriate illumination.

Hospital zones are intended to shelter categories of persons and things which are already protected under the Convention and consequently covered by the red cross emblem. It was therefore only reasonable to extend the use of the distinctive emblem to such zones[1]. This principle, which has never been questioned, was already expressed in the original draft provisions.

However, since the use of the red cross emblem is expressly governed by the Geneva Convention and since a hospital zone may include a considerable amount of territory and a resident population, such an extension requires the formal agreement of the parties concerned. That is the purpose of the present Article of the Draft Agreement.

The first sentence makes the marking of zones compulsory. The second sentence makes illumination at night optional. The absence of any distinctive marking by night would undoubtedly expose the zone to risks; on the other hand, the illumination of certain parts of a territory may, as we know, provide enemy aircraft with landmarks which will assist them in attacking military objectives.

ARTICLE 7 — NOTIFICATION AND RECOGNITION

The Powers shall communicate to all the High Contracting Parties in peacetime or on the outbreak of hostilities, a list of the hospital zones in the territories governed by them. They shall also give notice of any new zones set up during hostilities.

As soon as the adverse Party has received the above-mentioned notification, the zone shall be regularly constituted.

[1] On the other hand, it was necessary to adopt another solution in the case of safety zones, which are intended to shelter certain elements of the civilian population. See Article 6 of the Draft Agreement annexed to the Fourth Convention of 1949.

If, however, the adverse Party considers that the conditions of the present agreement have not been fulfilled, it may refuse to recognize the zone by giving immediate notice thereof to the Party responsible for the said zone, or may make its recognition of such zone dependent upon the institution of the control provided for in Article 8.

The above provision is not in its proper place in the Draft Agreement, its first paragraph relating to a period of time before the conclusion of the Agreement.[1] A provision of this nature should have been inserted in the Convention itself.

Be that as it may be, the basis which the Article offers to States is a most valuable one. Besides, the Powers concerned might well bring the Draft Agreement into force before the zones have been established.

ARTICLE 8 — CONTROL

Any Power having recognized one or several hospital zones instituted by the adverse Party shall be entitled to demand control by one or more Special Commissions, for the purpose of ascertaining if the zones fulfil the conditions and obligations stipulated in the present agreement.

For this purpose, the members of the Special Commissions shall at all times have free access to the various zones and may even reside there permanently. They shall be given all facilities for their duties of inspection.

It is only reasonable that a belligerent who recognizes a zone established by the opposing party should be able to demand the setting up of a controlling body to ascertain, for example, if the obligations under Articles 4 and 5 of the Agreement are duly fulfilled.

The draft submitted to the Diplomatic Conference stipulated that this function should be entrusted to the Power protecting the interests of the State which had recognized the zone. It would have been possible in this way to utilize an organization ready to carry out the work on the spot. The Conference was nevertheless unwilling to agree to this

[1] Article 23 of the Convention reads: "Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements ...". See above, page 206.

solution, as they considered that the Protecting Powers were already overburdened with multifarious tasks.

The Draft Agreement accordingly entrusts control to Special Commissions. Their composition is not indicated, however; nor is it said by whom their members will be appointed. These points will have to be settled at the time the Agreement is concluded. The members of the Commissions will no doubt be neutrals, chosen by mutual agreement between the belligerents and representing either the Protecting Powers or other neutral States.

The Agreement does not specify the qualifications or qualities which members of the Commissions must possess. As their main duty will be to supervise the execution of measures of a military nature, it will usually be desirable to obtain the assistance of officers, such as the military attachés of the Protecting Power or other neutral Powers. The participation of doctors would also appear to be indicated.

In order to be able to carry out their task, the members of the Commissions will at all times have free access to the various zones; they may even reside there permanently.

ARTICLE 9 — SANCTIONS

Should the Special Commissions note any facts which they consider contrary to the stipulations of the present agreement, they shall at once draw the attention of the Power governing the said zone to these facts, and shall fix a time limit of five days within which the matter should be rectified. They shall duly notify the Power who has recognized the zone.

If, when the time limit has expired, the Power governing the zone has not complied with the warning, the adverse Party may declare that it is no longer bound by the present agreement in respect of the said zone.

PARAGRAPH 1 — WARNING

As we saw when considering Article 8, the task of the Commissions is to make sure that the zones duly fulfil the conditions and obligations arising out of the Agreement. Should the Commissions note facts contrary to its stipulations, they should at once bring them to the notice

of the Power governing the zone and also notify the Power which has recognized it.

The wording of the Article shows clearly that the role of the Commissions is to note any cases where the rules governing the establishment of zones are not observed, and not cases of violation by the adverse Party. The Draft Agreement might be supplemented as regards the latter point; it might, for example, contain a reference to Article 52 of the Convention, which fixes the procedure for enquiries into cases of violation.[1]

The non-utilization of a zone for the purpose stipulated in the Agreement would no doubt in itself justify intervention by the Commission of control.

PARAGRAPH 2 — WITHDRAWAL OF RECOGNITION

If, on the expiry of the five days grace allowed by the Commission of control, the Power responsible for the zone has not complied with the warning, the adverse Party may declare that it is no longer bound by the Agreement in respect of the said zone.

The 1938 Draft laid down that representations should first be made to the State which established the zone. Should these be unsuccessful, the Commission of control could resign its mandate. The text adopted by the Diplomatic Conference is very nearly identical with that submitted at the XVIIth International Red Cross Conference.

The wording of paragraph 2 implies that when the time limit of five days allowed to the establishing State has expired, the Commission of control is to address itself a second time to the adverse Party; only then may the latter declare that it is no longer bound by the Agreement in respect of the zone in question.

What would the consequence of such a declaration be? It would put an end to the privileged position of the zone, but it would not deprive the persons and property there of protection. The wounded and sick, and medical units, establishments, personnel and equipment would still be protected under the Geneva Convention. The local population, for their part, would continue to benefit by the general immunity which

[1] See above, p. 374. This was the solution adopted in the 1938 Draft, which referred to Article 30 of the 1929 Convention.

international law assures them, and by the provisions of the Fourth Geneva Convention.

Article 6 of the First Convention (Article 7 of the Fourth Convention) lays down that no special agreement may adversely affect the situation of protected persons, nor restrict the rights which the Convention confers upon them. Article 9 of the Draft Agreement cannot, therefore, be interpreted as depriving the persons and property in a zone of the protection accorded them, independently of the Agreement, by the Conventions themselves. It should be remembered, finally, that the discontinuance of the protection to which medical establishments are entitled is subject to the conditions laid down in Article 21 of the Convention.

ARTICLE 10 — NOMINATION OF MEMBERS OF THE COMMISSIONS

Any Power setting up one or more hospital zones and localities, and the adverse Parties to whom their existence has been notified, shall nominate or have nominated by neutral Powers, the persons who shall be members of the Special Commissions mentioned in Articles 8 and 9.[1]

As we have seen above, neither the Convention nor the Draft Agreement lays down the procedure for the setting up of the Special Commissions and the nomination of their members. Article 10 of the Draft Agreement merely gives general directions which cannot be applied by the belligerents as they stand. The Agreements concluded should therefore lay down the exact procedure in regard to these two matters.

The following is a brief review of the solutions envisaged in the earlier drafts.

The Monaco Draft proposed a Commission whose members, appointed by a specified authority (the Permanent Court of International Justice or a specially constituted international body), "must be approved by the Government concerned".

The draft submitted to the XVIth International Red Cross Conference in 1938 provided for two distinct Special Commissions, viz.:

[1] The Draft Agreement under consideration differs—no doubt due to a clerical error—from that annexed to the Fourth Geneva Convention, in which, in place of the words "or have nominated by neutral Powers", we find the words "or have nominated by the Protecting Powers or by other neutral Powers". The latter wording is to be preferred.

(a) a Commission composed of neutral nationals nominated by the Protecting Powers and agreed to by the Powers concerned, which had to carry out its duties from the time the hospital zones were brought into actual use;

(b) an International Commission of Enquiry composed of neutrals and set up in time of peace for the purpose of intervening on the request of a belligerent or of the Commission of control.

The 1938 Draft merely proposed having a single Commission of control for each country; it was to be composed of three neutral members appointed by the International Committee of the Red Cross and approved by the State concerned.

The Draft Agreement submitted to the XVIIth International Red Cross Conference in 1948, entrusted inspection of the zones to the Protecting Powers; the inspection was to be carried out when requested by the adverse Party.

ARTICLE 11 — RESPECT OF THE ZONES

In no circumstances may hospital zones be the object of attack. They shall be protected and respected at all times by the Parties to the conflict.

As a natural consequence of their being declared neutral, hospital zones must never be attacked. There is also a positive obligation; they are to be protected and respected by the belligerents at all times.

The authors have deliberately used the phrase *protected and respected,* which the Geneva Convention applies consistently to the persons, buildings and objects which it safeguards. The 1938 Draft referred expressly to the Convention, saying: "they shall be respected and protected in accordance with Article 6 of the Geneva Convention of 1929".

The traditional sense attaching to these two words creates positive obligations of wider implication than a mere prohibition of attack.[1] Protection must be extended, in particular, to the arrangements for supplying the zones and possibly also to the communications leading to them. In case of occupation, the enemy will, moreover, be respon-

[1] See above, page 196.

sible for the welfare of persons residing in the zone. This responsibility also falls on the Power establishing the zone.

The corresponding Article in the draft submitted to the XVIIth International Red Cross Conference included a second paragraph, according to which, enemy forces reaching the outskirts of a zone could cross it without halting there. This provision has been dropped.

ARTICLE 12 — OCCUPATION

In the case of occupation of a territory, the hospital zones therein shall continue to be respected and utilized as such.

Their purpose may, however, be modified by the Occupying Power, on condition that all measures are taken to ensure the safety of the persons accommodated.

The occupying State is required to respect hospital zones and to utilize them as such. This obligation is new. The 1938 Draft merely made the continued use of the zone optional: it was to continue in use as a hospital zone in the absence of notification to the contrary by the Occupying Power or opposition on the part of the dispossessed enemy. The first mention of an obligation was in the proposals submitted by the International Committee of the Red Cross to the Conference of Experts of 1947; the idea was maintained in the various drafts, and in the final text of 1949.

The Occupying Power may, however, modify the purpose to which the zones are put. The reference here is to persons admitted to the zones and sheltered there. The Occupying Power will be free to place its own wounded in a hospital zone, after making suitable arrangements for those who were there at the time of occupation. But it is not entitled to expel the local population.

The Draft does not say when the zones are to cease to exist as such. The prevailing opinion would appear to have been that this was a question for the establishing State to decide.[1] As obligations laid upon the establishing State are at the same time safeguards for the enemy, it would appear desirable for the Agreement to fix the conditions governing

[1] See René CLEMENS, *Le Projet de Monaco*, p. 222.

liquidation, or, at least, that the utilization of the zone should be for a limited period, which could, if necessary, be extended.

ARTICLE 13 — HOSPITAL LOCALITIES

The present agreement shall also apply to localities which the Powers may utilize for the same purposes as hospital zones.

We have already indicated that the provisions of the Draft Agreement apply to localities established by the belligerents as well as to zones. There is no essential difference between the two.[1] The above remarks therefore apply to one as much as to the other.

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[1] For a definition of the two terms, see above, page 206

ANNEX II

Model identity card for medical personnel and chaplains attached to the armed forces (See above, page 313).

Front

(Space reserved for the name of the country and military authority issuing this card)

IDENTITY CARD

for members of medical and religious personnel attached to the armed forces

Surname .....

First names .....

Date of birth .....

Rank .....

Army number .....

The bearer of this card is protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, in his capacity as

.....

Date of Issue ..... Number of Card .....

Reverse Side

Photo of bearer

Embossed stamp of military authority issuing card

Signature or fingerprints or both

Height	Eyes	Hair
.....	.....	.....

Other distinguishing marks

.....

.....

.....

.....

.....

RESOLUTIONS
OF THE DIPLOMATIC CONFERENCE OF GENEVA, 1949

In addition to the four Geneva Conventions which it produced, the Diplomatic Conference of 1949 adopted eleven resolutions. They are given below, with reference where necessary to the relevant portions of the Commentary.

Resolution 1

The Conference recommends that, in the case of a dispute relating to the interpretation or application of the present Conventions which cannot be settled by other means, the High Contracting Parties concerned endeavour to agree between themselves to refer such dispute to the International Court of Justice [1].

Resolution 2

Whereas circumstances may arise in the event of the outbreak of a future international conflict in which there will be no Protecting Power with whose cooperation and under whose scrutiny the Conventions for the Protection of Victims of War can be applied; and

whereas Article 10 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, Article 10 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, Article 10 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, and Article 11 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949, provide that the

[1] See above, pages 130 and 379.

High Contracting Parties may at any time agree to entrust to a body which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the aforesaid Conventions,

the Conference recommends that consideration be given as soon as possible to the advisability of setting up an international body, the functions of which shall be, in the absence of a Protecting Power, to fulfil the duties performed by Protecting Powers in regard to the application of the Conventions for the Protection of War Victims.[1]

Resolution 3

Whereas agreements may only with difficulty be concluded during hostilities;

whereas Article 28 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, provides that the Parties to the conflict shall, during hostilities, make arrangements for relieving where possible retained personnel, and shall settle the procedure of such relief;

whereas Article 31 of the same Convention provides that, as from the outbreak of hostilities, Parties to the conflict may determine by special arrangement the percentage of personnel to be retained, in proportion to the number of prisoners and the distribution of the said personnel in the camps,

the Conference requests the International Committee of the Red Cross to prepare a model agreement on the two questions referred to in the two Articles mentioned above and to submit it to the High Contracting Parties for their approval.[2]

Resolution 4

Whereas Article 33 of the Geneva Convention of July 27th, 1929, for the Relief of the Wounded and Sick in Armies in the Field, concerning the identity documents to be carried by medical personnel, was only partially observed during the course of the recent war, thus creating serious difficulties for many members of such personnel,

the Conference recommends that States and National Red Cross Societies take all necessary steps in time of peace to have medical per-

[1] See above, page 116.
[2] See above, pages 257 and 267.

sonnel duly provided with the badges and identity cards prescribed in Article 40 of the new Convention.[1]

Resolution 5

Whereas misuse has frequently been made of the Red Cross emblem,

the Conference recommends that States take strict measures to ensure that the said emblem, as well as other emblems referred to in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, is used only within the limits prescribed by the Geneva Conventions, in order to safeguard their authority and protect their high significance.[2]

Resolution 6

Whereas the present Conference has not been able to raise the question of the technical study of means of communication between hospital ships, on the one hand, and warships and military aircraft, on the other, since that study went beyond its terms of reference;

whereas this question is of the greatest importance for the safety and efficient operation of hospital ships,

the Conference recommends that the High Contracting Parties will, in the near future, instruct a Committee of Experts to examine technical improvements of modern means of communication between hospital ships, on the one hand, and warships and military aircraft, on the other, and also to study the possibility of drawing up an International Code laying down precise regulations for the use of those means, in order that hospital ships may be assured of the maximum protection and be enabled to operate with the maximum efficiency.[3]

Resolution 7

The Conference, being desirous of securing the maximum protection for hospital ships, expresses the hope that all High Contracting Parties to the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, will arrange that, whenever conveniently practicable,

[1] See above, page 315.
[2] See above, page 335.
[3] See above, page 290.

such ships shall frequently and regularly broadcast particulars of their position, route and speed.

Resolution 8

The Conference wishes to affirm before all nations:

that, its work having been inspired solely by humanitarian aims, its earnest hope is that, in the future, Governments may never have to apply the Geneva Conventions for the Protection of War Victims;

that its strongest desire is that the Powers, great and small, may always reach a friendly settlement of their differences through cooperation and understanding between nations, so that peace shall reign on earth for ever.

Resolution 9

Whereas Article 71 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, provides that prisoners of war who have been without news for a long period, or who are unable to receive news from their next of kin or to give them news by the ordinary postal route, as well as those who are at a great distance from their home, shall be permitted to send telegrams, the fees being charged against the prisoners of war's accounts with the Detaining Power or paid in the currency at their disposal, and that prisoners of war shall likewise benefit by these facilities in cases of urgency; and

whereas to reduce the cost, often prohibitive, of such telegrams or cables, it appears necessary that some method of grouping messages should be introduced whereby a series of short specimen messages concerning personal health, health of relatives at home, schooling, finance, etc., could be drawn up and numbered, for use by prisoners of war in the aforesaid circumstances,

the Conference, therefore, requests the International Committee of the Red Cross to prepare a series of specimen messages covering these requirements and to submit them to the High Contracting Parties for their approval.

Resolution 10

The Conference considers that the conditions under which a Party to a conflict can be recognized as a belligerent by Powers not taking part

in this conflict, are governed by the general rules of international law on the subject and are in no way modified by the Geneva Conventions.[1]

Resolution 11

Whereas the Geneva Conventions require the International Committee of the Red Cross to be ready at all times and in all circumstances to fulfil the humanitarian tasks entrusted to it by these Conventions,

the Conference recognizes the necessity of providing regular financial support for the International Committee of the Red Cross.

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[1] See above, page 60.

THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD OF AUGUST 12, 1949

with, for comparison, the text of

THE GENEVA CONVENTION OF JULY 27, 1929

1929

PREAMBLE

(Names of Heads of States)... Being equally animated by the desire to lessen, so far as lies in their power, the evils inseparable from war and desiring, for this purpose, to perfect and complete the provisions agreed to at Geneva on the 22nd August, 1864, and the 6th July, 1906, for the amelioration of the condition of the wounded and sick in armies in the field,

Have resolved to conclude a new Convention for that purpose and have appointed as their Plenipotentiaries:

(names)

Who, after having communicated to each other their full powers, found in good and due form, have agreed as follows:

1949

PREAMBLE

The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of revising the Geneva Convention for the Relief of the Wounded and Sick in Armies in the Field of July 27, 1929, have agreed as follows:

CHAPTER I

GENERAL PROVISIONS [1]

Article 25 (paragraph 1)

The provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances.

Article 25 (paragraph 2)

If, in time of war, a belligerent is not a party to the Convention, its provisions shall, nevertheless, be binding as between all the belligerents who are parties thereto.

Article 1

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Article 2

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed

[1] The titles of Chapters and the order of the Articles are those of the 1949 Convention.

1929

1949

conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

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.

Article 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly

1929

1949

constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Article 4

Neutral Powers shall apply by analogy the provisions of the present Convention to the wounded and sick, and to members of the medical personnel and to chaplains of the armed forces of the Parties to the conflict, received or interned in their territory, as well as to dead persons found.

Article 5

For the protected persons who have fallen into the hands of the enemy, the present Convention shall apply until their final repatriation.

Article 2 (paragraph 2)

Belligerents shall, however, be free to prescribe, for the benefit of wounded or sick prisoners, such arrangements as they may think fit beyond the limits of the existing obligations.

Article 6

In addition to the agreements expressly provided for in Articles 10, 15, 23, 28, 31, 36, 37 and 52, the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of the wounded and sick, of members of the medical personnel or of chaplains, as defined by the present Convention, nor restrict the rights which it confers upon them.

Wounded and sick, as well as medical personnel and chaplains, shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been

1929

1949

taken with regard to them by one or other of the Parties to the conflict.

Article 7

Wounded and sick, as well as members of the medical personnel and chaplains, may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.

Article 8

The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

The Parties to the conflict shall facilitate to the greatest extent possible, the task of the representatives or delegates of the Protecting Powers.

The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties. Their activities shall only be restricted as an exceptional and temporary measure when this is rendered necessary by imperative military necessities.

Article 9

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of wounded and sick, medical personnel and chaplains, and for their relief.

Article 10

The High Contracting Parties may at any time agree to entrust to an organization which offers all guarantees of impartiality

1929

1949

and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.

When wounded and sick, or medical personnel and chaplains do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organization provided for in the first paragraph above, the Detaining Power shall request a neutral State, or such an organization, to undertake the functions performed under the present Convention by a Protecting Power designated by the Parties to a conflict.

If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.

Any neutral Power or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially.

No derogation from the preceding provisions shall be made by special agreements between Powers one of which is restricted, even temporarily, in its freedom to negotiate with the other Power or its allies by reason of military events, more particularly where the whole, or a substantial part, of the territory of the said Power is occupied.

Whenever in the present Convention mention is made of a Protecting Power, such mention also applies to substitute organizations in the sense of the present Article.

Article 11

In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

1929

1949

For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, in particular of the authorities responsible for the wounded and sick, members of medical personnel and chaplains, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. Protecting Powers may, if necessary, propose for approval by the Parties to the conflict a person belonging to a neutral Power or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

CHAPTER II

WOUNDED AND SICK

Article 1

Officers and soldiers and other persons officially attached to the armed forces who are wounded or sick shall be respected and protected in all circumstances; they shall be treated with humanity and cared for medically, without distinction of nationality, by the belligerent in whose power they may be.

Nevertheless, the belligerent who is compelled to abandon wounded or sick to the enemy, shall, as far as military exigencies permit, leave with them a portion of his medical personnel and material to help with their treatment.

Article 12

Members of the armed forces and other persons mentioned in the following Article, who are wounded or sick, shall be respected and protected in all circumstances.

They shall be treated humanely and cared for by the Party to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria. Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments; they shall not wilfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.

Only urgent medical reasons will authorize priority in the order of treatment to be administered.

Women shall be treated with all consideration due to their sex.

The Party to the conflict which is compelled to abandon wounded or sick to the enemy shall, as far as military considerations permit, leave with them a part of its medical personnel and material to assist in their care.

1929

1949

Article 13

The present Convention shall apply to the wounded and sick belonging to the following categories:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a Government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civil members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany.

(5) Members of crews, including masters, pilots and apprentices of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions in international law.

1929

1949

(6) Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Article 2 (paragraph 1)

Except as regards the treatment to be provided for them in virtue of the preceding article, the wounded and sick of an army who fall into the hands of the enemy shall be prisoners of war, and the general provisions of international law concerning prisoners of war shall be applicable to them.

Article 14

Subject to the provisions of Article 12, the wounded and sick of a belligerent who fall into enemy hands shall be prisoners of war, and the provisions of international law concerning prisoners of war shall apply to them.

Article 3

After each engagement the occupant of the field of battle shall take measures to search for the wounded and dead, and to protect them against pillage and maltreatment.

Whenever circumstances permit, a local armistice or a suspension of fire shall be arranged to permit the removal of the wounded remaining between the lines.

Article 15

At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.

Whenever circumstances permit, an armistice or a suspension of fire shall be arranged, or local arrangements made, to permit the removal, exchange and transport of the wounded left on the battlefield.

Likewise, local arrangements may be concluded between Parties to the conflict for the removal or exchange of wounded and sick from a besieged or encircled area, and for the passage of medical and religious personnel and equipment on their way to that area.

Article 4 (paragraphs 1 to 3)

Belligerents shall communicate to each other reciprocally, as soon as possible, the names of the wounded, sick and dead, collected or discovered, together with any indications which may assist in their identification.

They shall establish and transmit to each other the certificates of death.

They shall likewise collect and transmit to each other all articles of a personal nature found on the field of battle or on the dead, especially one half of their identity discs, the other half to remain attached to the body.

Article 16

Parties to the conflict shall record as soon as possible, in respect of each wounded, sick or dead person of the adverse Party falling into their hands, any particulars which may assist in his identification.

These records should if possible include:

(a) designation of the Power on which he depends;

(b) army, regimental, personal or serial number;

(c) surname;

(d) first name or names;

1929

Article 4 (paragraphs 4 to 7)

They shall ensure that the burial or cremation of the dead is preceded by a careful, and if possible medical, examination of the bodies, with a view to confirming death, establishing identity and enabling a report to be made.

They shall further ensure that the dead are honourably interred, that their graves are respected and marked so that they may always be found.

To this end, at the commencement of hostilities, they shall organize officially a graves registration service, to render eventual exhumations possible and to ensure the identification of bodies whatever may be the subsequent site of the grave.

After the cessation of hostilities they shall exchange the list of graves and of dead interred in their cemeteries and elsewhere.

1949

(e) date of birth;

(f) any other particulars shown on his identity card or disc;

(g) date and place of capture or death;

(h) particulars concerning wounds or illness, or cause of death.

As soon as possible the above mentioned information shall be forwarded to the Information Bureau described in Article 122 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, which shall transmit this information to the Power on which these persons depend through the intermediary of the Protecting Power and of the Central Prisoners of War Agency.

Parties to the conflict shall prepare and forward to each other through the same bureau, certificates of death or duly authenticated lists of the dead. They shall likewise collect and forward through the same bureau one half of a double identity disc, last wills or other documents of importance to the next of kin, money and in general all articles of an intrinsic or sentimental value, which are found on the dead. These articles, together with unidentified articles, shall be sent in sealed packets, accompanied by statements giving all particulars necessary for the identification of the deceased owners, as well as by a complete list of the contents of the parcel.

Article 17

Parties to the conflict shall ensure that burial or cremation of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made. One half of the identity disc, or the identity disc itself if it is a single disc, should remain on the body.

Bodies shall not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased. In case of cremation, the circumstances and reasons for cremation shall be stated in detail in the death certificate or on the authenticated list of the dead.

They shall further ensure that the dead are honourably interred, if possible according to the rites of the religion to which

1929

1949

they belonged, that their graves are respected, grouped if possible according to the nationality of the deceased, properly maintained and marked so that they may always be found. For this purpose, they shall organize at the commencement of hostilities an Official Graves Registration Service, to allow subsequent exhumations and to ensure the identification of bodies, whatever the site of the graves, and the possible transportation to the home country. These provisions shall likewise apply to the ashes, which shall be kept by the Graves Registration Service until proper disposal thereof in accordance with the wishes of the home country.

As soon as circumstances permit, and at latest at the end of hostilities, these Services shall exchange, through the Information Bureau mentioned in the second paragraph of Article 16, lists showing the exact location and markings of the graves, together with particulars of the dead interred therein.

Article 5

The military authorities may appeal to the charitable zeal of the inhabitants to collect and afford medical assistance, under their direction, to the wounded or sick of armies, and may accord to persons who have responded to this appeal special protection and certain facilities.

Article 18

The military authorities may appeal to the charity of the inhabitants voluntarily to collect and care for, under their direction, the wounded and sick, granting persons who have responded to this appeal the necessary protection and facilities. Should the adverse Party take or retake control of the area, he shall likewise grant these persons the same protection and the same facilities.

The military authorities shall permit the inhabitants and relief societies, even in invaded or occupied areas, spontaneously to collect and care for wounded or sick of whatever nationality. The civilian population shall respect these wounded and sick, and in particular abstain from offering them violence.

No one may ever be molested or convicted for having nursed the wounded or sick.

The provisions of the present Article do not relieve the occupying Power of its obligation to give both physical and moral care to the wounded and sick.

1929 *1949*

CHAPTER III

MEDICAL UNITS AND ESTABLISHMENTS

Article 6

Mobile medical formations, that is to say, those which are intended to accompany armies in the field, and the fixed establishments of the medical service shall be respected and protected by the belligerents.

Article 19

Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict. Should they fall into the hands of the adverse Party, their personnel shall be free to pursue their duties, as long as the capturing Power has not itself ensured the necessary care of the wounded and sick found in such establishments and units.

The responsible authorities shall ensure that the said medical establishments and units are, as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety.

Article 20

Hospital ships entitled to the protection of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, shall not be attacked from the land.

Article 7

The protection to which medical formations and establishments are entitled shall cease if they are made use of to commit acts harmful to the enemy.

Article 21

The protection to which fixed establishments and mobile medical units of the Medical Service are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after a due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded.

Article 8

The following conditions are not considered to be of such a nature as to deprive a medical formation or establishment of the protection guaranteed by article 6:

(1) that the personnel of the formation or establishment is armed, and that they use the arms in their own defence or in that of the sick and wounded in charge;

(2) that in the absence of armed orderlies

Article 22

The following conditions shall not be considered as depriving a medical unit or establishment of the protection guaranteed by Article 19:

(1) That the personnel of the unit or establishment are armed, and that they use the arms in their own defence, or in that of the wounded and sick in their charge.

(2) That in the absence of armed orderlies,

1929

the formation or establishment is protected by a piquet or by sentries;

(3) that small arms and ammunition taken from the wounded and sick, which have not yet been transferred to the proper service, are found in the formation or establishment;

(4) that personnel and material of the veterinary service are found in the formation or establishment, without forming an integral part of the same.

1949

the unit or establishment is protected by a picket or by sentries or by an escort.

(3) That small arms and ammunition taken from the wounded and sick and not yet handed to the proper service, are found in the unit or establishment.

(4) That personnel and material of the veterinary service are found in the unit or establishment, without forming an integral part thereof.

(5) That the humanitarian activities of medical units and establishments or of their personnel extend to the care of civilian wounded or sick.

Article 23

In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital zones and localities so organized as to protect the wounded and sick from the effects of war, as well as the personnel entrusted with the organization and administration of these zones and localities and with the care of the persons therein assembled.

Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the hospital zones and localities they have created. They may for this purpose implement the provisions of the Draft Agreement annexed to the present Convention, with such amendments as they may consider necessary.

The Protecting Powers and the International Committee of the Red Cross are invited to lend their good offices in order to facilitate the institution and recognition of these hospital zones and localities.

CHAPTER IV

PERSONNEL

Article 9 (paragraph 1)

The personnel engaged exclusively in the collection, transport and treatment of the wounded and sick, and in the administration of medical formations and establishments, and chaplains attached to armies,

Article 24

Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of

1929

shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be treated as prisoners of war.

Article 9 (paragraph 2)

Soldiers specially trained to be employed, in case of necessity, as auxiliary nurses or stretcher-bearers for the collection, transport and treatment of the wounded and sick, and furnished with a proof of identity, shall enjoy the same treatment as the permanent medical personnel if they are taken prisoners while carrying out these functions.

Article 10

The personnel of Voluntary Aid Societies, duly recognized and authorized by their Government, who may be employed on the same duties as those of the personnel mentioned in the first paragraph of article 9, are placed on the same footing as the personnel contemplated in that paragraph, provided that the personnel of such societies are subject to military law and regulations.

Each High Contracting Party shall notify to the other, either in time of peace or at the commencement of or during the course of hostilities, but in every case before actually employing them, the names of the societies which it has authorized, under its responsibility, to render assistance to the regular medical service of its armed forces.

Article 11

A recognized society of a neutral country can only afford the assistance of its medical personnel and formations to a belligerent with the previous consent of its own Government and the authorization of the belligerent concerned.

The belligerent who accepts such assistance is bound to notify the enemy thereof before making any use of it.

1949

medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances.

Article 25

Members of the armed forces specially trained for employment, should the need arise, as hospital orderlies, nurses or auxiliary stretcher-bearers, in the search for or the collection, transport or treatment of the wounded and sick shall likewise be respected and protected if they are carrying out these duties at the time when they come into contact with the enemy or fall into his hands.

Article 26

The staff of National Red Cross Societies and that of other Voluntary Aid Societies, duly recognized and authorized by their Governments, who may be employed on the same duties as the personnel named in Article 24, are placed on the same footing as the personnel named in the said Article, provided that the staff of such societies are subject to military laws and regulations.

Each High Contracting Party shall notify to the other, either in time of peace, or at the commencement of or during hostilities, but in any case before actually employing them, the names of the societies which it has authorized, under its responsibility, to render assistance to the regular medical service of its armed forces.

Article 27

A recognized Society of a neutral country can only lend the assistance of its medical personnel and units to a Party to the conflict with the previous consent of its own Government and the authorization of the Party to the conflict concerned. That personnel and those units shall be placed under the control of that Party to the conflict.

The neutral Government shall notify this consent to the adversary of the State which accepts such assistance. The Party to the conflict who accepts such assistance is bound to notify the adverse Party thereof before making any use of it.

In no circumstances shall this assistance be considered as interference in the conflict.

1929

Article 12

The persons designated in articles 9, 10 and 11 may not be retained after they have fallen into the hands of the enemy.

In the absence of an agreement to the contrary, they shall be sent back to the belligerent to which they belong as soon as a route for their return shall be open and military considerations permit.

Pending their return they shall continue to carry out their duties under the direction of the enemy; they shall preferably be engaged in the care of the wounded and sick of the belligerent to which they belong.

On their departure, they shall take with them the effects, instruments, arms and means of transport belonging to them.

Article 13

Belligerents shall secure to the personnel mentioned in articles 9, 10 and 11, while in their hands, the same food, the same lodging, the same allowances and the same pay as are granted to the corresponding personnel of their own armed forces.

At the outbreak of hostilities the belligerents will notify one another of the grades of their respective medical personnel.

1949

The members of the personnel named in the first paragraph shall be duly furnished with the identity cards provided for in Article 40 before leaving the neutral country to which they belong.

Article 28

Personnel designated in Articles 24 and 26 who fall into the hands of the adverse Party, shall be retained only in so far as the state of health, the spiritual needs and the number of prisoners of war require.

Personnel thus retained shall not be deemed prisoners of war. Nevertheless they shall at least benefit by all the provisions of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949. Within the framework of the military laws and regulations of the Detaining Power, and under the authority of its competent service, they shall continue to carry out, in accordance with their professional ethics, their medical and spiritual duties on behalf of prisoners of war, preferably those of the armed forces to which they themselves belong. They shall further enjoy the following facilities for carrying out their medical or spiritual duties:

(a) They shall be authorized to visit periodically the prisoners of war in labour units or hospitals outside the camp. The Detaining Power shall put at their disposal the means of transport required.

(b) In each camp the senior medical officer of the highest rank shall be responsible to the military authorities of the camp for the professional activity of the retained medical personnel. For this purpose, from the outbreak of hostilities, the Parties to the conflict shall agree regarding the corresponding seniority of the ranks of their medical personnel, including those of the societies designated in Article 26. In all questions arising out of their duties, this medical officer, and the chaplains, shall have direct access to the military and medical authorities of the camp who shall grant them the facilities they may require for correspondence relating to these questions.

1929

1949

(c) Although retained personnel in a camp shall be subject to its internal discipline, they shall not, however, be required to perform any work outside their medical or religious duties.

During hostilities the Parties to the conflict shall make arrangements for relieving where possible retained personnel, and shall settle the procedure of such relief.

None of the preceding provisions shall relieve the Detaining Power of the obligations imposed upon it with regard to the medical and spiritual welfare of the prisoners of war.

Article 29

Members of the personnel designated in Article 25 who have fallen into the hands of the enemy, shall be prisoners of war, but shall be employed on their medical duties in so far as the need arises.

See Articles 12 et 13.

Article 30

Personnel whose retention is not indispensable by virtue of the provisions of Article 28 shall be returned to the Party to the conflict to whom they belong, as soon as a road is open for their return and military requirements permit.

Pending their return, they shall not be deemed prisoners of war. Nevertheless they shall at least benefit by all the provisions of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949. They shall continue to fulfil their duties under the orders of the adverse Party and shall preferably be engaged in the care of the wounded and sick of the Party to the conflict to which they themselves belong.

On their departure, they shall take with them the effects, personal belongings, valuables and instruments belonging to them.

Article 31

The selection of personnel for return under Article 30 shall be made irrespective of any consideration of race, religion or political opinion, but preferably according to the chronological order of their capture and their state of health.

As from the outbreak of hostilities, Parties to the conflict may determine by special agreement the percentage of personnel to be retained, in proportion to

1929

See Articles 12 and 13.

1949

the number of prisoners and the distribution of the said personnel in the camps.

Article 32

Persons designated in Article 27 who have fallen into the hands of the adverse Party may not be detained.

Unless otherwise agreed, they shall have permission to return to their country, or if this is not possible, to the territory of the Party to the conflict in whose service they were, as soon as a route for their return is open and military considerations permit.

Pending their release, they shall continue their work under the direction of the adverse Party; they shall preferably be engaged in the care of the wounded and sick of the Party to the conflict in whose service they were.

On their departure, they shall take with them their effects, personal articles and valuables and the instruments, arms and if possible the means of transport belonging to them.

The Parties to the conflict shall secure to this personnel, while in their power, the same food, lodging, allowances and pay as are granted to the corresponding personnel of their armed forces. The food shall in any case be sufficient as regards quantity, quality and variety to keep the said personnel in a normal state of health.

CHAPTER V

BUILDINGS AND MATERIAL

Article 14

Mobile medical formations, of whatsoever kind, shall retain, if they fall into the hands of the enemy, their equipment and stores, their means of transport and the drivers employed.

Nevertheless, the competent military authority shall be free to use the equipment and stores for the care of the wounded and sick; it shall be restored under the conditions laid down for the medical personnel, and as far as possible at the same time.

Article 33

The material of mobile medical units of the armed forces which fall into the hands of the enemy, shall be reserved for the care of wounded and sick.

The buildings, material and stores of fixed medical establishments of the armed forces shall remain subject to the laws of war, but may not be diverted from that purpose as long as they are required for the care of wounded and sick. Nevertheless, the commanders of forces in the field may make use of them, in case of urgent military necessity, provided that they make previous arrangements for the welfare of the wounded and sick who are nursed in them.

1929

Article 16

The buildings of aid societies which are admitted to the privileges of the Convention shall be regarded as private property.

The material of these societies, wherever it may be, shall similarly be considered as private property.

The right of requisition recognized for belligerents by the laws and customs of war, shall only be exercised in case of urgent necessity and only after the welfare of the wounded and sick has been secured.

1949

The material and stores defined in the present Article shall not be intentionally destroyed.

Article 34

The real and personal property of aid societies which are admitted to the privileges of the Convention shall be regarded as private property.

The right of requisition recognized for belligerents by the laws and customs of war shall not be exercised except in case of urgent necessity, and only after the welfare of the wounded and sick has been ensured.

CHAPTER VI

MEDICAL TRANSPORTS

Article 17

Vehicles equipped for the evacuation of wounded and sick, proceeding singly or in convoy, shall be treated as mobile medical formations, subject to the following special provisions:

A belligerent intercepting vehicles of medical transport, singly or in convoy, may, if military exigencies demand, stop them, and break up the convoy, provided he takes charge in every case of the wounded and sick who are in it. He can only use the vehicles in the sector where they have been intercepted, and exclusively for medical requirements. These vehicles, as soon as they are no longer required for local use, shall be given up in accordance with the conditions laid down in article 14.

The military personnel in charge of the transport and furnished for this purpose with authority in due form, shall be sent back in accordance with the conditions prescribed in article 12 for medical personnel, subject to the condition of the last paragraph of article 18.

All means of transport specially organized for evacuation and the material used in equipping these means of transport belonging to the medical service shall be restored in accordance with the provisions of Chapter IV. Military means of transport other than those of the medical service may be captured, with their teams.

Article 35

Transports of wounded and sick or of medical equipment shall be respected and protected in the same way as mobile medical units.

Should such transport or vehicles fall into the hands of the adverse Party, they shall be subject to the laws of war, on condition that the Party to the conflict who captures them shall in all cases ensure the care of the wounded and sick they contain.

The civilian personnel and all means of transport obtained by requisition shall be subject to the general rules of international law.

1929

The civilian personnel and all means of transport obtained by requisition shall be subject to the general rules of international law.

Article 18

Aircraft used as means of medical transport shall enjoy the protection of the Convention during the period in which they are reserved exclusively for the evacuation of wounded and sick and the transport of medical personnel and material.

They shall be painted white and shall bear, clearly marked, the distinctive emblem prescribed in article 19, side by side with their national colours, on their lower and upper surfaces.

In the absence of special and express permission, flying over the firing line, and over the zone situated in front of clearing or dressing stations, and generally over all enemy territory or territory occupied by the enemy, is prohibited.

Medical aircraft shall obey every summons to land.

In the event of a landing thus imposed, or of an involuntary landing in enemy territory or territory occupied by the enemy, the wounded and sick, as well as the medical personnel and material, including the aircraft, shall enjoy the privileges of the present Convention.

The pilot, mechanics and wireless telegraph operators captured shall be sent back, on condition that they shall be employed until the close of hostilities in the medical service only.

1949

Article 36

Medical aircraft, that is to say, aircraft exclusively employed for the removal of wounded and sick and for the transport of medical personnel and equipment, shall not be attacked, but shall be respected by the belligerents, while flying at heights, times and on routes specifically agreed upon between the belligerents concerned.

They shall bear, clearly marked, the distinctive emblem prescribed in Article 38, together with their national colours, on their lower, upper and lateral surfaces. They shall be provided with any other markings or means of identification that may be agreed upon between the belligerents upon the outbreak or during the course of hostilities.

Unless agreed otherwise, flights over enemy or enemy-occupied territory are prohibited.

Medical aircraft shall obey every summons to land. In the event of a landing thus imposed, the aircraft with its occupants may continue its flight after examination, if any.

In the event of an involuntary landing in enemy or enemy-occupied territory, the wounded and sick, as well as the crew of the aircraft shall be prisoners of war. The medical personnel shall be treated according to Article 24 and the Articles following.

Article 37

Subject to the provisions of the second paragraph, medical aircraft of Parties to the conflict may fly over the territory of neutral Powers, land on it in case of necessity, or use it as a port of call. They shall give the neutral Powers previous notice of their passage over the said territory and obey all summons to alight, on land or water. They will be immune from attack only when flying on routes, at heights and at times specifically agreed upon between the Parties to the conflict and the neutral Power concerned.

The neutral Powers may, however, place conditions or restrictions on the passage or landing of medical aircraft on their ter-

1929

1949

ritory. Such possible conditions or restrictions shall be applied equally to all Parties to the conflict.

Unless agreed otherwise between the neutral Power and the Parties to the conflict, the wounded and sick who are disembarked, with the consent of the local authorities, on neutral territory by medical aircraft, shall be detained by the neutral Power, where so required by international law, in such a manner that they cannot again take part in operations of war. The cost of their accommodation and internment shall be borne by the Power on which they depend.

CHAPTER VII

THE DISTINCTIVE EMBLEM

Article 19

As a compliment to Switzerland, the heraldic emblem of the red cross on a white ground, formed by reversing the Federal colours, is retained as the emblem and distinctive sign of the medical service of armed forces.

Nevertheless, in the case of countries which already use, in place of the Red Cross, the Red Crescent or the Red Lion and Sun on a white ground as a distinctive sign, these emblems are also recognized by the terms of the present Convention.

Article 20

The emblem shall figure on the flags, armlets, and on all material belonging to the medical service, with the permission of the competent military authority.

Article 21

The personnel protected in pursuance of articles 9 (paragraph 1), 10 and 11, shall wear, affixed to the left arm, an armlet bearing the distinctive sign, issued and stamped by a military authority.

Article 38

As a compliment to Switzerland, the heraldic emblem of the red cross on a white ground, formed by reversing the Federal colours, is retained as the emblem and distinctive sign of the Medical Service of armed forces.

Nevertheless, in the case of countries which already use as emblem, in place of the red cross, the red crescent or the red lion and sun on a white ground, those emblems are also recognized by the terms of the present Convention.

Article 39

Under the direction of the competent military authority, the emblem shall be displayed on the flags, armlets and on all equipment employed in the Medical Service.

Article 40

The personnel designated in Article 24 and in Articles 26 and 27 shall wear, affixed to the left arm, a water-resistant armlet bearing the distinctive emblem, issued and stamped by the military authority.

Such personnel, in addition to the identity disc mentioned in Article 16, shall also carry a special identity card bearing the distinctive emblem. This card shall be water-resistant and of such size that it can be carried in the pocket. It shall be worded in the national language, shall

1929

Article 22

The distinctive flag of the Convention shall be hoisted only over such medical formations and establishments as are entitled to be respected under the Convention, and with the consent of the military authorities. In fixed establishments it shall be, and in mobile formations it may be, accompanied by the national flag of the belligerent to whom the formation or establishment belongs.

Nevertheless, medical formations which

1949

mention at least the surname and first names, the date of birth, the rank and the service number of the bearer, and shall state in what capacity he is entitled to the protection of the present Convention. The card shall bear the photograph of the owner and also either his signature or his finger-prints or both. It shall be embossed with the stamp of the military authority.

The identity card shall be uniform throughout the same armed forces and, as far as possible, of a similar type in the armed forces of the High Contracting Parties. The Parties to the conflict may be guided by the model which is annexed, by way of example, to the present Convention. They shall inform each other, at the outbreak of hostilities, of the model they are using. Identity cards should be made out, if possible, at least in duplicate, one copy being kept by the home country.

In no circumstances may the said personnel be deprived of their insignia or identity cards nor of the right to wear the armlet. In case of loss, they shall be entitled to receive duplicates of the cards and to have the insignia replaced.

Article 41

The personnel designated in Article 25 shall wear, but only while carrying out medical duties, a white armlet bearing in its centre the distinctive sign in miniature; the armlet shall be issued and stamped by the military authority.

Military identity documents to be carried by this type of personnel shall specify what special training they have received, the temporary character of the duties they are engaged upon, and their authority for wearing the armlet.

Article 42

The distinctive flag of the Convention shall be hoisted only over such medical units and establishments as are entitled to be respected under the Convention, and only with the consent of the military authorities.

In mobile units, as in fixed establishments, it may be accompanied by the national flag of the Party to the conflict to which the unit or establishment belongs.

Nevertheless, medical units which have

1929

have fallen into the hands of the enemy, so long as they are in that situation, shall not fly any other flag than that of the Convention.

Belligerents shall take the necessary steps, so far as military exigencies permit, to make clearly visible to the enemy forces, whether land, air, or sea, the distinctive emblems indicating medical formations and establishments, in order to avoid the possibility of any offensive action.

Article 23

The medical units belonging to neutral countries which shall have been authorized to lend their services under the conditions laid down in article 11, shall fly, along with the flag of the Convention, the national flag of the belligerent to whose army they are attached.

They shall also have the right, so long as they shall lend their services to a belligerent, to fly their national flag.

The provisions of the second paragraph of the preceding article are applicable to them.

Article 24

The emblem of the red cross on a white ground and the words " Red Cross " or " Geneva Cross " shall not be used, either in time of peace or in time of war, except to protect or to indicate the medical formations and establishments and the personnel and material protected by the Convention.

The same shall apply, as regards the emblems mentioned in article 19, paragraph 2, in respect of the countries which use them.

The Voluntary Aid Societies mentioned in article 10, may, in accordance with their national legislation, use the distinctive emblem in connexion with their humanitarian activities in time of peace.

As an exceptional measure, and with the express authority of one of the national societies of the Red Cross (Red Crescent, Red Lion and Sun), use may be made of the emblem of the Convention in time of peace to mark the position of aid stations exclusively reserved for the purpose of giving free treatment to the wounded or the sick.

1949

fallen into the hands of the enemy shall not fly any flag other than that of the Convention.

Parties to the conflict shall take the necessary steps, in so far as military considerations permit, to make the distinctive emblems indicating medical units and establishments clearly visible to the enemy land, air or naval forces, in order to obviate the possibility of any hostile action.

Article 43

The medical units belonging to neutral countries, which may have been authorized to lend their services to a belligerent under the conditions laid down in Article 27, shall fly, along with the flag of the Convention, the national flag of that belligerent, wherever the latter makes use of the faculty conferred on him by Article 42.

Subject to orders to the contrary by the responsible military authorities, they may, on all occasions, fly their national flag, even if they fall into the hands of the adverse Party.

Article 44

With the exception of the cases mentioned in the following paragraphs of the present Article, the emblem of the red cross on a white ground and the words "Red Cross", or "Geneva Cross" may not be employed, either in time of peace or in time of war, except to indicate or to protect the medical units and establishments, the personnel and material protected by the present Convention and other Conventions dealing with similar matters. The same shall apply to the emblems mentioned in Article 38, second paragraph, in respect of the countries which use them. The National Red Cross Societies and other Societies designated in Article 26 shall have the right to use the distinctive emblem conferring the protection of the Convention only within the framework of the present paragraph.

Furthermore, National Red Cross (Red Crescent, Red Lion and Sun) Societies may, in time of peace, in accordance with their national legislation, make use of the name and emblem of the Red Cross for their other activities which are in conformity with the principles laid down by the

1929

1949

International Red Cross Conferences. When those activities are carried out in time of war, the conditions for the use of the emblem shall be such that it cannot be considered as conferring the protection of the Convention; the emblem shall be comparatively small in size and may not be placed on armlets or on the roofs of buildings.

The international Red Cross organizations and their duly authorized personnel shall be permitted to make use, at all times, of the emblem of the red cross on a white ground.

As an exceptional measure, in conformity with national legislation and with the express permission of one of the National Red Cross (Red Crescent, Red Lion and Sun) Societies, the emblem of the Convention may be employed in time of peace to identify vehicles used as ambulances and to mark the position of aid stations exclusively assigned to the purpose of giving free treatment to the wounded or sick.

CHAPTER VIII

EXECUTION OF THE CONVENTION

Article 26

The Commanders-in-Chief of belligerent armies shall arrange the details for carrying out the preceding articles, as well as for cases not provided for, in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention.

Article 27

The High Contracting Parties shall take the necessary steps to instruct their troops, and in particular the personnel protected, in the provisions of the present Convention, and to bring them to the notice of the civil population.

Article 45

Each Party to the conflict, acting through its Commanders-in-Chief, shall ensure the detailed execution of the preceding Articles and provide for unforeseen cases, in conformity with the general principles of the present Convention.

Article 46

Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited.

Article 47

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of

1929

1949

military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.

Article 48

The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof.

CHAPTER IX

REPRESSION OF ABUSES AND INFRACTIONS

Article 29

The Governments of the High Contracting Parties shall also propose to their legislatures, should their penal laws be inadequate, the necessary measures for the repression in time of war, of any act contrary to the provisions of the present Convention.

They shall communicate to one another, through the Swiss Federal Council, the provisions relative to such repression not later than five years from the ratification of the present Convention.

Article 49

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

1929

Article 30

On the request of a belligerent, an enquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged violation of the Convention; when such violation has been established the belligerents shall put an end to and repress it as promptly as possible.

Article 28

The Governments of the High Contracting Parties whose legislation is not at present adequate for the purpose, shall adopt or propose to their legislatures the measures necessary to prevent at all times:

(a) the use the emblem or designation "Red Cross" or "Geneva Cross" by private individuals or associations, firms or companies, other than those entitled thereto under the present Convention, as well as the use of any sign or designation constituting an imitation, for commercial or any other purposes;

(b) by reason of the compliment paid

1949

Article 50

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Article 51

No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

Article 52

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

Article 53

The use by individuals, societies, firms or companies either public or private, other than those entitled thereto under the present Convention, of the emblem or the designation "Red Cross" or "Geneva Cross", or any sign or designation constituting an imitation thereof, whatever the object of such use, and irrespective of the date of its adoption, shall be prohibited at all times.

By reason of the tribute paid to Switzerland by the adoption of the reversed Federal colours, and of the confusion which may arise between the arms of Switzerland and the distinctive emblem of the Convention, the use by private individuals, societies or firms, of the arms of

1929

to Switzerland by the adoption of the reversed Federal colours, the use by private individuals or associations, firms or companies of the arms of the Swiss Confederation, or marks constituting an imitation, whether as trade-marks or as parts of such marks, or for a purpose contrary to commercial honesty, or in circumstances capable of wounding Swiss national sentiment.

The prohibition indicated in *(a)* of the use of marks or designations constituting an imitation of the emblem or designation of "Red Cross" or "Geneva Cross", as well as the prohibition in *(b)* of the use of the arms of the Swiss Confederation or marks constituting an imitation, shall take effect as from the date fixed by each legislature, and not later than five years after the coming into force of the present Convention. From the date of such coming into force, it shall no longer be lawful to adopt a trade-mark in contravention of these rules.

1949

the Swiss Confederation, or of marks constituting an imitation thereof, whether as trade-marks or commercial marks, or as parts of such marks, or for a purpose contrary to commercial honesty, or in circumstances capable of wounding Swiss national sentiment, shall be prohibited at all times.

Nevertheless, such High Contracting Parties as were not party to the Geneva Convention of July 27, 1929, may grant to prior users of the emblems, designations, signs or marks designated in the first paragraph, a time limit not to exceed three years from the coming into force of the present Convention to discontinue such use, provided that the said use shall not be such as would appear, in time of war, to confer the protection of the Convention.

The prohibition laid down in the first paragraph of the present Article shall also apply, without effect on any rights acquired through prior use, to the emblems and marks mentioned in the second paragraph of Article 38.

Article 54

The High Contracting Parties shall, if their legislation is not already adequate, take measures necessary for the prevention and repression, at all times, of the abuses referred to under Article 53.

FINAL PROVISIONS

Article 31

The present Convention, which shall bear this day's date, may be signed, up to the 1st February, 1930, on behalf of all the countries represented at the Conference which opened at Geneva on the 1st July, 1929, as well as by countries not represented at that Conference but which were

Article 55

The present Convention is established in English and in French. Both texts are equally authentic.

The Swiss Federal Council shall arrange for official translations of the Convention to be made in the Russian and Spanish languages.

Article 56

The present Convention, which bears the date of this day, is open to signature until February 12, 1950, in the name of the Powers represented at the Conference which opened at Geneva on April 21, 1949; furthermore, by Powers not represented at that Conference, but which are

1929

parties to the Geneva Conventions of 1864 and 1906.

Article 32

The present Convention shall be ratified as soon as possible.

The ratifications shall be deposited at Berne.

A *procès-verbal* of the deposit of each instrument of ratification shall be drawn up, one copy of which, certified to be correct, shall be transmitted by the Swiss Federal Council to the Governments of all countries on whose behalf the Convention has been signed, or whose accession has been notified.

Article 33

The present Convention shall come into force six months after not less than two instruments of ratification have been deposited.

Thereafter, it shall enter into force for each High Contracting Party six months after the deposit of its instrument of ratification.

Article 34

The present Convention shall replace the Conventions of the 22nd August, 1864, and the 6th July, 1906, in relations between the High Contracting Parties.

Article 35

From the date of its coming into force, the present Convention shall be open to accession duly notified on behalf of any country on whose behalf this Convention has not been signed.

Article 36

Accessions shall be notified in writing to the Swiss Federal Council, and shall take effect six months after the date on which they are received.

The Swiss Federal Council shall communicate the accessions to the Governments of all the countries on whose behalf the Convention has been signed or whose accession has been notified.

Article 37

A state of war shall give immediate effect to ratifications deposited and accessions notified by the belligerent Powers before or after the outbreak of hostilities.

1949

parties to the Geneva Conventions of 1864, 1906 or 1929 for the Relief of the Wounded and Sick in Armies in the Field.

Article 57

The present Convention shall be ratified as soon as possible and the ratifications shall be deposited at Berne.

A record shall be drawn up of the deposit of each instrument of ratification and certified copies of this record shall be transmitted by the Swiss Federal Council to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

Article 58

The present Convention shall come into force six months after not less than two instruments of ratification have been deposited.

Thereafter, it shall come into force for each High Contracting Party six months after the deposit of the instrument of ratification.

Article 59

The present Convention replaces the Conventions of August 22, 1864, July 6, 1906, and July 27, 1929, in relations between the High Contracting Parties.

Article 60

From the date of its coming into force, it shall be open to any Power in whose name the present Convention has not been signed, to accede to this Convention.

Article 61

Accessions shall be notified in writing to the Swiss Federal Council, and shall take effect six months after the date on which they are received.

The Swiss Federal Council shall communicate the accessions to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

Article 62

The situations provided for in Articles 2 and 3 shall give immediate effect to ratifications deposited and accessions notified by the Parties to the conflict be-

1929

The communication of ratifications or accessions received from Powers in a state of war shall be made by the Swiss Federal Council by the quickest method.

Article 38

Each of the High Contracting Parties shall be at liberty to denounce the present Convention. The denunciation shall not take effect until one year after the notification thereof in writing has been made to the Swiss Federal Council. The latter shall communicate such notification to the Governments of all the High Contracting Parties.

The denunciation shall only have effect in respect of the High Contracting Party which has made notification thereof.

Moreover, this denunciation shall not take effect during a war in which the denouncing Power is involved. In such a case, the present Convention shall continue binding beyond the period of one year, until the conclusion of peace.

Article 39

A certified copy of the present Convention shall be deposited in the Archives of the League of Nations by the Swiss Federal Council. Similarly, ratifications, accessions and denunciations which shall be notified to the Swiss Federal Council shall be communicated by them to the League of Nations.

IN WITNESS WHEREOF, the above-named Plenipotentiaries have signed the present Convention.

DONE at Geneva the twenty-seventh July, one thousand nine hundred and twenty-nine, in a single copy, which shall remain deposited in the Archives of the Swiss Confederation, and of which copies, certified to be correct, shall be transmitted to the Governments of all the countries invited to the Conference.

1949

fore or after the beginning of hostilities or occupation. The Swiss Federal Council shall communicate by the quickest method any ratifications or accessions received from Parties to the conflict.

Article 63

Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties.

The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, 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 and repatriation of the persons protected by the present Convention have been terminated.

The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

Article 64

The Swiss Federal Council shall register the present Convention with the Secretariat of the United Nations. The Swiss Federal Council shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to the present Convention.

IN WITNESS WHEREOF the undersigned, having deposited their respective full powers, have signed the present Convention.

DONE at Geneva this twelfth day of August 1949, in the English and French languages. The original shall be deposited in the Archives of the Swiss Confederation. The Swiss Federal Council shall transmit certified copies thereof to each of the signatory and acceding States.

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